THE ESTATE OF SEAN KING AND LISA KING, INDIVIDUALLY, AND AS ADMINISTRATRIX AD PROSEQUENDUM ON BEHALF OF THE ESTATE OF SEAN KING, Plaintiffs, v. HIGH GRADE BEVERAGE, INC.; HGB REALTY 2, LLC; ANTHONY DEMARCO; DENISE DEMARCO CRUTCHLEY; DIANA BATTAGLIA; JOSEPH HGB REALTY, LLC; ELIZABETH HGB REALTY, LLC; JOSEPH A. DEMARCO; ELIZABETH DEMARCO; and/or JOHN DOES 1-15 and/or JANE DOES 1-15 (fictitious individuals); and ABC CORPORATIONS 1-15 (fictitious business entities); Defendants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. 001419-22T4 On Appeal From: SUPERIOR COURT OF NEW JERSEY LAW DIVISION, CIVIL PART MORRIS COUNTY DOCKET NO.: MRS-L-2048-19 Hon. Rosemary E. Ramsey, J.S.C. Civil Action

BRIEF OF APPELLANTS, THE ESTATE OF SEAN KING AND LISA KING, INDIVIDUALLY, AND AS ADMINISTRATRIX AD PROSEQUENDUM ON BEHALF OF THE ESTATE OF SEAN KING

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Plaintiff, the Estate of Sean King and Lisa King, Individually, and as *Administratrix Ad Prosequendum* on behalf of The Estate of Sean King ("Plaintiff") respectfully appeals from the order of summary judgment for defendant HGB Realty 2, LLC ("HGBR2"), which resulted in the dismissal of Plaintiff's complaint against HGBR2 as a matter of law.

PRELIMINARY STATEMENT

This action arises from the tragic death of Sean King ("Sean") due to a worksite accident. King, a maintenance worker with High Grade Beverage, Inc. ("HGB" or "High Grade Beverage"), died after coming into contact with a 277-volt wire while working on an emergency light fixture. HGBR2 is liable for King's demise because HGBR2 is the landlord of the premises upon which King worked.

As the landlord, HGBR2 knew or should have known about the faulty electrical panel box which was indecipherable and required "trial and error" testing to determine the controlling breaker. As this faulty electrical panel box ultimately caused King's death, HGBR2's liability should be self-evident. However, HGBR2 argued at the trial court level that it is not liable for King's demise because of a "triple net lease" that existed on the relevant property. According to HGBR2, this lease delegated any duty of care HGBR2 may have owed to the tenant of the property High Grade Beverage ("HGB").

The trial court correctly rejected the notion that the lease delegated any duty of care owed by HGBR2 because the faulty electrical panel box predated the execution of the lease. As this defect occurred prior to HGB taking exclusive control of the property under the lease, HGBR2 had the opportunity and ability to exercise reasonable care to ameliorate the risk posed by the faulty electrical panel box. However, the trial court erred in finding that this duty of care terminated based on § 358 of the Restatement (Second) of Torts (1965). Under the trial court's reasoning, Plaintiff's claim for liability against HGBR2 failed because HGB knew, or had reason to know, about the faulty electrical panel box after taking control of the property under the lease and therefore bore exclusive liability for King's injuries. This determination is erroneous.

The trial court's rote application of § 358 of the Restatement (Second) of Torts (1965) to determine liability in this matter is not in accordance with the controlling duty analysis in New Jersey. To determine whether a duty of care existed in this matter, the trial court should have examined the facts of this case under the factors outlined in Hopkins v. Fox & Lazo Realtors, 132 N.J. 426, 436 (1993), including the nature of the attendant risk, the opportunity and ability to exercise care, and the public interest in the proposed solution. Had the trial court reviewed this case through the proper analytical framework it would have found that HGBR2 owed a duty of care to correct the defective electrical panel box.

Here, HGBR2 owed a duty of care because the defective electrical panel box predated the supposed "triple net lease" between HGBR2 and HGB that was in effect when the incident occurred. Given the high risk of serious and even fatal injury posed by the defective electrical panel box – which was not up to code - HGBR2 should not be permitted to ignore and disregard the dangerous condition and delegate any liability for the condition to the tenant. Instead, imposing a duty of care on HGBR2 for the electrical panel box comports with notions of basic fairness and public policy.

Indeed, this is not an incident where HGBR2 lacked the ability or opportunity to intervene because of HGB's exclusive control of the property. Instead, this fatal defect existed prior to the inception of the lease. HGBR2 knew or should have known about this condition and should not have passed the proverbial buck to HGB. Instead, HGBR2 should have taken the necessary steps to ameliorate the considerable risk posed by defective electrical panel box. The delegation principles inherent in a triple net lease do not exist to allow HGBR2 to evade its responsibility, and HGBR2's attempt to utilize the lease in such a fashion contravenes any notion of fairness of accepted public policy. Given the opportunity HGBR2 had to fix the faulty electrical panel box and its failure to do so, HGBR2 must be found to (1) have owed a duty of care to King, and (2) breached this duty. Accordingly, the grant of Summary Judgment to HGBR2 must be reversed and this matter must be permitted to proceed to trial.

PROCEDURAL HISTORY

This action arises out of a worksite fatality. Plaintiff filed the Complaint in this action on September 25, 2019, against, HGB and HGBR2 seeking damages for wrongful death and survivorship as to both defendants and intentional harms as to HGB. (Pa0044) HGB filed its Answer and Affirmative Defenses on November 20, 2019. (Pa0677-0689). HGBR2 filed its answer on November 26, 2020. (Pa0690-0701.)

