Commonwealth of Massachusetts
The Appeals Court

Essex County

No. 2018-P-1564

ROBERT GOREHAM,

Plaintiff-Appellant,

– vs. –

ROSE MARTINS & others,

Defendants-Appellees.

ON APPEAL FROM THE ORDER OF THE NORTHEAST HOUSING COURT DIVISION OF THE TRIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS, HONORABLE DAVID D. KERMAN, JUDGE

BRIEF FOR PLAINTIFF-APPELLANT

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2. *Did the trial court err, as a matter of law in finding that the Plaintiff's use of the rear stairway to access the driveway constituted unreasonable misuse, thereby barring recovery under the common law implied warranty of habitability?*

3. *Did the trial err, as a matter of law by concluding that the Plaintiff's negligence which was greater than that of the Defendant, as well as the Plaintiff's misuse of the premises, barred recover under the statutory covenant of quiet enjoyment?*

STATEMENT OF THE CASE

The Plaintiff Robert Goreham commenced this action on December 9, 2011 in the Northeast Housing Court against his former landlords ("Martins") and the snow plowing contractor ("Martins Construction"). (App. 3) The complaint sought damages for serious and disabling injuries sustained by Plaintiff as a result of an incident that occurred at 5 Burnside Street, Salem, Massachusetts, ("the leased premises") on January 25, 2010. Plaintiff alleged that the Defendants were negligent with regard to the removal of snow and ice on the driveway on the leased premises. As a result, Plaintiff fell, fracturing his right ankle, requiring extensive medical treatment, including several surgeries. Plaintiff also claimed that his landlords violated the implied warranty of habitability and covenant of quiet enjoyment, were strictly liable pursuant to G.L. 143 sec 51 and violated G.L. c. 93A. (App. 10-16)

On September 13, 2017, the trial court issued an order following a hearing on several motions in limine. Regarding the claims for breach of the common law implied warranty of habitability and the statutory covenant of quiet enjoyment, the court ruled: The

charge will be only (1) for common law negligence, because (2) for habitability causing personal injury, **negligence at least is acquired**, (3) for quiet enjoyment, **negligence at least is required**, (4) for state building code, strict liability, public or commercial use is required, and (5) for Chapter 93, unfairness or deception is required. (App. 26)

On October 17, 2017, prior to jury empanelment, the court revisited and discussed its prior ruling, stating "The only thing that is going to the jury is negligence." (App. 40) Clarifying this ruling, the court further stated, "If they find **negligence** they necessarily found a serious connection with quiet enjoyment in view of the interest. If they found negligence, they've necessarily found breach of the warranty of habitability, but both of those causes of action are subject to a portion meaning that they are offset by the Plaintiff's own negligence." Attempting to obtain further clarification as to the court's ruling, counsel for the Plaintiff stated: "I think I understand. So if the jury finds negligence, the court will, as a matter of law, make a ruling of the breach of implied warranty and quiet enjoyment." The court replied "yes". (App. 40-41)

The case was tried before a jury from October 17, 2017 through October 20, 2017. (App. 7) On October 20, 2017 the jury rendered a verdict. In response to special question #1, the jury found the Martins **negligent** and Martins' Construction Company not negligent. The jury also determined that the Plaintiff was negligent and apportioned negligence as follows: Defendants, Jose C. & Rose S. Martins, 47%; Defendant Martins Construction Company, Inc., 0% and Plaintiff, Robert Goreham, 53%. (App. 27) Despite the jury's determination that the Martins were negligent, which was the predicate for a breach of the implied warranty of habitability and covenant of quiet enjoyment, the court nonetheless entered judgment for the Martins. (App. 29)

On November 3, 2018 Plaintiff filed several post trial motions; including motions to amend judgement, i.e, to enter judgement for the Plaintiff on the warranty of habitability and quiet enjoyment claims, for a new trial, additur and assessment of attorneys fees (App. 7-8). On February 14, 2018, the trial court issued its Ruling and Order denying Plaintiff's post trial motions. (App. 30). In its Ruling the court confirmed consistent with prior rulings that it

reserved until after trial, disposition of the claims for violation of the statutory covenant of quiet enjoyment and for the common law implied warranty of habitability. "It is true that the jury found negligence causing physical injury to the Plaintiff on the part of the Defendant Landlord/Owners, which finding establishes the existence of a material housing defect. The defective condition of the premises due to the negligence of the landlord/owners constituted a material breach of the warranty." (App. 31-32) Although the court acknowledged that "under current Massachusetts Law, comparative negligence does not apply as a defense to a breach of warranty of habitability claim and that a finding of Plaintiff's negligence greater than that of the Defendants by himself does not bar recovery", the court ruled, nonetheless, that "the Plaintiff's **misuse of the premises**, i.e., the rear stairway, barred his recovery." (App. 31-32)

With regard to the Plaintiff's claim for quiet enjoyment, the court stated, "it is true that the jury's finding of negligence on the part of the defendant landlord owners satisfies the 'fault or foreseeability requirement of the quiet enjoyment

claim". The court ruled however that "since the Plaintiff's negligence was greater than that of the Defendants, as well as the Plaintiff's misuse of the premises, recovery was barred." (App. 32)

Although the jury's damage award was parsimonious and inconsistent with the verdict, the trial judge also denied Plaintiff's request for additur stating "The amount of damages found may be **insufficient**, but additur or new trial on the issue of damages will not be ordered where on the facts and on the law there is no liability" (App. 33) On March 12, 2018. Plaintiff filed a timely Notice of Appeal. (App. 8,34)

As the record demonstrates the court's determination that the Plaintiff's "misuse" of the rear stairway, effectively barring recovery, is without support in the facts or the law.

STATEMENT OF THE FACTS

A. The January 25, 2010 incident

At the time of this incident in 2010, Goreham was 34 years old and employed as an editor at Navtech in Quincy, Massachusetts. He had resided at the leased premises, which was a three-family apartment building, as a tenant at will since March 1, 2003. (App. 78-84)

From January 17-19, 2010, it snowed approximately 9 inches. By January 25, 2010, the date of Plaintiff's incident, snow and ice remained on the entire driveway at 5 Burnside Street, including the area adjacent to the front stairway. (App. 67, 86-87)

On January 25, 2010, the Plaintiff left his apartment which was on the second floor of the premises, intending to go out and run a few errands. As he always did, he used the rear stairway. (App. 90)

During the course of his seven year tenancy, the Plaintiff would **only** use the rear stairway to access his apartment.

Q: How would you access your apartment?
A: There was an outdoor staircase that led up from the parking lot to the second and third floor.

Q: I notice there's a stairway – looks like on the front of this or on the side of the building?
A: Yes.

Q: Would you use that staircase?
A: No.

Q: Why not?
A: It was easier to go up the fire escape. (App. 84)

When asked why he used the rear stairway on the date of the incident he stated that it was his routine to use the rear stairway. Moreover, there was no evidence that he ever used the front entrance or that

use of the front stairway would have been safer. (App. 83-84)[1]

Denise Bouchard who resided with Goreham on the date of the loss also testified that she regularly used the rear stairway because it allowed you to enter directly into the apartment. (App. 186-187). When asked to describe the stairway, she described it as a "metal graduated stairway that had divots in it so when you walked on it you had traction." (App. 187)

As Goreham walked down the driveway he slipped on ice approximately forty feet from the rear stairway and less than 10 feet from the sidewalk. (App. 106, 171) He described the driveway being covered eighty (80%) percent with ice and twenty (20%) percent bare pavement. (App. 90, 98) He testified that he traversed the driveway "diagonally" to avoid the iciest spots but felt he could "safely navigate the driveway." (App. 95-96, 102-103, 319)

When asked whether there was anything about the way he walked that could have contributed to the fall,

[1] Although the stairway has been characterized as the front stairway it is actually on the side of the building adjacent to the driveway. (App. 220-221)

Plaintiff answered "no"; and when asked what caused the fall, he stated "the slippery ice". (App. 104)

The neighbor from across the street, Denise Wyatt also testified. From her window she saw Goreham lying on the driveway and went to his assistance. (App. 58) Significantly, Wyatt stated there was "a lot of snow and ice" and that the "whole driveway was icy". (App. 60-61) She almost fell on the driveway while assisting Goreham. (App. 68)

The uncontroverted evidence established that the driveway including the area near the front (side) stairway were covered with ice and snow, and no salt or sand had been left on the premises or applied in the area where Goreham fell. (App. 70-73, 93-94). Significantly, there was no evidence that the area adjacent to the front (side) stairway provided a safer means of egress.

