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

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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)

APPELLANTS' REPLY BRIEF

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INTRODUCTION

The Appellants—DCA Capitol Hill LTAC, LLC and DCA Capitol Hill SNF, LLC—run BridgePoint Hospital on Capitol Hill in Washington, D.C. With their affiliates, the Appellants operate the only two long-term acute care hospitals in Washington. In 2014, these hospitals went bankrupt and were going to close. But the Appellants rescued them and ensured that the people of Washington, who were seriously ill and needed long-term, around-the-clock care, had somewhere to go.

No good deed goes unpunished. Appellee Capitol Hill Group, the long-time landlord of one of the hospitals, came to the bankruptcy proceedings and refused to sign off on the hospital's continued operation unless the purchasers agreed to pay the Landlord millions of dollars. The principal stated reason: The Appellants (hereinafter, "the Hospital") needed to reimburse the Landlord for the $5 million it was spending on a "state-of-the-art HVAC system." The Landlord's representations regarding the HVAC system were false when made, as the Landlord already was under contract to obtain limited work on the system for a fraction of $5 million, with no possibility for additional costs. And the Landlord already knew this limited work would leave an HVAC system that would not work to heat or cool the Hospital.

The Superior Court granted summary judgment against fraud and misrepresentation claims seeking to remedy this conduct, on grounds that integration clauses in the subsequent lease blocked them "as a matter of law." App. 412.

The Landlord makes no meaningful effort to defend the Superior Court's summary judgment decision. That would have been hard to do: This Court has established black letter law—repeatedly cited in the Superior Court—that integration clauses do not block fraud claims based on misrepresentations of existing fact. *Drake v. McNair*, 993 A.2d 607 (D.C. 2010). Instead, the Landlord does not even utter the term "summary judgment" until page 41 of its 50-page brief and then remarkably argues the ruling did not occur and that the fraud claims were tried. Not so. On the eve of trial, the Superior Court expressly held that the fraud claims were "out of the case as a matter of law," and the Landlord's counsel and the Superior Court repeatedly cited this ruling throughout the trial. App. 412, 818, 855, 1520.

Importantly, the Landlord never contests the appropriate remedy for the Superior Court's summary judgment error: Vacating the trial verdict and remanding the case for a properly scoped trial. By effectively conceding the summary judgment was error and the remedy for that error, the Landlord obviates the need to address the other assignments of error in this case. This Court should reverse the summary judgment, vacate the liability and fee judgment below, and remand for a trial not improperly circumscribed by the Superior Court's erroneous summary judgment.

If the court does address the remaining issues on appeal, it should reverse the numerous legal errors that the Superior Court made when interpreting the Lease, as well as the Superior Court's erroneous attorneys' fees award.

ARGUMENT

I. The Landlord Effectively Concedes That Granting Summary Judgment Against the Hospital's Fraud and Misrepresentation Claims Would Be Error.

The Landlord's brief is a description of the decision it wished had occurred below, now that it has grappled with this Court's binding precedents. It dreams of a Superior Court proceeding where the fraud and misrepresentation claims were allowed to go to trial and, after a full and fair airing of the facts relevant to them, were resolved by applying the legal elements of the cause of action to them. That clearly did not happen. By straining against the record to claim that it did, the Landlord effectively concedes that resolving the fraud and misrepresentation charges on summary judgment was error.

A. The Superior Court Clearly Granted Summary Judgment Against the Hospital's Fraud and Misrepresentation Claims.

Summary judgments are the frequent subject of reversal in the appellate courts. *Johnson v. District of Columbia*, 935 A.2d 1113, 1116 (D.C. 2007) ("[T]he general jurisprudence of summary judgment often involves reversals."). Summary judgments are purely legal rulings and cannot be entered without determining that there is no disputed issue of fact material to a cause of action. *Radbod v. Moghim*, 269 A.3d 1035, 1041 (D.C. 2022).