HGBR2 filed a motion for summary judgment seeking dismissal of Plaintiff's Complaint on January 7, 2022. (Pa0295-0419). Plaintiff filed an Opposition to this motion on January 25, 2022. (Pa0420-0439). HGBR2 filed a Reply Brief on January 31, 2022. (Pa0650-0689).

On December 1, 2022, the Court heard oral arguments for HGBR2's motion for summary judgment. After hearing arguments on December 1, 2022, the Court issued its Order (Pa0293) and read its statement of reasons onto the record. (Pa0289-0365.) In the Order, the Court granted Summary Judgment for HGBR2 and dismissed Plaintiff's claims with prejudice. (Pa0371). This appeal followed.

STATEMENT OF FACTS

A. The Parties

Prior to his untimely demise, HGB employed King as a maintenance worker. HGB is a wholesale distributor of various alcoholic beverages and soft drinks

operating at a commercial property located at 86 Canfield Avenue, Randolph, New Jersey (the "Property"). HGBR2 is a Limited Liability Company formed on August 22, 2016, and was the owner of the Property at the time of King's death (Pa0034-43).

HGBR2 obtained its ownership interest in the Property on December 24, 2016. (Pa0035-0043). However, HGB purported to enter into a lease agreement with HGBR2 for exclusive use of the Property on or about September 1, 2016. (Pa0001-0033). Accordingly, HGB and HGBR2 executed the 2016 Lease more than three months *before* HGBR2 acquired any ownership interest in the Property. In other words, HGBR2 entered the 2016 Lease with HGB before acquiring any ownership interest in the property.

B. 2011 Lease Agreement

In its Summary Judgment Motion, HGBR2 sought to rely upon a 2011 Lease Agreement (the "2011 Lease") between Joseph HGB Realty, L.L.C. ("Joseph") and Elizabeth HGB Realty, L.L.C. ("Elizabeth"), as the landlords, and High-Grade Beverage, as the tenant. However, HGBR2 did not produce this 2011 Lease in discovery, and the only lease produced was the 2016 Lease between HGBR2, as landlord, and HGB, as Tenant.

Moreover, the 2011 Lease is irrelevant to the present matter because the title history of the Property establishes that the owner of the Property immediately prior

to HGBR2's ownership were the former individual defendants, Anthony DeMarco, Denise DeMarco Crutchley and Diana Battaglia, not Joseph and Elizabeth. (Pa0035-0043). There is no evidence of a lease agreement between Anthony DeMarco, Denise DeMarco Crutchley and Diana Battaglia, as landlords, and HGB, as the tenant. Nor was there evidence showing that the 2011 Lease was assigned by Joseph and Elizabeth to Anthony DeMarco, Denise DeMarco Crutchley and Diana Battaglia. (Pa0001-0033).

C. King's Fatal Electrocution Occurred While He was Trying to Replace an Emergency Light Fixture Ahead of an Annual Fire Inspection.

On November 13, 2017, King attempted to replace a non-working emergency light fixture in HGB's warehouse in anticipation of an upcoming fire inspection. (Pa0051). Later that day, King's co-workers found him lying on his back on a scissor lift, without a pulse. "Live" black cables, which were connected to the emergency light fixture and carrying 277 Volts of electric power, were found dangling near King's body. (Ibid.) Randolph Township Police Department responded to HGB's Randolph warehouse to a reported cardiac arrest as a result of electrocution. (Pa0050-0051). Upon arrival, police noted that King was laying supine on the scissor lift, blue in color and without a pulse. (Pa0050-0051). King was also observed to have a visible burn mark on the inside of his left hand. (Pa0051). Resuscitation

efforts were attempted on King by Randolph Police and a responding E.M.S. unit. (Pa0051).

Electricians from L.D.R. Electric were called to the scene to secure the exposed electrical lines that caused King's catastrophic injuries and demise. (Pa0051). The responding electricians determined that King was working on an emergency light fixture with 277 Volts of electricity powering it and that the circuit breaker connected to same had not been turned off. (Pa 0051). As a result of the circuit breaker being left on, King sustained an electrocuted entrance wound in his right hand and a large exit wound in his left hand. (Pa0051). King was transported to Saint Clare's Medical Center, where he was pronounced dead at the age of fifty-five. (Pa0050). King's cause of death was determined to be fatal electrocution. (Pa0050).

D. The Illegible/Unclear Panelboard Housing the Circuit Breaker

Perry Morris ("Morris") was an employee and maintenance crew chief for High Grade Beverage for approximately 31 years. (Pa0081). During his deposition, Morris confirmed that there are two or three electrical panels at the HGB facility. (Pa0152). Morris testified that when the building was being built, the electrical panels were not labeled correctly from the time of construction forward. (Pa0155). While Morris and another employee previously attempted to rectify this issue, Morris was "not 100% sure" the labeling properly was sufficiently corrected.

(Pa0155). At the time of King's demise, the electrical panel directory for the building's electrical fixtures was located on the inside of the door panel. (Pa. 0190). However, as testified by Morris, this directory was not entirely accurate. (Pa0155).

The import of the mislabeled electric panel becomes clear when the circumstances of King's death are examined. Prior to his fatal electrocution, King was attempting to repair an emergency light fixture that was not working. Because the emergency light was not working, there was no way to test through trial and error - i.e., flipping the switch on/off - whether power was going to that emergency light fixture. (Pa0158). While King tried to cut the power off to the emergency light fixture by turning off the circuit breaker switch that controls the subject emergency light, because of the mislabeled panel, King did not switch off the correct circuit breaker. Accordingly, King's demise was directly caused by this mislabeled electric panel box. (Pa0211-0212).