B. The Medical Course

As a result of his severe lower extremity injuries, the Plaintiff was transported by ambulance to the Beverly Hospital. X-rays confirmed a comminuted oblique fracture of the right fibula requiring surgery, "open reduction and internal

fixation of the ankle, including open syndesmosis repair". (App. 107-110)

Following discharge from the Beverly Hospital and due to his significant functional limitations, the Plaintiff required the assistance of skilled nursing care from Northeast Homecare. During this period of time, he was in a CAM walker and using crutches and a walker for minimal ambulation. Being unable to care for his personal needs or perform household chores, his roommate Denise Bouchard provided assistance. (App. 115-118)

On March 15, 2010 he was admitted to the Beverly Hospital and underwent a second operative procedure for removal of the 2 Synthes screws. (App. 120-121) On December 26, 2012, he underwent his third surgical procedure which consisted of a right ankle fusion. (App. 127-128) The audio-visual deposition of Plaintiff's treating physician, Dr. Robert Wood was presented to the jury.

Plaintiff testified that despite having gone through three surgical procedures, including an ankle fusion, he continues to be plagued by right ankle pain. His range of motion is substantially limited, he is unable to fully ambulate, and is at risk for

development of post traumatic osteoarthritis and will likely be facing additional surgical intervention. He also testified that he cannot run, climb stairs, walk barefoot or perform any activities which require flexion of the foot. He has further incurred causally related medical expenses of **$69,297.46.** (App. 129-132)

C. Additional Relevant Procedural Background

This case was tried over the course of four (4) full days. Eleven (11) witnesses testified including several experts; John Allin, a snow and ice consultant, Dr. Robert Wood, Plaintiff's treating orthopedic surgeon, and Robert Copeland, a meteorologist called by the Defendants. Thirty-six (36) exhibits were admitted into evidence including photographs of the subject premises taken within forty-eight (48) hours of the incident. (App. 319-321) After five (5) hours of deliberation, the jury returned a Special Verdict. (App. 27) Despite the court's previous rulings and the Jury's Special Verdict, the clerk entered judgment for the defendants on October 27, 2017. (App. 29) On February 14, 2018, the trial court denied Plaintiff's posttrial motions.

SUMMARY OF ARGUMENT

The trial court's application of the Correia defense was clear error since there was no evidence of unreasonable misuse. Additionally, there was no evidence that Goreham subjectively appreciated the risk of using the rear stairway to access the driveway nor was there evidence that use of the front stairway was a safer alternative.

ARGUMENT

I. THE PRODUCTS LIABILITY CONCEPT OF UNREASONABLE MISUSE

Relying ostensibly on footnote 7 in *Scott v Garfield*, 454 Mass. 790 (2009), the trial court incorporated into a premises liability case the product liability concept of "unreasonable misuse". (App. 31-32) Such wholesale importation is ill-conceived and untenable.

The "unreasonable misuse" doctrine was significantly defined in the seminal products liability case of *Correia v. Firestone Tire & Rubber Company*, 388 Mass 342 (1983). In *Correia*, the Plaintiff as administratrix of the estate of her late Husband, brought suit against Firestone alleging that the Firestone tire which blew out and which caused her

husband's death was due to negligence or breach of warranty by Firestone. The Supreme Judicial Court on certification from the United States District where the case was pending, addressed three questions, one of which is relevant to the analysis here. "Does Massachusetts recognize contributory or comparative fault as a full or partial defense to an action for personal injury or wrongful death based upon breach of warranty." Id at 353

The court held that the clear language of the comparative negligence statute rendered it inapplicable since actions for strict liability are not actions in negligence. Id.

In addressing the issue of unreasonable misuse the court stated,

> The liability focus is whether the product is defective and unreasonably dangerous and not on the conduct of the user. The only duty imposed on the user is to act reasonably with respect to a product which he knows to be defective and dangerous. Id at 355

In the context of this case and as will be detailed herein, Goreham could not deemed to unreasonably misuse the rear stairway to access the driveway, which stairway was his primary means of ingress and egress.

Although the court in *Garfield* made it clear that liability predicated upon a breach of the implied warranty of habitability is not subject to comparative negligence, other than footnote 7, little guidance was provided as to the application of the unreasonable misuse doctrine.

To obtain that necessary guidance, in the context of the trial court's ruling, we must look to product's liability law to interpret the concept of unreasonable misuse, since it is devoid in premises liability or breach of habitability law. There are no reported Massachusetts cases which discuss this issue. Moreover, it is difficult to fathom what type of conduct qualifies as unreasonable misuse of a premises.

As the record here clearly demonstrates the unreasonable misuse doctrine is difficult of application in a breach of habitability context, since we are not dealing with a product but a component of the premises.

Strict liability under product liability law is predicated upon well-defined and well-established public policy consideration.

> On whatever theory, the justification for strict liability has been said to be that the seller, by marketing his product for use and consumption, has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it; that the public has the right to and does expect, in the case of products which it needs and for which it is forced to rely upon the seller; that reputable sellers will stand behind their goods; that public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them….. Id at 355

The imposition of strict liability under the warranty of habitability is premised upon contract law. The essential objectives of the warranty is to make certain that the tenant gets what he is paying for, a safe and habitable dwelling. *Berman & Sons v. Jefferson*, 379 Mass. 196 (1979)

Although, strict liability under both doctrines Is grounded upon public policy considerations of safety, products sent into the stream of commerce are different than component parts of a premises. As such, the reference to the *Correia* doctrine in *Scott* should be relegated to a historical footnote.

II. THE IMPLIED WARRANTY OF HABITABILITY

In *Scott v Garfield*, 454 Mass. 790 (2009), the Supreme Judicial Court held that the warranty of habitability extended to guests of tenants who sustained personal injury on the leased premises. The court also held that the **Plaintiff's comparative negligence would not reduce the jury's award of damages predicated upon a breach of the warranty of habitability.**

In *Scott*, Plaintiff husband and wife brought suit against Defendant property owners to recover for husband's injuries and wife's loss of consortium. Defendant owners rented the second floor apartment to a friend of the husband. A railing on the second floor porch on which the husband had been leaning broke and the husband fell to the ground sustaining injuries. The Plaintiffs brought an action in the Superior Court asserting claims for negligence and breach of the implied warranty of habitability as well as a separate claim for the wife for loss of consortium. The Defendants argued as a defense that due to the Plaintiff's consumption of alcohol, he had been comparatively negligent.

> The jury returned special verdicts in favor of Scott, on his claims of negligence and breach of the **implied warranty of habitability**, in favor of Pamela Scott, on her claim for loss of consortium, and in favor of the Garfields on their comparative negligence defense, finding that Scott has been twenty percent comparatively negligent. Mass.R.Civ.P. 49(a), 365 Mass. 812 (1974). Because judgment entered for Scott on his claim of breach of the **implied warranty of habitability** (rather than his claim for negligence), **he recovered $450,000, the full amount of damages found by the jury with no reduction for the jury's finding of comparative negligence.** Pamela Scott recovered damages in the amount of $4,000 on her loss of consortium claim. *Scott* at 793.