Remarkably, the first time the Landlord mentions this plain vulnerability is on page 41 of its 50-page brief. It then spends four pages of its brief arguing that the

Superior Court sent the Hospital's fraud and misrepresentation claims to trial. Resp. Br. at 42-45.

This is why this Court requires the transcripts of proceedings below to be ordered. There is no ambiguity—none—that the Superior Court disposed of the fraud and misrepresentation claims on summary judgment: "[A]s a matter of law" and before trial commenced. App. 412; App. 373 ("So I'll be granting summary judgment to the plaintiff on that fraud claim."). The Court expressly said the fraud and misrepresentation claims were outside the triable issues, App. 412 ("So the fraud counterclaim, at least as it pertains to misrepresentations before the lease was signed, is out of the case as a matter of law."), and determined that the only claims that were going to trial were the parties' respective breach of contract claims, *see* App. 407-13 (discussing scope of triable issues). The Superior Court and the parties also referenced the summary judgment decision—and that the fraud and misrepresentation claims were not being tried—again and again throughout the trial. App. 1520 ("[W]e don't have a claim anymore for misrepresentation or fraud or anything like that, given there's no counterclaim[.]"); *see also* App. 818, 855.

The Landlord now says the Superior Court somehow reversed course and held a trial on the fraud and misrepresentation claims without telling anyone it was happening. Resp. Br. at 43. That the Superior Court allowed some testimony about some of the statements the Landlord made about the HVAC system and its costs

does not create a trial on the fraud and misrepresentation claims. Resp. Br. at 43 n.12. That evidence was permitted for the express and limited purpose of potential parol evidence relevant to the contract claims. App. 413 (expressly referencing parol evidence). In any event, having some undisclosed trial on the fraud and misrepresentation claims would itself have been error. After all, the parties were entitled to notice of what claims were being tried so they could have an opportunity to bring all evidence relevant to the elements of those claims to the fact-finder. *See Tobin v. John Grotta Co.*, 886 A.2d 87, 91 (D.C. 2005).

Nor did the Superior Court supplement its summary judgment ruling in its trial verdict with factual findings subject to some kind of deference from this Court. Resp. Br. at 34-37, 41-42. Courts cannot both enter summary judgment on claims and weigh evidence relevant to them. "No court can grant a summary judgment without first concluding that there are no facts to be found—*i.e.*, no factual issues to be resolved—because all the material facts are undisputed." *See District of Columbia v. W.T. Galliher & Bro., Inc.*, 656 A.2d 296, 302 (D.C. 1995). Accordingly, "trial courts need not—indeed, cannot—make findings of fact when granting a motion for summary judgment." *Id.* In any event, the evidence at trial, or its absence, cannot be used to bolster any ruling on the fraud and misrepresentation claims. Those claims were not before the Court; at a minimum, no party had fair notice that they were.

Finally, the Landlord very mistakenly asserts that this Court's review is limited only to the content of a final judgment. Resp. Br. at 41. An order granting partial summary judgment—like any interlocutory order—becomes reviewable upon entry of final judgment in the underlying case. *See Berryman v. Thorne*, 700 A.2d 181, 182 n.3 (D.C. 1997).

B. The Superior Court Erred In Granting Summary Judgment Against the Hospital's Fraud and Misrepresentation Claims Based Solely on the Integration Clauses in the Lease.

Directly contrary to the Superior Court's ruling, this Court expressly has held that "an integration clause does not provide a blanket exemption to claims of fraud in the inducement." *McNair*, 993 A.2d at 624. The *McNair* Court did not carve out an exception to this rule for sophisticated actors, and courts implementing *McNair* similarly have declined to do so. *See Intelsat USA Sales Corp. v. Juch-Tech, Inc.*, 935 F. Supp. 2d 101, 114 (D.D.C. 2013). Nor does the Superior Court or the Landlord make any sustained argument for such an exception.

The Landlord's resort to this Court's decision in *Hercules & Company v. Shama Restaurant Corporation*, 613 A.2d 916 (D.C. 1992), is entirely misplaced. Resp. Br. at 38. In *McNair*, this Court expressly distinguished its prior *Hercules* decision, holding that its precedential value was cabined to "the 'especially compelling' policies against circumventing the parol evidence rule when a party is seeking to avoid an arbitration clause," not "fraud-in-the inducement" disputes.