E. L.D.R. Electric, LLC

Plaintiff subpoenaed the records from HBG's long time electrical contractor, L.D.R. Electric, LLC, requesting all "documents that evidence work L.D.R. Electric, LLC performed from January 2011 to January 2018" at the facility located at 86 Canfield Avenue, Randolph, New Jersey. (Pa0219—0220). The records produced by L.D.R. Electric were devoid of any requests by HGBR2 to address the illegible and unclear panel directory going back to 2011. (Pa0221-0288).

F. Plaintiff's Expert's Opinion

Plaintiff decedent retained liability expert, Les Winter, PE, an electrical engineer with Robson Forensic, to offer opinions about the subject panelboard directory. Winter opined that the directory was non-compliant with electrical code and OSHA regulations, and was a direct cause of King's death. (Pa0205).

In his report, Winter explained that the importance of disconnecting devices being "legibly identified as to its clear, evident and specific purpose or use." (Pa0204). Based on Winter's examination of the above photographs, Winter concluded that the panelboard **which fed the subject emergency light was not code or regulation compliant**. (Pa0210-0211).

In his report, Winter explained the importance of having a circuit breaker "legibly identified as to its clear, evident and specific purpose or use":

> Under that condition, even trial and error testing, by turning off and on random circuit breakers, would not have informed King as to whether the fixture was de-energized. Under such circumstances, King would have needed to open the fixture and to use a tick tracer or multimeter to determine if the fixture was actually turned off. The use of such devices required King to first disassemble the fixture: a potentially fatal task.

(Pa0205). This is exactly the scenario that occurred in this case.

Here, King was found by a co-worker lying on his back on the scissor lift, unresponsive. "Live" black cables connected to the emergency light fixture, carrying 277 Volts of electric power, were found dangling near his body. (Pa0210-0211). Winter concludes that the non-compliant panelboard was unreasonably dangerous in

a manner that created the perfect storm that caused King's death. (Pa0211-0212). The opinions offered by Winter are unrebutted.

LEGAL ARGUMENT

I. The Trial Court's Summary-Judgment Decision, Which Dismissed Plaintiff's Claims Against Hgbr2 Should Be Reversed (Pa55).

The trial court erred in awarding HGBR2 summary judgment as it relied upon inapt case law and disregarded extant disputes of material facts. Appellate review of this award is *de novo*. See Calco Hotel Mgmt. Grp., Inc. v. Gike, 420 N.J. Super. 495, 507 (App. Div. 2011) (conclusions of law are reviewed de novo). Based on the facts present in the record, this review warrants reversal.

A. HGBR2 is Liable for Defective Conditions That Predated the Lease, Such as the Illegible and Unclear Electrical Panel and "Trial and Error" Testing Process.

HGBR2 sought to avoid liability in this matter by relying on the terms of the 2016 Lease, which allegedly constituted a "triple net lease." Under the terms of a triple net lease a tenant is responsible for "maintaining the premises and for paying all utilities, taxes and other charges associated with the property." Geringer v. Hartz Mountain Development Corp., 388 N.J. Super. 392, 400 (App. Div. 2006). Based on the responsibilities assumed by the tenant, landlords can delegate premises liability.

See ibid. (finding use of a triple net lease can result in delegation of liability). The purpose of this delegation is ultimately a consideration of fairness to the landlord.

In the typical triple net lease case, the defect to the property which causes injury arises after the tenant has taken exclusive possession and control of the property. See generally, McBride v. Port Auth. of N.Y. & N.J., 295 N.J. Super. 521, 524-25 (App. Div. 1996) (finding no evidence existed to support notion that defect which caused plaintiff's injury existed at time triple net lease took effect).[1] New Jersey Courts have found that assigning sole liability to the tenant is fair because the landlord lacks the meaningful ability to discovery or ameliorate the defective condition. See Geringer, 388 N.J. Super. at 402.[2] However, the protections afforded by triple net leases to landlords are not absolute. Instead, New Jersey Courts have found that the landlord of property can be held liable for a property defect where this defect predates the inception of the triple net lease. See Geringer v. Hartz Mountain

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[1] The terms, conditions, and protections afforded by a triple net lease have not been subject to significant review in published opinions in New Jersey, and there are no discernible New Jersey Supreme Court cases which analyze the propriety of these leases delegating tort liability. See generally, McBride v. Port Auth. of N.Y. & N.J., 295 N.J. Super. 521, 526 (App. Div. 1996)

[2] The permissibility of this delegation is a carryover from the common law which treated a lease as a sale of an interest in land. See McBride v. Port Authority of New York and New Jersey, 295 N.J. Super. 521, 525 (App. Div. 1996). See also Michaels v. Brookchester, Inc., 26 N.J. 379, 382 (1958) (Historically a lease was viewed as a sale of an interest in land. The concept of caveat emptor, applicable to such sales, seemed logically pertinent to leases of land. However, exceptions to the broad immunity inevitably developed).

Development, 388 N.J. Super. 392, 403-05 (App. Div. 2006); Albert v. Pathmark Stores, Inc., 2019 N.J. Super. Unpub. LEXIS 1586, 2019 WL 3003822 (App. Div. July 10, 2019), certif. denied, 240 N.J. 1 (2019).

In its ruling on the motion for summary judgment, the trial court properly recognized as much and held that a commercial landlord could be held responsible for injuries caused by defects to the property that existed prior to the inception of the lease irrespective of whether it entered a triple net lease. The trial court further correctly determined that the electrical panel defects caused or significantly contributed to King's demise and pre-existed the lease.[3] However, after making these apt determinations, the trial court erred in finding that liability against HGBR2 was nonetheless precluded.