Following an appeal by the Defendant, the Supreme Judicial Court transferred the case from the Appeals Court. The Court determined that a lawful visitor to a tenant's residence could recover damages for personal injury caused by a breach of the implied warranty of habitability. In discussing the artificial dichotomy between tenant and guest, the court stated:

> To decide otherwise would create or maintain a type of distinction based on status that we long ago rejected. It would not stand to reason that where a tenant and a lawful visitor both suffered injuries on the tenant's rented premises, caused by the same significant defect in violation of the sanitary code, the tenant might recover on a breach of warranty claim, while the tenant's guest could recover only in negligence, **thus subjecting only the guest to a comparative negligence defense.**

Accordingly, the court made clear that liability predicated upon a breach of warranty claim is **not subject to a reduction for comparative negligence.**

> We recognize that the **inapplicability of comparative negligence** as a defense to a breach of **warranty of habitability** claim may not relieve a tenant or a lawful visitor of his or her legal responsibility to act reasonable toward a defect on the premises. Cf. *Correia v. Firestone Tire & Rubber co.*, 388 Mass. 342, 356, 446 N.E.2d 1033 (1983) (**consumer's own negligence does not prevent recovery** except where consumer unreasonable uses product that he knows to be defective and dangerous). *Scott* at n. 7

The *Scott* holding is consistent with prior decisional law. In *Ruiz v. Pelson Realty Trust,* 2001 Mass. Super. Lexis 252, the court held that when a tenant suffered personal injuries as a result of the landlord's breach of the implied warranty of habitability, the landlord's contractual obligation required payment of **compensatory damages to the tenant under a strict liability standard.**

Three years following the *Ruiz* decision, Justice Connolly in *Gifford v. Sears,* 2005 Mass. Super. Lexis 411 ruled that liability could be imposed for a breach of the implied warranty of habitability **without consideration of fault on the part of the landlord.** In *Gifford* the Plaintiff filed a personal injury claim

against the Defendant landlord seeking to recover for injuries sustained on the subject premises. She alleged claims for breach of the warranty of habitability, violations of G.L. 143, § 51 and negligence. In reviewing the claim for breach of the implied warranty of habitability, the court stated:

> The defendants erroneously argue that breach of the implied warranty of habitability does not impose strict liability claims for personal injury. The warranty of habitability is derived from a **contact theory which does not incorporate a fault element which amounts to strict liability**." See *Berman and Sons*, 379 Mass. 200, 395 N.E.2d 981. ("Considerations of fault do not belong in an analysis or warranty"). It is designed not to penalize the landlord for misbehavior, but rather to provide a dwelling suitable for habitation. The essential objective of the warranty is to make sure that the tenant receives what he is paying for. The landlord may not avoid his duty with mere reasonable efforts to provide a habitable dwelling as the tenant may not excuse his obligation with reasonable efforts to pay rent. *Gifford* at 417.

There are no reported cases in Massachusetts subsequent to the *Scott* decision which hold that a claim for breach of warranty of habitability imposes a fault or comparative negligence standard.

Since the *Scott* Decision, the Supreme Judicial Court has continued to expand the scope of the common law implied warranty of habitability which was first

recognized in *Boston Housing Authority v. Hemingway*, 363 Mass. 184 (1973). In *The Trustees of the Cambridge Point Condominium Trust v. Cambridge Point, LLC and others*, 478 Mass. 697 (2018), the court held that the implied warranty of habitability applied to condominium unit owners seeking redress for defective construction of common areas. The court reviewed the history of the common law implied warranty of habitability.

> Massachusetts has a well -established public policy in favor of the safety and habitability of homes, as reflected in our implied warranty of habitability under common law and in the legislative enactment of building codes. In *Albrecht v. Clifford*, 436 Mass. 706, 710-711, (2002), we expanded our implied warranty of habitability under common law, holding that it attaches not only to residential leases but also to "the sale of new homes by builder-vendors in the Commonwealth." The purpose of this implied warranty is "to protect a purchaser of a new home from latent defects that create substantial questions of safety and habitability," 1151 Id. at 711. *Boston Hous. Auth. V. Hemingway*, 363 Mass 184 (1973) ("[I]n a rental of any premises for dwelling purposes, under a written or oral least, for a specified time or at will, there is an implied warranty that the premises are fit for human occupation"). Although the precise scope of the warranty depends on the circumstances of the case, "a home that is unsafe because it deviates from fundamental aspects of the applicable building codes, or is structurally unsound, or fails to 706 keep out the elements because of defects of construction, would breach the implied warranty." *Albrecht, supra.* We have emphasized that "[the

> implied warranty] cannot be waived or disclaimed, because to permit the disclaimer of a warranty protecting a purchaser from the consequences of latent defects would defeat the very purpose of the warranty." Id. Cf. *Boston Hous. Auth.*, supra ("This warranty [insofar as it is based on the State sanitary code and local health regulations] cannot be waived by any provision in the lease or rental agreement").
>
> The policy reasons that led us to adopt an implied warranty of habitability in the purchase of a new home apply equally to the purchase of a new condominium unit." *Berish*, 437 Mass. at 263. In *Berish*, *supra* we therefore held that an implied warranty of habitability attaches to the sale of new residential condominium units by builder-vendors. At the same time, we recognized that "the protections afforded [to] purchasers of newly constructed condominium units by this implied warranty against latent defects in their own units may not be adequate to ensure the habitability of those units" because improper design, material, or workmanship that causes a defect in a common area might cause units to be uninhabitable or unsafe. Id. at 264-265. "To ensure that there is a complete remedy for a breach of habitability in the sale of condominium units, we conclude[d] that an organization of unit owners" – such as a condominium trust – "may bring a claim for breach of the implied warranty of habitability when there are latent defects in the common areas that implicate the habitability of individual units. Id. at 265.

Prior to the *Scott* Decision the Supreme Judicial Court dispensed with the "vitality requirement" in an injury case relating to an exterior porch. *Crowell v.*

McCafferty, 377 Mass 443, 451 (1979). Accordingly, in light of the expanding scope of the implied warranty of habitability, the trial court's determination that the Plaintiff "misused" a vital part of the premises is clearly erroneous and must be reversed.

A. The Trial Judge Improperly Equated Unreasonable Use to Comparative Negligence

It is well-settled that the liability analysis based on negligence and breach of warranty impose "distinct duties and standards of care," *Hagland v. Philip Morris, Inc.*, 446 Mass. at 747 n. 9, quoting *Colter v. Barber-Greene Co.*, 403 Mass. at 61; see *Correia v. Firestone Tire & Rubber Co.*, 388 Mass. at 356 (keeping the standards of care and duties separate and well-defined will best serve the policies of negligence and warranty liability).

In determining warranty liability, the inquiry focuses on whether the product is unreasonably dangerous, **not the user's conduct.** Accordingly, concepts of comparative fault and contributory negligence are inapplicable to a breach of warranty claim. Colter v. Barber Greene Co., 403 Mass at 63; *Allen v. Chance Mfg. Co.*, 398 Mass. at 34; *Correia v. Firestone Tire & Rubber Co.*, 388 Mass. at 356; *Fahey*

v. Rockwell Graphic Systems, Inc., 20 Mass. App. Ct. 642, 652 (1985).

In the present case, the trial court's determination that the Plaintiff misused the rear stairway to access the driveway contradicted the fundamental separateness between breach of warranty and negligence. The trial court's characterization of "unreasonable use" was therefore equivalent to comparative negligence.

Although the issue of unreasonable use was not submitted to the jury, the margin of victory for the Martins' was only three (3%) percent (53% to 47%). Based upon the jury's determination, although the trial court may have been warranted in independently assessing that Goreham was negligent, there was nothing in the record to establish unreasonable misuse under *Correia* and its progeny. How could the Plaintiff misuse a rear stairway which he regularly used, especially when the claimed defect was in the driveway, not the stairway?