McNair, 993 A.2d at 623 n.26. Indeed, the *Hercules* Court acknowledged that "[i]t has been held that, even when a contract contains a merger clause, a party to it may successfully base a fraudulent inducement claim on prior oral representations not included in the contract." 613 A.2d at 931.[1]

Recognizing the significance of the Superior Court's error in light of *McNair*, the Landlord attempts to invent a wholly new basis for the summary judgment order by arguing that the counterclaims involve promises of future conduct. Resp. Br. at 38. This is not analysis the Superior Court undertook and thus cannot salvage the result below. In any event, the misrepresentations were not promises of future conduct but lies about then-existing facts. *See* App. 325-26.

Prior to executing the Lease, the Landlord misrepresented both the cost and quality of the "new HVAC system." App. 1707-08; 1709-10. The Landlord knows this is a problem, so it suggests that "[t]he final cost of the HVAC project" was unknown to the Landlord until "late 2014." Resp. Br. at 10 n.2. This is a misrepresentation on top of a misrepresentation. The Landlord already had entered into an agreement limiting its expenses on a variety of work, including the HVAC repairs, to *no more than $2.7 million*. App. 288-90; App. 551; App. 1182-83.

[1] The other cases cited by the Landlord are likewise inapposite. Resp. Br. at 38. *Sibley v. St. Albans School*, 134 A.3d 789 (D.C. 2016), did not consider an integration clause. *Washington Investment Partners of Delaware, LLC v. Securities House*, 28 A.3d 566 (D.C. 2011), determined that alleged misrepresentations were either not inducements or were "expressly contradicted" by the contract. *Id.* at 576.

The Landlord argues the Hospital should have operated under the assumption that the Landlord was lying about the cost of the HVAC repairs and had an independent duty to corroborate its "out-of-pocket spend." Resp. Br. at 39-40. The Landlord cites no cases establishing that duty, as none exists. *See, e.g.*, *Burman v. Phoenix Worldwide Indus., Inc.*, 384 F. Supp. 2d 316, 29-30 (D.D.C. 2005). Instead, a contracting party is entitled to rely on the representations of its counterparty when there is "no reason to doubt" them. *See IntelSat*, 935 F. Supp. 2d at 111-12.

The Hospital argued at length in its opening brief that the Superior Court's summary judgment error required vacatur of the liability and fee judgments and remand for a new, properly-scoped trial reaching both the misrepresentation and contract claims, including because fraud inducing a contract renders it voidable. Op. Br. at 3, 31-32, 49-50. The Landlord does not even acknowledge this argument, much less contest it, and has therefore waived any objection to the remedy for the summary judgment error. *See, e.g.*, *Classic CAB v. D.C. Dep't of For-Hire Vehicles*, 244 A.3d 703, 707 (D.C. 2021).

II. The Court Should Reverse the Superior Court's Erroneous Interpretation of the Lease.

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

The Lease required the Landlord to have installed "a new HVAC system" in the Hospital. No small thing, as keeping hospital rooms for the very ill at relatively

even temperatures is mission critical for the Hospital. Instead of giving "new HVAC system" its ordinary meaning as integrated equipment that would actually work to heat and air-condition the Hospital, the Superior Court erroneously strained to define it as about $1 million worth of new parts that were never going to work.

The driving force of this error was the Superior Court's reliance on another agreement—partially appended to the Lease—that had nothing to do with the Landlord's obligation to the Hospital. App. 2584. Instead, it was an easement agreement that was strictly for the purposes of allowing the developer of an adjacent wing of the building to move about the Hospital performing various tasks to facilitate transforming that wing into a luxury apartment building. App. 1681-92. One of those tasks was some HVAC work, which was described in an exhibit to the easement agreement that never made its way into the executed copy. App. 1681-1700, 2563 n.3. Yet the Superior Court held that the four corners of the Lease limited the Landlord's obligation to install a new HVAC system to the handful of parts described in that missing attachment. App. 2584. The Landlord's arguments in defense of the Superior Court's contractual interpretation holding are unpersuasive.