B. Trial Court Erred by Inflexibly Applying Reyes and § 358 of Restatement (Second) of Torts

In granting summary judgment in favor of HGBR2 the trial court held that because HGB knew or should have known about the defective electrical panel, liability against HGBR2 was precluded. In making this determination, the trial court relied upon Reyes v. Egner, 404 N.J. Super. 433, 437 (App. Div. 2009) and § 358 of

[3] As this determination is factual in nature, this conclusion should be afforded deference. See Potomac Ins. Co. of Illinois ex rel. OneBeacon Ins. Co. v. Pa. Mfrs.' Ass'n Ins. Co., 215 N.J. 409, 421 (2013).

the Restatement (Second) of Torts (1965). However, these sources of authority are inapt to the present facts.

In Reyes, plaintiff rented a summer beach house at the Jersey Shore for two weeks. Id. at 438-39. The tenant's elderly father, who had been vacationing at the defendants' summer rental home, was injured when he lost his balance while stepping onto an outside wooden deck which was about seven inches below the bottom of the sliding glass door. Id. at 440-41. An ensuing negligence action was brought by plaintiff against, *inter alia*, the landlord. The trial court granted the defendants' summary judgment motion after finding that the plaintiffs failed to prove that the lessors actively or fraudulently concealed the allegedly dangerous condition. Id. at 404 N.J. Super. 438 (App. Div. 2009).

On appeal, the Appellate Division noted that it hesitated to continue to impose upon plaintiffs an inflexible doctrinal requirement of first proving the lessor's 'fraudulent concealment' of a dangerous condition before finding liability. Id. at 459. Instead, the Appellate Division held that held that the law had developed so that the landowner's duties in such circumstances "should be defined consistent with the precepts of § 358 of the Restatement (Second) of Torts." Ibid.[4] Thus, the court

[4] In relevant part, § 358 states:

(1) A lessor of land who conceals or fails to disclose to his lessee any condition, whether natural or artificial, which involves unreasonable risk of physical harm to

focused on whether the lessor and the lessee had "reason to know" of a condition that involved unreasonable risk of physical harm. Reyes, 404 N.J. Super. at 461-62.

In applying this holding to the facts at issue to the standard espoused in § 358 of the Restatement (Second) of Torts, the Reyes Court concluded that the discovery record, viewed in a light most favorable to the plaintiffs, raised genuine issues as to whether a vacationing lessee would have reasonably noticed the dangerous condition presented by the step. Id. at 461. In reaching this holding, the Reyes Court acknowledged that it was departing from the controlling precedent but was guided by the evolution of modern case law and the facts present in the dispute. See Id. at 451. See also Szeles v. Vena, 321 N.J. Super. 601, 606 (App. Div. 1999) (noting the "obvious inroads" in the law concerning the responsibilities of lessors to maintain safe premises).

Reyes's progeny has further expanded on these inroads and continued the departure from the longstanding rules concerning landowner's liability. For example, in Meier v. D'Ambose, 419 N.J. Super. 439, 449 (App. Div. 2011) the

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persons on the land, is subject to liability to the lessee and others . . . for physical harm caused by the condition after the lessee has taken possession, if

(a) the lessee does not know or have reason to know of the condition or the risk involved, and

(b) the lessor knows or has reason to know of the condition, and realizes or should realize the risk involved, and has reason to expect that the lessee will not discover the condition or realize the risk.

Appellate Division did not strictly apply § 358 of the Restatement (Second) of Torts and instead applied the analysis and factors discussed in Hopkins v. Fox & Lazo Realtors, 132 N.J. 426, 436 (1993) to assess a landlord's liability for a faulty furnace. In applying the Hopkins factors, the Appellate Division concluded that defendant lessor had a duty to maintain a furnace so that it was not dangerous to persons or property, and that such duty required periodic inspections to discover dangerous defects.

In carving out this exception to the Restatement, the Meier court relied on the underlying facts of the case noting the cost of repairing the furnace, the catastrophic results that can result when a furnace is not maintained, and the monetary incentive a landlord has in maintaining the property. Furthermore, the Meier court noted that the lessor, "has a non-delegable duty of care to third parties to avoid a hazardous condition of his property." Meier, 419 N.J. Super. at 450 (citing Hopkins, 132 N.J. at 441). See also Sanna v. National Sponge Co., 209 N.J. Super. 60 (App.Div.1986) (holding that duty of landowner to make reasonable inspections to discover hazardous conditions of property nondelegable); Zentz v. Toop, 92 N.J. Super. 105, 112-13 (App. Div. 1966) (The landowner's duty includes the obligation of making a reasonable inspection to discover defective and hazardous conditions). As the Meier court explained, "[w]hatever may be the terms of a lease and the duties of lessor and

lessee as to each other, the lessor cannot by virtue of the lease release himself from potential liability to third parties." 419 N.J. Super. at 450.

In granting HGBR2's motion for summary judgment, the trial court erred in rigidly applying Reyes and § 358 of the Restatement (Second) of Torts (1965). The facts of this case are inapposite to those found in Reyes insofar as Plaintiff in this matter is not the tenant and is not bound by any direct contractual relationship with HGBR2. Likewise, the danger here is not a missing handrail or depressed landing, but a defective electrical panel. Given the high risk of fatal injury posed by such a danger, simply looking to the knowledge that HGB had about this risk is not enough to vitiate a duty of care on the part of HGBR2. See Zentz, 92 N.J. Super. at 115 (finding that the dangerousness of the defective condition is an element to be considered in assessing a landowner's duty of care).

As established in Reyes and Meier, the determination of whether a duty of care exist is not a simple color by number analysis. Accordingly, the proper analytical framework for this case is not to inflexibly apply the strictures of Reyes and § 358 of the Restatement (Second) of Torts. Instead, the trial court should have analyzed HGBR2's duty under the factors set forth in Hopkins. See Albert, 2019 N.J. Super. Unpub. LEXIS 1586, at *5 (To determine whether a duty-shifting provision in a lease should be ignored, courts should apply the Hopkins factors and focus on which party had the opportunity and ability to exercise care). See also

Prosser and Keeton on Torts, § 63, at 446 (Fifth Edition, 1984) (noting the modern trend is to impose a general tort duty of care on landlords).