B. The Trial Court Failed to Consider the Second Element of the Correia defense.

In *Goulet v. Whitin Machine Works, Inc.*, 30 Mass. App. Ct. 310 (1991), the Appeals Court further

refined an element of the *Correia defense* – namely, **the Plaintiff's subjective understanding and appreciation of the magnitude of the danger of using the product.** In *Goulet*, the Plaintiff was injured while attempting to perform routine cleaning to a cylinder in a carding machine. He opened the doors of the machine while it was operating and used an air hose on the rotating cylinder. The air hose became caught in the cylinder, and the Plaintiff's arm was pulled into the machine, causing serious injuries ultimately resulting in amputation of his arm. Id. at 311-312.

At trial, the Plaintiff admitted that he knew the rotating cylinder could seriously injury his hand, but he also testified that he "never dreamed" that he could lose his arm. In answer to special questions, the jury found that the Plaintiff did not know that he could be seriously injured if he placed his hand too close to the cylinder. The defendant argued on appeal that the Plaintiff's lack of knowledge of the specific injury he subsequently suffered was irrelevant and his admission that he knew he risked serious injury was sufficient to bind the Plaintiff and bar recovery under Correia. Id. at 311-314.

The Appeals Court concluded that the Correia defense **applies only if** the magnitude of the risk understood by the Plaintiff encompassed the injury that he or she actually received. Id. at 314-315. In other words, the jury cannot determine whether a Plaintiff acted unreasonably in using a machine he knew to be defective until they decide that the Plaintiff understood and appreciated the magnitude of the risk which he faced. Id. Knowledge of general harm or the danger of lesser injury is not knowledge of the danger created by the defect and is insufficient proof that a Plaintiff voluntarily and knowingly used a defective machine. Id. at 314; see *Valleca v. Uniroyal Tire Co.*, 36 Mass. App. Ct. 247, 249 (1993) ("Knowledge that a product is dangerous, standing along, is not enough").

Although there was evidence that the Plaintiff knew the driveway was dangerous, i.e., he had a knowledge of **the general harm or danger** it posed; there was no evidence submitted from which the trial court could conclude that the Plaintiff **subjectively understood** the magnitude of the risk and the potential injury he could receive, a subjective standard. Plaintiff's testimony is to the contrary. He felt

that he could "safely navigate the driveway" and there was nothing about the way that he walked that he believed contributed to his injury. (App. 95-96, 102-103)

C. Plaintiff's use of the rear stairway to access the driveway cannot be characterized as unreasonable.

The Plaintiff's decision to use the rear stairway was not within the scope of those "extraordinary" or "abnormal" uses to preclude recovery under a warranty claim. *Back v. Wickes Corp.*, 375 Mass. 633 (1978). Plaintiff's conduct is not even within the parameters of something that could be deemed an unforeseeable act, since he was using the same rear stairway that he had used on a regular basis since he began occupying the premises in 2003. Hence, there can be no finding of deliberate misuse since Goreham was not using the rear stairway and driveway in a manner unrelated to any normal or intended use of that of that item. Venezia v. Miller Brewing Company, 626 F.2d 188 (1st Cir. 1980) (recovery barred due to misuse where eight year old plaintiff threw beer bottle against telephone pole, causing glass to shatter resulting in eye injury).

Moreover, the court expressly found that the use of the driveway was "vital to the use of the demised premises" citing both *Scott v. Garfield* 454 Mass. 790 (2009) (porch) and *Crowell v. McCafferty,* 377 Mass. 443 (1979) (porch). How could the Plaintiff mis-use a part of the premises which the court determined was vital to the use of the premises?

Only a Plaintiff whose unreasonable conduct (an objective standing) and who has subjectively evaluated the risk should be denied recovery. Far from the Plaintiff committing the kind of egregious act which bar recovery, the causal connection between Plaintiff's act and omissions which may be relevant to a determination of comparative negligence do not bar recovery under a warranty theory. *McCarthy v. Litton Industries, Inc.,* 410 Mass. 15 (1991).

The affirmative defense misuse differs from the traditional doctrine of the assumption of the risk because it combines a subjective element, the Plaintiff's actual knowledge and appreciation of the risk with an objective standard, the reasonableness of his conduct in the face of the known danger. To successfully defend against a claim for breach of the implied warranty, the Defendant must show that the

Plaintiff's unreasonable use was the proximate cause of his injury. *Vincent v. Nicholas E. Tsikous Company*, 337 Mass. 726 (1958) (No breach of warranty where Plaintiff used a bottle opener to open a jar causing it to shatter). See also, *Venezia v. Miller Brewing Company*, 626 F.2d 188 (1980)

In this case, the trial judge's findings, as they relate to unreasonable use were deficient in that he failed to consider the nature, extent and scope of the Plaintiff's subjective knowledge of the particular defect; and his understanding of the harm that it could inflict. While the court did find that the "Plaintiff's choice to use the rear stairway was an unreasonable use of the premises" he failed to "consider the relationship between the perceived risk and the injury actually received," or anything remotely similar. See *Goulet v. Whitin Machine Works, Inc.*, 30 Mass. App. Ct. at 315 n. 5. The trial judge's failure to consider the Plaintiff's subjective knowledge of the particular risk which he encountered – that his ankle could be fractured –and which determined whether he knowingly and voluntarily addressed the hazard was clear error.

Since essential elements of the *Correia* doctrine were not considered, the trial judge committed reversible error. *See Velleca v. Uniroyal Tire Co.*, 36 Mass. App. Ct. 247 (1994).

D. There is no evidence that the use of the front stairway was safer and hence a more reasonable use.

There is no evidence in the record to support the trial court's conclusion that the use of the front stairway was a safer alternative to the rear stairway and hence a more reasonable use. Despite the complete absence of evidence on this issue, the trial court held "in this case, the Plaintiff's own negligence consists of his unreasonable use of the stairway leading to the driveway that he knew to be defective and dangerous, instead of the front stairway leading to the street." App. 32)

As set forth above, the Plaintiff walked approximately 40 feet from the rear stairway without falling and fell within 10 feet of the sidewalk, approximately 5 to 6 feet away from the front stairway. The Plaintiff and other witnesses also testified that the entire driveway, including the area adjacent to the front stairway was covered with snow and ice and that there was no sand or salt to be present. Accordingly,

the trial court's conclusion, in the absence of any evidence that the use of the front stairway, was a safer alternative to the rear stairway, was speculative and clearly erroneous.

The facts here clearly demonstrate the practical difficulties of applying the *Correia* defense in the context of a habitability claim.

Accordingly, based upon the jury's determination that the Martins were negligent, the court's prior rulings and the clear mandate of existing case law Judgment should enter for Plaintiff on Count II and VII of the complaint.

III. THE COVENANT OF QUIET ENJOYMENT

G.L. c. 186 § 14 provides in relevant part "Any lessor or landlord of any building or part thereof, occupied for dwelling purposes …. who willfully or intentionally fails to furnish such water, hot water, heat, light, power, gas, elevator service, telephone service, janitor services or refrigerated service at any time when the same is necessary to the proper customer use of such building or part thereof…..**or any** lessor or landlord **who directly or indirectly interferes with the quiet enjoyment** of any residential

premises by the occupant **shall** be punished by a fine of not less than twenty-five dollars nor more than three hundred dollars, or by imprisonment for not more than six months. Any persons who commits any act in violation of this section **shall** also be liable for actual and consequential damages or three months rent, whichever is greater, and the cost of such action, including reasonable attorneys fees…….

The statutory covenant of quiet enjoyment was enacted to protect a tenant's right to freedom from serious interference with his tenancy, i.e. acts or omissions that impair the character and value of the leased premises. In analyzing whether there is a breach of the covenant the focus is on the landlord's conduct and not his intentions. Thus a landlord may not intend to violate a tenant's right to quiet enjoyment but may do so nonetheless when the breach is a "natural and probable consequence of what the landlord did, what he failed to do or what he permitted to be done." *Jane Doe and others v. New Bedford Housing Authority and another*, 417 Mass. 373, 385 (1974).