First, according to the Landlord, the Hospital is claiming "that it should not be bound" by the easement agreement appended to the contract. Resp. Br. at 25. Not so. The Hospital is absolutely bound by what the easement agreement says. But what that agreement says is that a third party—the adjacent apartment developer—

gets to move about the Hospital for a wide variety of purposes helpful to that developer. App. 1681-92. It says nothing about the Landlord's capital improvement obligations to the Hospital, for which it was charging the Hospital millions of dollars in the Lease. *Id.* Removing all doubt, the Lease itself says explicitly why the easement agreement is appended: To delineate the Hospital and apartment developers' "rights of access to any space situate" within the other part of the property. App. 1773 (Lease § 1.3).

Second, the Landlord argues that the purchasers of the Hospital should have figured out that the Landlord was not replacing every tentacle of the HVAC system. Resp. Br. at 20, 24, 26-28. As an initial matter, that observation cannot drive the interpretation of the contract. What work the apartment developer was doing is a different question than what the Landlord was contractually required to do.

More importantly, the Landlord is attacking a strawman interpretation of the contract that the Hospital expected the replacement of every last capillary in the HVAC system. As reinforced by the evidence at trial, the Hospital instead expected the delivery of an HVAC system that *worked or functioned* to heat and cool the building for the health, safety, and comfort of its patients. Op. Br. at 37; App. 1002-03. The undisputed evidence is that the handful of parts the Landlord caused to be installed left a system that did not work to heat and cool the building.

Third, the Landlord encourages this Court to take only the lightest of touches in reviewing the Superior Court's contractual interpretation holding, claiming it is subject only to review for "clear error." Resp. Br. at 4-5, 24-26. The Landlord unsurprisingly cites absolutely no authority for this proposition. After all, this Court long has held that a trial court's interpretation of a written contract is a legal question that is reviewed *de novo*, full stop. *See 1305 Rhode Island Ave. NW, LLC v. Mussells*, 292 A.3d 212, 218 (D.C. 2022); *Miller & Long Co. v. John J. Kirlin, Inc.*, 908 A.2d 1158, 1159 (D.C. 2006).

The Landlord believes it has found the exception to this rule, explaining that all contracts must be interpreted as a "reasonable person" viewing the "circumstances surrounding" the contract would understand its terms, that interpretation thus requires factual work, and thus contractual interpretation determinations are factual and protected by clear error review. Resp. Br. at 23. None of the cases the Landlord cites for this sequence of analysis follows that path, much less applies clear error review to a question of contract interpretation. *See Debnam v. Crane*, 976 A.2d 193, 197 (D.C. 2009); *Akassy v. William Penn Apartments Ltd. P'ship*, 891 A.2d 291, 299 (D.C. 2006); *Spencer v. Spencer*, 494 A.2d 1279, 1286 (D.C. 1985). The Landlord's aphorism, applicable to the global exercise of contractual interpretation, does not upend the rule of this Court that contractual interpretation determinations are reviewed *de novo*.

The Landlord is also wrong to claim the Superior Court framed its holding in this way, as depending on "the surrounding circumstances." Instead, the Court held that the contract language was clear from the four corners of the agreement. App. 2584 ("[T]he term was defined in documents attached to and incorporated into the lease itself."). To the extent that the Superior Court made factual findings in the course of interpreting Section 8.4, they were to reject arguments regarding parol evidence, not to define "new HVAC system." App. 2584-85.

In any event, even accepting each of the Landlord's "factual circumstances," a reasonable person still would have expected a "new HVAC system" to effectively heat and cool the building and, if that were not the case, for the promising party to make that clear. That is especially true because this was not just any building—the Landlord was installing the new system in a *long-term acute care hospital*, where temperature control is quite literally a matter of life and death.