In applying the Hopkins factors to the facts of this case, a duty of care should be found to exist given the nature of the risk, the ability of HGBR2 to exercise care, and the danger that existed in HGBR2 neglecting to exercise care.

C. Application of Hopkins Gives Rise to a Duty of Care Between HGBR2 and Plaintiff.

In Hopkins, the New Jersey Supreme Court found that the duty owed in premises liability matters cannot be determined through the application of rigid classifications. See Hopkins, 132 N.J. at 438 (the attempt to pigeonhole the parties within the traditional categories of the common law is both strained and awkward). Instead, the determination of whether a duty of care exists requires a review of the nature of the attendant risk, the opportunity and ability to exercise care, and the public interest in the proposed solution." Hopkins, 132 N.J. at 439. Ultimately, "[w]hether a person owes a duty of reasonable care toward another turns on whether the imposition of such a duty satisfies an abiding sense of basic fairness under all of the circumstances in light of considerations of public policy . . . [t]he analysis is both very fact-specific and principled; it must lead to solutions that properly and fairly resolve the specific case and generate intelligible and sensible rules to govern future conduct. Ibid. Under these principles a duty of care owed by HGBR2 must be found to exist in this matter.

The danger posed by the defective electrical panel and the time in which this defect arose are both cogent issues which counsel in favor of imposing a duty of care on HGBR2 in this matter. Here, the defective electrical panel box presented a clearly foreseeable risk of serious or even fatal injury and did in fact cause such injury. This risk was not speculative and did not require great foresight to recognize. A reasonable landlord should have been able to easily foresee that an electrical panel box that was largely indecipherable and which did not comply with code would present a serious risk of electrocution to those who came into contact with this defect. See Reyes, 404 N.J. Super. at 456-58 (finding that code violations may be evidential if not conclusive of the lessors' potential breach of a duty); Parks v. Rogers, 176 N.J. 491, 494, 496 n.1, (2003) (noting potential code violation in discussing duty to warn of dangerous condition on property). HGBR2 as the owner/landlord had the opportunity to exercise reasonable care to correctly and clearly label the electrical panel and resolve the "trial and error" circuit breaker process. That it chose not to take the necessary action to discover and/or ameliorate this risk because of the terms of existence of the "triple net lease" is not a compelling reason to evade liability.

New Jersey courts have previously found that a triple net lease is not a talisman that can be used to extinguish all claims of liability. For example, in Geringer, the Appellate Division held that a commercial landlord could be held responsible for injuries caused by defects to the property that existed prior to the

inception of the lease irrespective of whether it entered a triple net lease. 388 N.J. Super. at 404. The Appellate Division reaffirmed this principle in Albert v. Pathmark Stores, Inc., 2019 N.J. Super. Unpub. LEXIS 1586, 2019 WL 3003822 (App. Div. July 10, 2019), certif. denied, 240 N.J. 1 (2019). Like Geringer, Albert concerned a triple net lease. In Albert, the Appellate Division found that Geringer stood for the general proposition that a landlord remains liable for injuries caused by defects to the property that existed at the inception of the lease agreement. However, the Albert court affirmed the dismissal of the lower court because it found that plaintiff's proofs were wanting with respect to alleging "a genuine dispute of material fact that the defect existed prior to the existence of the lease agreement and that the [landlord] had constructive notice of the defect." Ibid.

Imposing a duty of care here comports with precedent and is entirely fair to HGBR2. Unlike in the typical case involving a triple net lease, the defect did not arise while the tenant had exclusive use and control of the property. Instead, the defect existed prior to the initiation of the 2016 Lease. As the landlord, HGBR2 should not be permitted to evade responsibility for the property by avoiding either the discovery of potentially fatal defects or avoiding the repair of such defects. This ostrich in the sand approach to property ownership contravenes the generally accepted rule that landowners have the duty to make their premises reasonably safe. See Zentz, 92 N.J. Super. at 113. Had HGBR2 acted as a reasonably prudent

landlord, HGBR2 could have discovered this defective condition and ameliorated the associated risk. That it chose not to do so is ultimately unfair to King, who paid the ultimate price for this decision.

Overarching considerations of public policy support the finding of a duty of care in this matter. Specifically, established public policy in New Jersey provides that a landlord is not permitted to disregard a potentially fatal and easily discoverable condition on the property, assign control of the property to a tenant, and then avoid any liability which arises from this discoverable defective condition See J.H. v. R & M Tagliareni, LLC, 239 N.J. 198, 218 (2019) (citing Scully v. Fitzgerald, 179 N.J. 114, 121-22 (2004) (noting that generally a landlord's duty arises when the harm is foreseeable and the landlord has sufficient control to prevent it); Potomac Aviation, LLC v. Port Auth. of N.Y. and N.J., 413 N.J. Super. 212, 226-27 (App. Div. 2010) (scope of a duty is determined under the totality of the circumstances, and must be reasonable under those circumstances); Monaco v. Hartz Mt. Corp., 178 N.J. 401, 414 (2004) (finding a landowner must exercise reasonable care including making reasonable inspections of its property and taking such steps as are necessary to correct or give warning of hazardous conditions or defects); Dwyer v. Skyline Apartments, Inc., 123 N.J. Super. 48, 52 (App. Div. 1973) (finding duty of care exists where landlord knew or should have been known about defective condition, so that he had an opportunity to correct it).