Section 14 belongs to a body of statutes establishing tenants' remedies against landlords who fail to provide safe and sanitary housing. See for

example, G.L. c. 111, § 127A through § 127L. These statutes are designed to facilitate enforcement of State housing regulations and to provide relief for tenants deprived of decent homes. See *Boston Housing Auth. V. Hemingway,* 363 Mass. 184, 191-193 (1973). The objectives of these statutes go beyond deterrence of intentional wrongdoing; unsanitary conditions in an apartment cause harm to the occupants whether the landlord has acted intentionally, negligently, or innocently. See G.L. c. 239, § 8A (no requirement that landlord must have reasonable opportunity to repair before tenant may withhold rent); *Berman & Sons v. Jefferson,* 379 Mass. 196, 200-204 (1979).

When § 14 was first enacted, both categories of prohibited conduct – failure to provide essential services and interference with quiet enjoyment – were modified by the words "willfully or intentionally." St. 1927, c. 339, § 1. In 1973, the statute was rewritten. St. 1973, c. 778, § 2. The requirement of intentional conduct was retained for failure to provide essential services but deleted from the quiet enjoyment clause. One natural inference from this amendment is that the Legislature meant to abrogate the requirement of specific intent to disturb quiet enjoyment.

The common law background of § 14 also suggests that malicious intent is not a condition of liability. The phrase "quiet enjoyment" is a familiar term in landlord-tenant law, signifying the tenant's right to freedom from serious interferences with his tenancy – acts or omissions that "impair the character and value of the leased premises." *Winchester v. O'Brien*, 266 Mass. 33, 36 (1929) (quoting from *Brande v. Grace*, 154 Mass. 210, 212 [1891]). See *Blackett v. Olanoff*, 371 Mass. 714 (1977). Every tenancy is deemed to entail an implied covenant that the landlord will not disturb this right during the tenancy. Id. Although early cases applying the covenant of quiet enjoyment required intent on the part of the landlord, e.g., Katz v. Duffy, 261 Mass. 149 (1927), more recent decisions have imposed liability whenever the "natural and probably consequence" of a landlord's action was interruption of the tenant's rights *Westland Hous. Corp. v. Scott*, 312 Mass. 375, 381-383 (1942). *Shindler v. Milden*, 282 Mass. 32, 33 (1933). See also *Blackett v. Olanoff*, 371 Mass. 714, 716 (1977). [Note 7] when the Legislature chose the words "quiet enjoyment" – words that have little inherent meaning but a rich background in decisional law – it must have intended to incorporate

these cases into the statute. See *Pineo v. White*, 320 Mass. 487, 491 (1946); *Commissioners of Pub. Works v. Cities Serv. Oil Co.*, 308 Mass. 349, 360 (1941).

A. The fault and foreseeability requirement has been satisfied.

To establish a claim for breach of the statutory covenant of quiet enjoyment pursuant to G.L. 186, § 14 a Plaintiff must show "at least some degree of fault" on the part of the landlord.

In *Al-Ziad v Mourgios*, 424 Mass. 847 (1989) the Supreme Judicial Court vacated the trial court's award of attorneys fees under 186 § 14 because a violation of the lead paint statute, **without more**, did not constitute a violation of the statutory covenant of quiet enjoyment. The court concluded however that conduct involving "**some degree of fault**" by a landlord could support the imposition of liability under §14. "To support the imposition of liability under the quiet enjoyment statute, there must be a showing of **at least** negligent conduct by a landlord…" *Al-Ziad* at 850-851. In reviewing the legislative history and relevant case law, the court went on to state, "**some degree of fault or foreseeability** should be a prerequisite to liability under § 14." *Al-Ziad* at 851.

The court did not determine that the landlord's degree of fault needed to be **greater** than that of the tenant for the imposition of liability under §14. The court's repeated references to "some degree" and "at least" makes it clear that only a showing of **some** negligent conduct was necessary to trigger relief. "Some" is defined generally as "unspecified in amount, degree or number" or "at least a small amount in number". Webster's Universal College Dictionary, 1997, p.749.

Subsequent case law has reaffirmed the "some degree of fault" standard as enunciated in Ziad. See *Lindquist v. Stella,*94 Mass. App. Ct. 1101 (2018); *Duff v. Pouliot,* 2018 Mass. App. Div. 42 (2018); *Gallo v. Marinelli,* 90 Mass. App. Ct. 1107 (2016); *Hutchins v. Hunt,* 83 Mass. App. Ct. 1125 (2013); *Almonte v. Berton,* 83 Mass. App. Ct. 1102 (2012); Lawrence v Andersen, 73 Mass. App. Ct. (2011)

B. The Trial Court's Conclusion that Reckless, Willful or Intentional Conduct is Required is Clearly Erroneous.

The trial court acknowledged that the jury's finding of negligence satisfied the "fault or foreseeability" requirement. The court went on to state "However, (although there is no appellate court

ruling on this issue), I hold that where there is no showing of **reckless, willful intentional conduct,** and liability for quiet enjoyment is based solely on negligence, the Plaintiff's own negligence greater than that of the Defendants, as well as the Plaintiff's mis-use of the premises, bar recovery." (App. 32)

The quiet enjoyment statute provides that a showing of willful and intentional conduct is only required to trigger the landlord's liability to furnish **essential services** such as hot water, heat, light, and power. No showing of intentional conduct is required, however, where the landlord directly interferes with quiet enjoyment, which is the case here. Accordingly, liability under §186 can be triggered by the landlord's willful or intentional failure to provide essential services or by "direct or indirect interference with quiet enjoyment." *Simon v. Solomon,* 385 Mass. 91 (1982).

In *Home Savers Counsel of Greenfield Gardens, Inc. v. Luz Sanchez,* 70 Mass. App. Ct. 453 (2007), the Appeals Court confirmed that "negligent conduct" as opposed to "willful or reckless behavior" is all that

is required for a violation of the quiet enjoyment statute.

Since the jury's finding of negligence satisfied the "fault or foreseeability" requirement of the statute", no showing of reckless, willful or intentional or conduct was required. As such, the trial judge should have entered judgment for Goreham on his claims for breach of the covenant of quiet enjoyment.

C. The trial court grafted onto the statute a comparative negligence and mis-use defense.

The trial court's analysis of the statutory covenant of quiet enjoyment presents questions of law regarding statutory interpretation. "We review questions of statutory interpretation de novo", *Commerce Ins. Co. v. Commission of Ins.* 447 Mass. 678, 481 (2006). In deciding whether comparative negligence or mis-use bars recovery under the provisions of G.L. c. 186 § 14 this court must accept the facts and the findings of the jury and trial court supplemented by the uncontroverted material in the record. *Orsono v. Simone*, 56 Mass. App. Ct. 612 (2002).

To ascertain the intent of the legislature with respect to meaning of words in a statute, i.e., the inclusion of a word or otherwise general meaning, the

court must consider well settled principals of statutory construction. In a statutory construction case, the beginning point must be the language of the statute itself and when a statute speaks with clarity to an issue, judicial inquiry into the statute's meaning except in the most extraordinary circumstance, is finished. *United States v. Bokhari,* 185 F.Supp.3d 254 (2016). *Sony BMG Music Entertainment v. Tenenbaum,* 660 F.3d 487 (2011).