Finally, to the extent that Judge Campbell's factual findings are relevant, they should be subject to *de novo* review, not clear error review, in light of the nearly four year gap between trial and judgment. Op. Br. at 24-25. Contrary to the Landlord's suggestion (Resp. Br. at 23 n.7), both *Keller v. United States*, 38 F.3d 16, 21 (1st Cir. 1994), and *Hollis v. United States*, 323 F.3d 330, 338 (5th Cir. 2003), explicitly applied heightened scrutiny, and reviewed factual findings with extra care following long delays in trial court decisions. Judge Campbell's inability to remember critical

details about his prior rulings—including his flawed recitation of his summary judgment decision on rent withholding (Op. Br. at 19; App. 2674)—is not contested by the Landlord (Resp. Br. at 46 n.13) and confirms the need to scrutinize his findings with extra care.

B. The Superior Court Erred in Interpreting the Procedure for Not Accepting the New HVAC System.

The Superior Court also erred in interpreting Section 8.4's terms establishing the procedures for notifying the Landlord the HVAC system was not being accepted. Contrary to the Superior Court's holding, Section 8.4 does not require a bill of particulars detailing specific problems with the HVAC system. App. 1788. Nor does it allow the Landlord to receive the notice of non-acceptance and remain completely silent if, for some reason, it "disputes" the sufficiency or level of detail in a notice. The Landlord's arguments do nothing to salvage this incorrect interpretation. Resp. Br. at 28-31.

First, the Landlord and the Superior Court are placing great emphasis on the word "matters" in Section 8.4, as in: the "Tenant shall provide its acceptance of such installation or notify the Landlord, in writing, of any *matters* to which Tenant objects…." App. 1788 (emphasis added); *see also* Resp. Br. at 28-29. But the term "matters" does not generally connote a requirement of specificity or detail. To the contrary, it is difficult to conceive of a mushier word. The first definition in the dictionary is "the events or circumstances of a particular but usually unspecified

situation, occurrence, or relation." WEBSTER'S THIRD INTERNATIONAL DICTIONARY (2002 ed.) at 1394. The Hospital CEO's notice got over this threshold, notifying the Landlord the system was not being accepted because it was not clear that it worked.

Leaning on the term "matters" to require details is particularly inappropriate in light of the next sentence, contemplating a Landlord response to the notice. App. 1788. The notice within 90 days was supposed to start a conversation between Landlord and Tenant about what could be done to make the HVAC system right. Contrary to the Landlord's argument (Resp. Br. at 29), problems with the level of detail provided in the notice is clearly within the ambit of "disput[ing] such matters," of which the Landlord was required to provide some kind of notice. App. 1788. It did not permit the Landlord privately to harbor a view that the notice was insufficiently detailed, only to spring it on the Hospital four years later in a trial.

Nothing in Section 8.4 or elsewhere in the Lease bears the hallmarks of creating a high-stakes pleading game, where if the notice were insufficiently detailed in some way, a healthcare institution forever throws away its contractual rights. To the contrary, the structure of Section 8.4 is designed to have the parties work out the problem, not lie in wait with some unsurfaced but curable suggestion of a shortcoming. And indeed, more generally, the Lease is congenitally oriented against creating such cliffs, as it gives a party an opportunity to cure far more significant shortcomings upon request of the other. App. 1797-98 (Lease § 18.1). Even in

ongoing litigation, courts do not create these cliffs, addressing lack of detail in allegations through providing leave to amend. *See Washkoviak v. Student Loan Mktg. Ass'n*, 849 A.2d 37, 39 (D.C. 2004).[2]