Accordingly, a landlord cannot disregard a code violation which poses a serious and potentially fatal risk. See Reyes, 404 N.J. Super. at 458 ("an owner of property is directly responsible for compliance with the building codes . . . and a violation of code may be evidential if not conclusive of the lessors' potential breach of a duty."). Where there is such a serious code violation, the landlord of the property must be required to ameliorate this condition prior to assigning control of the property to the tenant. Allowing an opposite policy to prevail would unreasonably imperil those entering and coming into contact with the property and would encourage landlords to either remain obtuse to discoverable defects or disregard the need to repair such defects prior to transferring control of the property.

As the general principles of fairness espoused in upholding the protections of a triple net lease are absent from this case, HGBR2, as the landlord of the Property, should be found to have owed a duty of care to inspect the Property and ameliorate the defective electrical panel box prior to assigning the Property to HGB. HGB2's failure to do so is a breach of this duty.

That HGB knew or should have known about the defective fuse box does not change the determination that HGBR2 owed a duty of care, nor is it sufficient to offset the duty of care owed by HGBR2 in this matter. See Sanna v. Nat'l Sponge Co., 209 N.J. Super. 60, 67 (App. Div. 1986) ("The possibility that another person may also have been negligent does not relieve the landowner of his legal duty.").

While the knowledge of a tenant is determinative in a §358 Restatement (Second) of Torts analysis, this is not the applicable analytical framework for this matter. Accordingly, the trial court's reliance on the knowledge of HGB to offset liability against HGBR2 is an erroneous determination, and HGBR2 must be found to have owed and subsequently breached its duty of care in this matter.

CONCLUSION

For the reasons set forth herein, Plaintiffs respectfully request reversal of the Order for Summary Judgment in favor of HGBR2.

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Attorneys for Appellant

Dated: July 26, 2023

THE ESTATE OF SEAN KING AND LISA KING, INDIVIDUALLY, AND AS ADMINISTRATRIX AD PROSEQUENDUM ON BEHALF OF THE ESTATE OF SEAN KING, v. HIGH GRADE BEVERAGE, INC.; HGB REALTY 2, LLC; ANTHONY DEMARCO; DENISE DEMARCO CRUTCHLEY; DIANA BATTAGLIA; JOSEPH HGB REALTY, LLC; ELIZABETH HGB REALTY, LLC; JOSEPH A. DEMARCO; ELIZABETH DEMARCO; and/or JOHN DOES 1-15 and/or JANE DOES 1-15 (fictitious individuals); and ABC CORPORATIONS 1-15 (fictitious business entities);	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. 001419-22T4 On Appeal From: SUPERIOR COURT OF NEW JERSEY LAW DIVISION, CIVIL PART MORRIS COUNTY DOCKET NO.: MRS-L-2048-19 Hon. Rosemary E. Ramsay, P.J.Cv. Civil Action

BRIEF OF DEFENDANT/RESPONDENT, HGB REALTY 2, LLC

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In 2011, six years before the accident in question, the property located at 86 Canfield Avenue, Randolph, New Jersey was owned jointly by Joseph HGB Realty LLC and Elizabeth HGB Realty LLC. (Pa 375). (The property had been held in the DeMarco family, and passed down through generations, for decades. Joseph DeMarco, now deceased, was the founder of several family businesses. The "Joseph" in the entity mentioned above obviously refers to Joseph DeMarco, and the "Elizabeth" entity referred to his wife, Elizabeth DeMarco). The property consisted of approximately 16 acres on which there was situated a one-story masonry cold-storage industrial complex consisting of approximately 72,000 square feet of warehouse, office and garage space. (Pa 380).

At that time the entire property, both the building and land, were conveyed to a single tenant, High Grade Beverage Corporation via a 'triple-net' lease. (Pa 379-380). Under the lease the tenant, High Grade Beverage, was responsible to pay all utilities, taxes, public improvement assessments, insurance and other charges associated with the property. (Pa 381-383). As verified by the lease, High Grade Beverage had inspected the premises, was fully familiar with the premises, and agreed it was leasing the premises in "AS IS" condition. (Pa 380).

This lease also unquestionably placed responsibility for all maintenance and repair upon the tenant. For example, the lease to High Grade Beverage provided in part:

> Repairs. Section 9.01 The *tenant* shall keep the lease premises, including but not limited to, the roof, exterior walls, windows, plumbing, *electrical*, HVAC, parking areas, driveways, storm sewers, *lighting*, and sidewalks, *in good condition and repair* and shall redecorate, paint and renovate the lease premises as may be necessary to keep them in good condition and repair and in good appearance. (emphasis added).

The lease also provided that the property owner retained no control over the property and had no responsibilities for any portion of the property. (Da 027) [1] Uncontradicted testimony from the representative of HGB Realty II LLC revealed that High Grade Beverage was the only tenant on the property at all times relevant. (Pa 392-394). The property-owner never maintained offices at the property. (Pa 395). There were never "any circumstances where the tenant, which is High Grade Beverage, must obtain approval of the landlord, the Realty company, before carrying out any maintenance work at 86 Canfield in Randolph." (Pa 392).

[1] Although 2011 lease appears in the plaintiff's appendix (Pa 375) only the first ten pages of that lease was included. When this defendant filed the summary judgment motion in January, 2022 we inadvertently omitted filing a complete copy of the 2011 lease. That oversight was immediately corrected with a "deficiency correction" filed with the Court on January 7, 2022, and the complete lease was part of the motion record. We have provided the complete lease in defendant's appendix, Da 001.

Subsequent to the 2011 lease Mr. and Mrs. DeMarco, as part of their estate planning process with the assistance of counsel, determined it was appropriate to change the corporate structure of the landlords from the "Joseph" and "Elizabeth" entities identified in the 2011 lease to this defendant, HGB Realty II, LLC.