In construing a statutory phrase, the Appeals Court looks first to the statute's plain language and will give an effect consistent with its plain meaning and in light of the aim of the legislature. *Commonwealth v. Ryan,* 93 Mass. App. Ct. 486 (2018). *Millis Public Schools v. MP,* 478 Mass. 767 (2018). Accordingly, if a statute's plain meaning supplies a plausible interpretation the inquiry is often at an end. *United States v. Gordon,* 875 F.3d 26 (1st Cir. 2017). Where the meaning of statutory text is plain and works no absurd result the plain meaning controls. Moreover, statutory definitions which declare what the term means excludes any meaning that is not stated. *Penobscot Nation v. Mills,* 861 F.3d 324 (2017). In determining whether the statutory meaning is plain a

court must give words their ordinary definitions. Where the statutory language at issue admits of only one meaning, it is neither the duty nor the privilege of the courts to enter speculative fields in search of different meanings. Only where the statutory language is ambiguous are traditional cannons of statutory construction applied to interpret the statute's meaning. *In Re Sagendorph*, 562 B.R. 545 (D. Mass. 2017)

As the Supreme Judicial court has observed:

"A general term in a statute or ordinance takes meaning from the setting in which it is employed. The literal meaning of a general term in an enactment must be limited so as not to include matters that, although within the letter of the enactment, do not fairly come within its spirit and intent." *Kenney v. Building Comm'r of Melrose*, 315 Mass. 291, 295 (1943); *Accord Com. V. Baker*, 346 Mass. 279, 273 (1963); *Koller v. Duggan*, 346 Mass. 270, 273 (1963). "The problem is to determine what particulars that were not mentioned are sufficiently like those that were, in ways that are germane to the subject and purpose of the act, to be made subject to the act's provisions by force of the

general reference." 2A c. Sands, Sutherland Statutory Construction § 47.18 at 110.

Applying general rules of statutory construction, the legislature clearly intended to hold landlords civilly liable for any **direct or indirect interference with quiet enjoyment**. Once a determination has been that quiet enjoyment has been disrupted the landlord **shall** "be liable for actual and consequential damages and attorneys fees." If the legislature intended to limit recovery under § 14 or bar recovery due to comparative negligence and/or mis-use, it would have provided for the same.

The choice of the word "shall" is significant in determining legislative intent. The word "shall" in a statute is ordinarily interpretative of having a mandatory or imperative obligation. *Galenski v. Town of Erving and others*, 471 Mass. 305 (2015).

Based upon the jury's answer to special question #1 they did find that the Martins conduct involved "some degree of fault". The trial court's acknowledgement as to the jury's finding of negligence or fault compelled the court to enter judgment on the covenant of quiet enjoyment claims. *Gablowski v. Casey*, 64 Mass. App. Ct. 744 (2005).

Based upon the above, the court should enter judgment for the Plaintiff on Counts III and VIII of the complaint and remand this matter for an assessment hearing on attorney's fees consistent with the clear mandate of *Al-Ziab* and its progeny.

CONCLUSION

For the foregoing reasons Plaintiff/appellant, Robert Goreham respectfully requests that this court:

1. Enter Judgment for the Plaintiff on Counts II and VII of the complaint alleging Breach of the Implied Warranty of Habitability; and on Counts III and VIII for breach of the Covenant of Quiet Enjoyment;
2. Remand this matter to the Northeast Housing Court for further proceedings on damages and an assessment of attorneys fees pursuant to G.L. c. 186 § 14.
3. Vacate the denial of the Motion for a New Trial or for an Additur and that the action be remanded to the trial court with instructions to allow the motion and for further proceedings according to the opinion issued.

/s/Louis J. Muggeo
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CERTIFICATON UNDER RULE 16 OF MASS.R.A.P.

Now comes, Louis J. Muggeo, counsel for the Plaintiff-Appellant, and hereby certifies that the Brief submitted herewith complies with the rules of court that pertain to the filing of briefs, including, but not limited to: Mass.R.A.P. 16(a)(6) (pertinent findings or memoranda of decision); Mass.R.A.P. 16(e) (references to the record); Mass.R.A.P. 16(f) (reproduction of statutes, rules, regulations); Mass.R.A.P. 16(h) (length of brief); Mass.R.A.P. 18 (appendix to the briefs); and Mass.R.A.P. 20 (form of briefs, appendices and other papers).

I further attest, that this brief is being filed under rule 13(a), and that the day of mailing is within the time fixed for filing by the court.

/s/ Louis J. Muggeo
Louis J. Muggeo

Judgment for Defendant(s)	**Docket Number** 11H77CV000250	**Commonwealth of Massachusetts Housing Court Department**

RE: Robert Goreham v. Jose C Martins et al

Plaintiff(s) who are parties to this Judgment:

Robert Goreham

Northeast Housing Court
Fenton Judicial Center
2 Appleton Street
Lawrence, MA 01840
(978)689-7833

Defendant(s) who are parties to this Judgment:

Jose C. Martins
Rose S. Martins
Martins Construction Company, Inc.

After coming before the court, the issues having been duly tried or heard, and a finding or verdict having been duly rendered, IT IS ORDERED AND ADJUDGED by the court (Kerman, J.) that the Plaintiff(s) named above take nothing, that the action be dismissed on the merits and the Defendant(s) named above recover of the Plaintiff(s) the "Judgment Total" below.

Date of Breach, Demand or Complaint	12/09/2011
Date Judgment Entered	10/27/2017
Pre Judgment Interest as provided by law from 12/09/2011 to	$.00
Damages	$0.00
Double or Treble Damages Awarded by Court	$0.00
Filing Fee & Surcharge	$0.00
Other Costs Awarded by Court	$0.00
Other Costs	$0.00
Court Ordered Attorney Fees	$0.00
Judgment Total Payable to Plaintiff(s)	**$0.00**

Further orders of the court:

Entered and notice sent on October 27, 2017.

Jeffrey Hernandez
Clerk - Magistrate

COMMONWEALTH OF MASSACHUSETTS
NORTHEAST HOUSING COURT

ROBERT GOREHAM

Plaintiff

- v.- No. 11-CV-0250

JOSE C. MARTINS

Defendant

RULINGS AND ORDER

On January 25, 2010, the plaintiff second floor tenant of the three dwelling unit apartment building located at 5 Burnside Street, Salem, exited through the rear stairway of the building and slipped and fell on snow and ice on the adjacent driveway. He suffered a fractured ankle that required extensive medical treatment including fusion surgery. The plaintiff brought suit against the landlord owners and against the snow plowing company that had recently plowed the driveway (which company was owned and operated by the owners' son).

Before trial I dismissed as a matter of law the claims for violation of the Consumer Protection Act, Gen.L. c.93A, because an unfair or deceptive act or practice was not shown. See, Darviris v. Petros, 442 Mass. 274, 277-278, 812 N.E.2d 1188, 1192 (2004).

I dismissed as a matter of law the claim for strict liability for failure to comply with the State Building Code Law, Gen.L. c.143 §51, because public or commercial use of the premises was not shown. See, Sheehan v. Weaver, 467 Mass. 734, 7 N.E.3d 459 (2014), rev'g N.E.Hsg.Ct. No. 08-CV-0135 (February 10, 2012).

I reserved until after trial disposition of the claim for violation of the statutory covenant of quiet enjoyment, Gen.L. c.186 §14, because reckless, wilful or intentional conduct was not shown, and because it is established that a finding of "at least negligent conduct" is required to establish liability under that law. See, Al-Ziab v. Mourgis, 424 Mass. 847, 679 N.E.2d 528 (1997).

I reserved until after trial disposition of the claim for breach of the common law implied warranty of habitability, because (although there is no definitive appellate court ruling on the issue), I hold that a finding of negligence is required to establish liability for physical injuries under that law. See, Scott v. Garfield, 454 Mass. 790, 796 fn.8, 912 N.E.2d 1000, 1006 fn.8 (2009) (open question whether for physical injuries caused by a breach of the warranty of habitability the standard is one of negligence, as provided by the Restatement (Second) of Property (Landlord and Tenant) §17.6 (1977), or strict liability as for economic loss).

The case went to trial only on the issues of common law negligence. After four days of trial including five hours of deliberations the jury found (1) that the defendant landlord owners were negligent, (2) that the defendant snow plowing company was not negligent, (3) that the plaintiff tenant himself was negligent, (4) that the percent of negligence as proximately caused the plaintiff tenant's injuries was 47% attributable to the defendant landlord owners, and 53% attributable to the plaintiff tenant, and (5) that the total dollar amount of the plaintiff tenant's damages was $25,000.