Second, even if 90 days were the deadline to provide precise detail on the system's defects, the Lease's *force majeure* clause delays that deadline due to weather. The Superior Court erred by not addressing this legal issue at all. This Court should reject the Landlord's efforts to excuse the error by reference to factual findings, as it does "not assume that [an] issue has been considered *sub silentio*." *Branson v. D.C. Dep't of Emp. Servs.*, 801 A.2d 975, 979 (D.C. 2002). Even the substance is flawed. To extend a contractual deadline, nothing in Section 24.18 required "D.C.'s winter weather in early 2015" to be particularly "unusual." Resp. Br. at 30. Rather, the clause was designed to be as broad as possible, excusing a deadline for "*any other cause* beyond such party's reasonable control (whether similar or dissimilar)" to a list of specific events. App. 1810. Weather is the prototypical event triggering *force majeure* clauses. *Watts v. Smith*, 226 A.2d 160, 162 (D.C. 1967). As the Hospital informed the Landlord in its timely notice, the inability to test the HVAC system in an occupied critical care hospital in the dead of winter was clearly "beyond [its] reasonable control." App. 1770. If the Landlord

[2] *Williams v. Dudley Trust Foundation*, 675 A.2d 47 (D.C. 1996), involved a tenant that made no attempt to provide any notice. *Id.* at 56. It did not, as the Landlord suggests (Resp. Br. at 29), involve waiver through insufficient detail in a notice.

"disput[ed]" that assertion, the Landlord should have said so within 30 days, as the lease required. App. 1788. The testimony of Plaintiff's paid expert, years after the fact, speculating that (had he been hired) he could have found a way to test the cooling function in winter is no answer. Resp. Br. at 30. The *force majeure* clause does not require parties to move heaven and earth to overcome the weather, it requires reasonable actions, and the Superior Court never measured the ability to test against this standard. App. 1810.

Third, what level of detail is required in a Section 8.4 notice is not some factual question. Resp. Br. at 28-30. It is a quintessential task in contractual interpretation that is reviewed *de novo* by this Court. *Mussells*, 292 A.3d at 218.

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

Section 8.4 charged the Landlord with causing 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 Landlord never fulfilled this obligation because it provided only a single generator that could not meet the Hospital's critical electrical needs. App. 728-30, 1394.

None of the Landlord's reasons for sustaining the Superior Court's erroneous interpretation of this provision holds water. First, Section 8.4 did not require the installation of a single generator as the Landlord contends. Resp. Br. at 31. Section 8.4 plainly refers to "generators." Second, the Landlord's argument that the

Hospital's March 2015 notice of non-acceptance waived any issue not flagged in that notice was not part of the Superior Court's holding. *See* App. 2585-86. Third, seeking the costs of bringing in a functioning replacement generator is not "consequential damages;" it rather directly addresses expenses to "correct" the failure to ensure that the hospital is "served by…generators." *See* App. 1788.

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

The Landlord does not meaningfully contest the Hospital's argument regarding the federal bankruptcy proceedings, except to bemoan a supposed lack of explanation. Resp. Br. at 33. But the Hospital's argument is clear: The bankruptcy proceedings added an additional layer of solemness to the Lease's formation process, which the Superior Court repeatedly and erroneously ignored. Op. Br. at 42-44. Instead of accounting for the bankruptcy context, the Superior Court treated the interpretation process like a high-stakes scavenger hunt, placing the onus on the Hospital to untangle the Landlord's numerous statements and omissions, and even going so far as hold the Hospital accountable for not trekking down to the D.C. Recorder of Deeds' office to dig up an easement agreement that the Landlord neglected to attach to the contract. App. 2584. The Superior Court's passing references to the fact of the bankruptcy proceedings do not cure this error. *See* Resp. Br. at 33 (citing pages of Superior Court opinion mentioning bankruptcy).