Commencing in 2016, HGB Realty II, LLC entered into a revised lease agreement with the same High Grade Beverage Corporation. (Pa 342-374). The 2016 lease was similar in all respects to the 2011 lease, particularly as they related to the landlord's relinquishment of control and the tenant's responsibilities and obligations to maintain and repair the property. The 2016 lease once again conveyed the *entire* property to the tenant, High Grade Beverage. (Pa 345-346). The 2016 lease provided that the property owner retained no control over the property and had no responsibilities for any portion of the property. (Pa 367). And the 2016 agreement again unambiguously placed responsibility for all maintenance and repair upon the tenant, repeating the same language as in the earlier lease:

> Repairs. Section 9.01 The *tenant* shall keep the lease premises, including but not limited to, the roof, exterior walls, windows, plumbing, *electrical*, HVAC, parking areas, driveways, storm sewers, *lighting*, and sidewalks, *in good condition and repair* and shall redecorate, paint and renovate the lease premises as may be necessary to keep them in good condition and repair and in good appearance. (Pa 351).

For at least six years before the incident in question High Grade Beverage, the only tenant on the property, operated a "beverage sales, distribution, storage and warehouse." (Pa 380-381). On November 13, 2017 one of its employees, the plaintiff's decedent, was mortally injured. It is alleged that his injuries occurred when he was performing repair work on an electrical light fixture inside High Grade Beverage's warehouse.

As it pertains to this defendant, plaintiff's forensic consultant, Mr. Les Winter, has opined concerning one particular electrical breaker box panel in High Grade's warehouse. His actual complaint focuses upon the "circuit directory," which is a piece of paper pasted on the inside of the door panel to the breaker box. (Pa 204). Although many of Mr. Winter's findings pertain to the decedent's employer, High Grade Beverage (now dismissed), as it pertains to this defendant Mr. Winter sole criticism is that "Line #36" on the directory was not "*legibly identified*" in accord with Section 408.4 (A) of the National Electrical Code. (Pa 204, 211). He also notes the requirement that breakers are to be "*legibly marked*" in accord with Section 110.22 of the Code. (Pa 204, 211).

It is not disputed that Mr. Winter never appeared in person to inspect this paper directory pasted on the inside of the door panel to the breaker box. His findings were made exclusively on his review of black & white photographs. In further support of his conclusions, Mr. Winter pointed to one selected portion of the testimony of

High Grade's maintenance manager, Mr. Perry Morris, taken on February 9, 2021, as follows:

> **Q. Can you see which line in that photo is 36?**
> **A. Yes.**
> **Q. Are you able to read what's there?**
> **A. No.** (Pa 202).

Relying on this testimony, and referencing "Applicable Standards of Care," Mr. Winter thence concluded the circuit breaker directory was "non-compliant" because, as stated by the expert, "*As Morris testified above, he was unable to identify which breaker was powering the incident emergency fixture from this directory.*" (Pa 205).

Throughout its occupancy the tenant, High Grade Beverage, had established a maintenance crew in the warehouse to maintain its facilities. The maintenance crew chief was Mr. Perry Morris, who held that position for 21 years. (Pa 82-83). The maintenance chief had taken courses covering electrical work, learning how to check live circuits, use a volt meter, and lockout procedures. (Pa 90-91). He and his men performed repairs and maintenance on the property such as changing ballasts, replacing fixtures and junction boxes and electrical conduit using electrical tools like volt sensors (Pa 95, 112, 134-135). Indeed Mr. Morris trained the decedent on electrical repair, showing him how replace ballasts and how to use a tic-trace, a volt

sensor and multi-meters all of which were stored in High Grades' maintenance room. (Pa 109, 111, 116). With regard to the specific breaker box which is the focus of the plaintiff's expert, Mr. Morris has also "[took] Sean through the panel box and explain (sic) to him." (Pa 157). Morris showed the decedent "which switch controls which" and showed him "how to turn off electrical circuits during his training." (Pa 157, 161).

As High Grade Beverage's maintenance crew chief, Mr. Morris was familiar with the paper directory on the inside of the door panel of the breaker box alleged to have caused injury to the decedent. (T91-92). Based on his actual face-to-face interactions with the breaker box before the accident, Mr. Morris affirmatively confirmed *"[i]f you were standing in front of this panel and you opened the door and looked at the label and went to Line 36, assume you didn't know what it controlled, [yes, you would] be able to read what was written on Line 36."* (Pa 157).

But Mr. Morris also indicated that he and his maintenance crew at High Grade Beverage had performed some troubleshooting for a problem on that same breaker box before the decedent's accident. Speaking of the breaker box that controlled the circuit on which the decedent was working, he said:

A. This sticks in my memory because it says emergency, something like emergency light trailer dock, but that circuit also on that circuit unbeknownst to anybody else, and I found out the hard way, it also controlled a light in GP's office. Bear with me. Because one time when we were – they were working on it. Tony Sedia came out and he said we have to look at a light in George's office it won't work. I have changed the bulbs and everything. Lo and behold a major repair on the emergency light went over and turned the breaker on and George's light worked. That's what I remember.

Q. When you say GP you're referring to George Policastro?
A. Yes.

Q. Were you able to determine what switch 36 controlled based on reading what's on the label or through trial and error, flipping on and off switches to see what turned it off and on?
A. Trial and error.

Q. Why is that?
A. Because without going into big details and telling a long story, when they were building High Grade Beverage, there were three electrical contractors in there at the same time. They didn't know what each of them was doing. So the panels that were labeled weren't done right the first time. Pete Struble and I, to the best of our ability and knowledge, stayed after work one night and done trial and error and tried to label them right.