Judgment entered for the defendants on the verdict and under Gen.L. c.231 §85. I consider now the plaintiff's post-trial motions [Doc.#71-82].

1. Habitability. The plaintiff seeks judgment for the full amount of damages sustained, without apportionment for comparative negligence, on his claim for breach of the warranty of habitability [Doc.#74; 80, 81, 82]. I deny the motion.

It is true that the jury found negligence causing physical injury to the plaintiff on the part of the defendant landlord owners, which finding establishes the existence of a material housing defect. See, Papadopoulos v. Target Corp., 457 Mass. 368, 930 N.E.2d 142 (2010) (equating "defects" and "defective conditions" with "negligence"). See also, McAllister v. BHA, 429 Mass. 300, 301-302, 708 N.E.2d 95, 97 (1999) (The central issue was whether the defendant was negligent). The defective condition of the premises FN1/ due to negligence by the landlord owners constituted a material breach of the warranty.

However, the jury also found negligence on the part of the plaintiff tenant, who having lived at the apartment since 2004 was familiar with the premises and its condition during the winter months, and who chose, by force of habit, despite the weather conditions, to leave the building through the rear stairway leading to the driveway instead of through the front stairway leading to the sidewalk. The plaintiff's choice to use the rear stairway, not to reach his car but only to reach the street, was an unreasonable use of the premises and the cause of his own injuries. The plaintiff's knowing and unreasonable misuse of the premises defeats his breach of warranty claim. See, Scott v. Garfield, 454 Mass. 790, 795 fn.7, 912 N.E.2d 1000, 1006 fn.7 (2009).

FN1/ The defendants argue that the driveway and parking lot area was not "vital to the use of the demised premises" and therefore was not covered by the warranty. The defendants rely on trial court rulings in Brooks v. Manzaro, 2008 WL 5146863 (Agnes, J., 2008) (parking lot not "vital" to use of premises) and Henry v. Clark, (Salinger, J., 2013) (same). But this argument was held "unavailing" by our Supreme Judicial Court in Scott v. Garfield, 454 Mass. 790, 797, 912 N.E.2d 1000, 1007 (2009) (porch), citing Crowell v. McCaffey, 377 Mass. 443, 450-451, 386 N.E.2d 1256, 1261-1262 (1979) (porch). Regardless whether the off-street parking and driveway area is considered to be part of the demised premises or part of the common areas, the landlord owners were required to exercise reasonable care that the driveway and parking area was reasonably safe.

I acknowledge that under current Massachusetts law FN2/, comparative negligence does not apply as a defense to a breach of warranty of habitability claim, and that a finding of plaintiff's negligence greater than that of the defendants, by itself, does not bar recovery. But in this case, the plaintiff's own negligence consists of his unreasonable use of the rear stairway leading to the driveway that he knew to be defective and dangerous, instead of the front stairway leading to the street. Therefore, in this case, the plaintiff's misuse of the premises bars recovery. See, Scott v. Garfield, 454 Mass. 790, 793, fn.6, 795 fn.7, 912 N.E.2d 1000, 1004, fn.6, 1006 fn.7 (2009).

2. Quiet Enjoyment. The plaintiff seeks judgment for the full amount of his damages, without apportionment for comparative fault, plus statutory attorney's fees, on his claim for violation of the covenant of quiet enjoyment, Gen.L. c.186 §14 [Doc.#74, 79; 80, 81, 82]. I deny the motion. It is true that the jury's finding of negligence on the part of the defendant landlord owners satisfies the "fault or foreseeability" requirement of the quiet enjoyment claim. However (although there is no appellate court ruling on the issue), I hold that where there is no showing of reckless, wilful or intentional conduct, and liability for quiet enjoyment is based solely on negligence, the plaintiff's own negligence greater than that of the defendants, as well as the plaintiff's misuse of the premises, bar recovery.

3. Inconsistent Verdict. The plaintiff seeks a new trial on his contention that the verdict was inconsistent [Doc.#75, 76; 80, 82]. I deny the motion, first because there was no inconsistency, and second because there was no objection to the verdict before the jury was discharged. See, SPI v. Goverman, 396 Mass. 567, 573, 487 N.E.2d 520, 524-525 (1986). See also, Sheehan v. Weaver, N.E.Hsg.Ct. No. 08-CV-0135 (February 10, 2012), rev'd other grounds, 467 Mass. 734, 7 N.E.3d 459 (2014), and Copley v. Anderson, Bos.Hsg.Ct. No. 89-SP-52386 (October 17, 1991), citing B.F. Hodgson Co. v. Lisanti, 339 Mass. 775, 159 N.E.2d 67 (1959) (rescript).

4. Jury Instructions. The plaintiff seeks a new trial on his contention that the jury should have been instructed that a finding of negligence on his part greater than that of the defendants would entirely bar his recovery [Doc.#75, 76; 80, 82]. I deny the motion, because there was no request for such instruction, either by the jury, or by the plaintiff, and there was no indication that such instruction was needed to prevent the jury from "speculating in the dark." See, Baudanza v. Comcast, 454 Mass. 622, 633, 912

FN2/ Massachusetts law may stand alone. See generally, Sheehan v. Weaver, N.E.Hsg.Ct. No. 08-CV-0135 (February 10, 2012), rev'd other grounds, 467 Mass. 734, 7 N.E.3d 459 (2014); Griffith v. Messina, N.E.Hsg.Ct. No. 07-CV-0065 (December 20, 2007), and authorities cited, including Peterson v. Superior Court, 10 Cal.4th 1185, 43 Cal.Rptr.2d 836, 899 P.2d 905 (1995), overruling Becker v. IRM Corp., 38 Cal.3d 454, 213 Cal.Rptr. 213, 698 P.2d 116, 48 ALR4 601 (1985); Dwyer v. Skyline Apartments, Inc., 123 N.J.Super. 48, 301 A.2d 463 (1973), aff'd 63 N.J. 577, 311 A.2d 1 (1973) (per curiam); Sargent v. Ross, 113 N.H. 388, 308 A.2d 528 (1973).

N.E.2d 458, 467-468 (2009); Dilaveris v. W.T.Rich Co., 424 Mass. 9, 13-15, 673 N.E.2d 562, 565-566 (1996); Flood v. Southland Corp., 33 Mass.App. 287, 300-302, 601 N.E.2d 23, 30-31 (1992).

5. Weight of Evidence. The plaintiff seeks a new trial on the issue of liability on his contention that the jury's finding about his own negligence was against the weight of the evidence [Doc.#75, 76; 80, 82]. I deny the motion because the weight of the evidence was otherwise.

6. Additur. The plaintiff seeks a new trial or additur on the issue of damages on his contention that the jury's finding of the amount of damages was insufficient as a matter of law [Doc.#77, 78; 80, 82]. The amount of damages found may be insufficient, but additur or new trial on the issue of damages will not be ordered where on the facts and on the law there is no liability.

David D. Kerman
Associate Justice

Dated: February 14, 2018

STATUTORY ADDENDUMS

G.L. c. 143 § 51

Section 51. The owner, lessee, mortgagee in possession or occupant, being the party in control, of a place of assembly, theatre, special hall, public hall, factory, workshop, manufacturing establishment or building shall comply with the provisions of this chapter and the state building code relative thereto, and such person shall be liable to any person injured for all damages caused by a violation of any of said provisions. No criminal prosecution for such violation shall be begun until the lapse of thirty days after such party in control has been notified in writing by a local inspector as to what changes are necessary to meet the requirements of such provisions, or if such changes shall have been made in accordance with such notice. Notice to one member of a firm or to the clerk or treasurer of a corporation or to the person in charge of the building or part thereof shall be sufficient notice hereunder to all members of any firm or corporation owning, leasing or controlling the building or any part thereof. Such notice may be served personally or sent by mail.