III. The Court Should Reverse the Superior Court's Erroneous Attorneys' Fees Award.

The Landlord does not want to deal with failing to attain the almost $62 million it sought as damages for withholding $1.2 million in rent, not even mentioning it in reciting the case's procedural history. *See* Resp. Br. at 18-19. As this Court has repeatedly instructed, the Superior Court was required to account for the Landlord's failure to obtain the staggering majority of its claimed damages in its attorneys' fees award. *See Fleming v. Carroll Publ'g Co.*, 581 A.2d 1219, 1221, 1228-29 (D.C. 1990) ("*Fleming I*"); *Fleming v. Carroll Publ'g Co.*, 621 A.2d 829, 837 (D.C. 1993) ("*Fleming II*"); *Fred A. Smith Mgmt. Co. v. Cerpe*, 957 A.2d 907, 919 (D.C. 2008). Because it did not—failing to even mention the Landlord's unsuccessful gambit for tens of millions of dollars from a hospital that relies on Medicare and Medicaid insurance for reimbursement in its initial opinion on the topic—the Superior Court erred in awarding the Landlord every cent of its claimed attorneys' fees. None of Landlord's arguments alters this conclusion.

First, the Landlord is wrong to argue that the attorneys' fees decision deserves maximum deference. Resp. Br. at 45-46. By failing to even consider the impact of its rejection of the lion's share of the Landlord's claimed damages on attorneys' fees, the Superior Court repeatedly applied the wrong legal standard. *See 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)). That error is reviewed *de novo*. *Mitchell v. United States*, 80 A.3d 962, 971 (D.C. 2013).

The Landlord argues that the Superior Court did, in fact, take account of its failure to obtain all but a fraction of its claimed damages, pointing to a footnote in a *separate order* stating that the Superior Court had already ruled that the Landlord was the prevailing party. Resp. Br. at 47. That footnote—which does not even mention the Landlord's post-trial loss—does not discharge the Superior Court's obligation to explain whether a reduction is warranted in light of a plaintiff's partial success. *Fleming II*, 621 A.2d at 837.

Second, the Hospital did not waive its attorneys' fee argument by neglecting to preemptively raise it in its August 2022 brief opposing attorneys' fees. Resp. Br. at 46. No principle of law or decision from this Court required the Hospital to engage in hypothetical litigation in its attorneys' fees brief—addressing each permutation of how the Superior Court might rule on reconsideration. But even if that were the law, the Hospital argued its 2022 brief that the attorneys' fee award should be reduced proportionately to reflect the Landlord's overall level of success, Supp. App. 236-37, and explicitly reserved its right to update that argument later, Supp. App. 230 n.1.

Third, the Landlord argues that Judge McKenna correctly assessed the merits of the Hospital's argument on reconsideration. Resp. Br. at 48-49. As discussed

above, however, Judge McKenna's analysis does not even mention the most relevant decisions on point. App. 2734 (failing to cite or acknowledge *Fleming I*, 581 A.2d 1219 at 1221, 1228-29, *Fleming II*, 621 A.2d at 837, or *Cerpe*, 957 A.2d at 919).

Fourth, this Court's decision in *Thanos v. D.C.*, 109 A.3d 1084, 1092 (D.C. 2014), is not relevant here. Resp. Br. at 48-49. In *Thanos*, the District sought several forms of relief, not just damages, and it succeeded in obtaining the principal form of relief it sought under D.C. Code § 42-3101—a permanent injunction against a prostitution-related nuisance. 109 A.3d at 1085. By contrast, damages were the only issue in this trial, and the Landlord's late fee claims represented 73% of the Landlord's claimed damages as measured at the time of the December 2018 trial and 98% as measured at the time of the June 2022 judgment.

Fifth, the Court should reject the Landlord's efforts to minimize the effect of its eye-watering, high-eight-figure damages demand on the case. Resp. Br. at 48. The late fee issue took up precious air time at trial during opening and closing statements, App. 443-46, 1499-1505, and during the examination of key witnesses, App. 620-32, 823-38. The Landlord's citation to dozens of pages of trial transcript and post-trial briefing only highlights the importance of the issue. Resp. Br. at 48 n.14. And the testimony showed that its late-breaking and incorrect demand for a staggering amount of damages played a key role in sinking settlement negotiations, sending this case to trial, and extending the litigation. *See* App. 573-74.

Dated: May 6, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of May 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.

/s/ Michael J. Edney
Michael J. Edney

Counsel for Appellants DCA Capitol Hill LTAC, LLC and DCA Capitol Hill SNF, LLC