G.L. c. 186 § 14

Section 14. Any lessor or landlord of any building or part thereof occupied for dwelling purposes, other than a room or rooms in a hotel, but including a manufactured home or land therefor, who is required by law or by the express or implied terms of any contract or lease or tenancy at will to furnish water, hot water, heat, light, power, gas, elevator service, telephone service, janitor service or refrigeration service to any occupant of such building or part thereof, who willfully or intentionally fails to furnish such water, hot water, heat, light, power, gas, elevator service, telephone service, janitor service or refrigeration service at any time when the same is necessary to the proper or customary use of such building or part thereof, or any lessor or landlord who directly or indirectly interferes with the furnishing by another of such utilities or services, or who transfers the responsibility for payment for any utility services to the occupant without his knowledge or consent, or any lessor or landlord who directly or indirectly interferes with the

quiet enjoyment of any residential premises by the occupant, or who attempts to regain possession of such premises by force without benefit of judicial process, shall be punished by a fine of not less than twenty-five dollars nor more than three hundred dollars, or by imprisonment for not more than six months. Any person who commits any act in violation of this section shall also be liable for actual and consequential damages or three month's rent, whichever is greater, and the costs of the action, including a reasonable attorney's fee, all of which may be applied in setoff to or in recoupment against any claim for rent owed or owing. The superior and district courts shall have jurisdiction in equity to restrain violations of this section. The provisions of section eighteen of chapter one hundred and eighty-six and section two A of chapter two hundred and thirty-nine shall apply to any act taken as a reprisal against any person for reporting or proceeding against violations of this section. Any waiver of this provision in any lease or other rental agreement, except with respect to any restriction on the provision of a service specified in this section imposed by the United States or any agency thereof or the commonwealth or any agency or political subdivision thereof and not resulting from the acts or omissions of the landlord or lessor, and except for interruptions of any specified service during the time required to perform necessary repairs to apparatus necessary for the delivery of said service or interruptions resulting from natural causes beyond the control of the lessor or landlord, shall be void and unenforceable.

G.L. c. 239 § 8A

Section 8A. In any action under this chapter to recover possession of any premises rented or leased for dwelling purposes, brought pursuant to a notice to quit for nonpayment of rent, or where the tenancy has been terminated without fault of the tenant or occupant, the tenant or occupant shall be entitled to raise, by defense or counterclaim, any claim against the plaintiff relating to or arising out of such property, rental, tenancy, or occupancy for breach of warranty, for a breach of any material provision of the rental agreement, or for a violation of any other law. The amounts which the tenant or occupant may claim hereunder shall include, but shall not be limited to, the difference between the agreed upon rent

and the fair value of the use and occupation of the premises, and any amounts reasonably spent by the tenant or occupant pursuant to section one hundred and twenty-seven L of chapter one hundred and eleven and such other damages as may be authorized by any law having as its objective the regulation of residential premises.

Whenever any counterclaim or claim of defense under this section is based on any allegation concerning the condition of the premises or the services or equipment provided therein, the tenant or occupant shall not be entitled to relief under this section unless: (1) the owner or his agents, servants, or employees, or the person to whom the tenant or occupant customarily paid his rent knew of such conditions before the tenant or occupant was in arrears in his rent; (2) the plaintiff does not show that such conditions were caused by the tenant or occupant or any other person acting under his control; except that the defendant shall have the burden of proving that any violation appearing solely within that portion of the premises under his control and not by its nature reasonably attributable to any action or failure to act of the plaintiff was not so caused; (3) the premises are not situated in a hotel or motel, nor in a lodging house or rooming house wherein the occupant has maintained such occupancy for less than three consecutive months; and (4) the plaintiff does not show that the conditions complained of cannot be remedied without the premises being vacated; provided, however, that nothing in this clause shall be construed to deprive the tenant or occupant of relief under this section when the premises are temporarily vacated for purposes of removal or covering of paint, plaster, soil or other accessible materials containing dangerous levels of lead pursuant to section one hundred and ninety-seven of chapter one hundred and eleven.

Proof that the premises are in violation of the standard of fitness for human habitation established under the state sanitary code, the state building code, or any other ordinance, by-law, rule or regulation establishing such standards and that such conditions may endanger or materially impair the health, safety or well-being of a person occupying the premises shall create a presumption that conditions existed in the premises entitling the tenant or occupant to a counterclaim or defense under this section. Proof of written notice to the owner or his agents, servants, or employees, or to the person to whom the tenant or occupant customarily paid his rent, of an

inspection of the premises, issued by the board of health, or in the city of Boston by the commissioner of housing inspection, or by any other agency having like powers of inspection relative to the condition of residential premises, shall create a presumption that on the date such notice was received, such person knew of the conditions revealed by such inspection and mentioned in such notice. A copy of an inspection report issued by any such agency, certified under the penalties of perjury by the official who inspected the premises, shall be admissible in evidence and shall be prima facie evidence of the facts stated therein.

There shall be no recovery of possession pursuant to this chapter pending final disposition of the plaintiff's action if the court finds that the requirements of the second paragraph have been met. The court after hearing the case may require the tenant or occupant claiming under this section to pay to the clerk of the court the fair value of the use and occupation of the premises less the amount awarded the tenant or occupant for any claim under this section, or to make a deposit with the clerk of such amount or such installments thereof from time to time as the court may direct, for the occupation of the premises. In determining said fair value, the court shall consider any evidence relative to the effect of any conditions claimed upon the use and occupation of residential premises. Such funds may be expended for the repair of the premises by such persons as the court after a hearing may direct, including if appropriate a receiver appointed as provided in section one hundred and twenty-seven H of chapter one hundred and eleven. When all of the conditions found by the court have been corrected, the court shall direct that the balance of funds, if any, remaining with the clerk be paid to the landlord. Any tenant or occupant intending to invoke the provisions of this section may, after commencement of an action under this chapter by the landlord, voluntarily deposit with the clerk any amount for rent or for use and occupation which may be in dispute, and such payments shall be held by the clerk subject to the provisions of this paragraph.

There shall be no recovery of possession under this chapter if the amount found by the court to be due the landlord equals or is less than the amount found to be due the tenant or occupant by reason of any counterclaim or defense under this section. If the amount found to be due the landlord exceeds the amount found to be due the tenant or

occupant, there shall be no recovery of possession if the tenant or occupant, within one week after having received written notice from the court of the balance due, pays to the clerk the balance due the landlord, together with interest and costs of suit, less any credit due the tenant or occupant for funds already paid by him to the clerk under this section. In such event, no judgment shall enter until after the expiration of the time for such payment and the tenant has failed to make such payment. Any such payment received by the clerk shall be held by him subject to the provisions of the preceding paragraph.

Any provision of any rental agreement purporting to waive the provisions of this section shall be deemed to be against public policy and void. The provisions of section two A and of section eighteen of chapter one hundred and eighty-six shall apply to any tenant or occupant who invokes the provisions of this section.

AFFIDAVIT OF SERVICE

DOCKET NO. 2018-P-1564
----------X
ROBERT GOREHAM

vs.

ROSE MARTINS & others
----------X

I, Elissa Diaz, swear under the pain and penalty of perjury, that according to law and being over the age of 18, upon my oath depose and say that:

on January 18, 2019

I served the Brief for Plaintiff-Appellant pursuant to Rule 13(a) of the Massachusetts Rules of Appellate Procedure within in the above captioned matter upon:

Peter C. Kober
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via **Electronic Service** through the efileMA electronic filing system.

Filing has been completed on the same date as above via **Electronic Filing** through the efileMA electronic filing system.

Sworn to before me on January 18, 2019

/s/ Robyn Cocho
_____

/s/ Elissa Diaz

Robyn Cocho
Notary Public State of New Jersey
No. 2193491
Commission Expires January 8, 2022

Louis J. Muggeo
B.B.O. NO. 359220

Job #285487