Q. Were you successful?
A. For the most part.
Q. You're not 100 percent sure?
A. No.

Q. Can you tell based on this photograph whose handwriting is on line 36?
A. No, I cannot. It may be Pete -- I am not saying…….

Q. Pete who?
A. Pete Struble.

Q. What we are seeing right now in this photograph which is marked King 143, to the best of your recollection is that what it looked like up until the time you retired from the company?
A. Yes……

Q. I am not asking you to speculate. If you were standing in front of this panel and you opened the door and looked at the label and went to line 36, assume you didn't know what it controlled, would you be able to read what was written on line 36?
A. Yes.
Q. Did you take Sean through the panel box and explain to him --
A. Yes.
Q. Okay. You did. Next question. You took him to the panel box, correct?
A. Yes.
Q. Did you show him which switch controls which?
A. Yes.
Q. How did you do that?

A. I pointed to the card written on the door and then to the corresponding circuit breakers. (Pa 154-157).

Thus, it is fairly evident and undisputed that the tenant, High Grade Beverage, was aware of the condition alleged by the plaintiff, as it had made attempts to address the electrical panel at issue before the accident.

There are no facts in the record suggesting that this defendant, HGB Realty 2, LLC, had any knowledge of the condition.

LEGAL ARGUMENT

POINT I

THE TRIAL COURT'S DISMISSAL IS LEGALLY CORRECT AND SHOULD BE NOT DISTURBED BECAUSE (1) THE MOTION RECORD DEMONSTRATED THAT THE PREMISES OWNER HAD TRANSFERRED AND RELINQUISHED ALL CONTROL OF THE PREMISES EXCLUSIVELY TO A SINGLE TENANT, INCLUDING THE RESPONSIBILITY TO REPAIR AND MAINTAIN THE INJURY-PRODUCING CONDITION, (2) BECAUSE NONE OF THE THREE COMMON LAW EXCEPTIONS TO THE NON-LIABILITY RULE APPLY, AND (3) BECAUSE THE RECORD SHOWED THAT THE OWNER DID NOT CONCEAL THE CONDITION NOR DID THE OWNER FAIL TO DISCLOSE A CONDITION THAT WAS UNKNOWN TO THE TENANT AS THE TENANT'S MAINTENANCE PERSONNEL HAD PERFORMED REPAIRS ON THE CONDITION BEFORE INCIDENT INVOLVING PLAINTIFF'S DECEDENT (Pa 293).

"Historically a lease was viewed as a sale of interest in land. The concept of *caveat emptor*, applicable to such sales, seemed logically pertinent to leases of land. There was neither an implied covenant for the intended use nor responsibility in the landlord to maintain the premises." Michaels v. Brookchester, 26 N.J. 379, 382 (1958). Thus, traditionally a landlord is not responsible for the maintenance of a leased premises. "In the absence of an agreement to make repairs, the landlord is under no obligation to do so. That burden falls upon the tenant." Coleman v. Steinberg, 54 N.J. 58, 63 (1969).

In the case of non-residential property, early on there came to be two recognized exceptions to the general rule of non-liability: (1) a landlord is responsible to use reasonable care with regard to portions of the leased premises which are not demised and *remain in the landlord's control*, and (2) a landlord's *covenant to repair* gives rise to a duty to the tenant. McBride v. Port Auth. of NY & NJ, 295 N.J. Super. 521, 525 (App. Div. 1996).

In making a determination if a duty of care should be imposed, our courts have always concluded that the element *of control*, - or the absence of it – is paramount.

"Recently,…[the Supreme] Court emphasized the importance of control in imposing a duty on a landlord, finding that a 'landlord has a duty to exercise reasonable care to guard against foreseeable dangers arising from the use of those portions of the rental property over which the landlord *retains control*." (emphasis in original), Shields v. Ramslee Motors, 240 N.J. 479, 491 (2018). The reason for the Court's emphasis on control, of course, is because a landlord who relinquishes control no longer has the opportunity and ability to exercise care. As noted in Shields, "[i]t would be impractical to require the landlord here to prevent the harm…on property that it does not control," noting that "[t]he landlord does not maintain a presence on the property and does not have access to information about the condition of the property." Shields, 494. In short, "fairness precludes the

landlord's liability for plaintiff's injuries" where the landlord transferred control to a tenant. Shields, 494.

Of course, looking to the other side of that coin, when control is vested in a tenant it is appropriate and in the interests of all concerned that liability should rest with the tenant who has both the opportunity and ability to address foreseeable dangers. "…[O]ur application of the classic control-based liability analysis specific to the landlord-tenant context dictates that, in fairness, the entity with control over the property is the entity that should be held responsible. We decline to hold the landlord responsible for property over which it relinquished control." Shields, 494.

Eventually a third exception to the rule of non-liability for landlords who transfer control to a tenant came to be known, grounded in the *Restatement of Torts, Section 358*. That is, even in the absence of a landlord's covenant to repair, a lessor of land who conceals or fails to disclose any natural or physical condition involving potential harm can be subject to liability only if the tenant *"does not know of the condition* or the risk involved therein, and the lessor knows of the condition and realizes the risk involved therein and has reason to believe that the lessee will not discover the condition or realize risk." Faber v. Creswick, 31 N.J. 234, 243 (1958), citing *First Restatement of Torts, Sec. 358* (1934).

"The principles of Michaels, Faber, and Coleman continue to represent the law of this State…" McBride, 526.

The evolution of how New Jersey courts have embraced the *Restatement of Torts* in general, and Section 358 of the *Restatement* in particular, was tracked by this Court in Reyes v. Egner, 404 N.J. Super. 433 (App. Div. 2009). Although Reyes involved residential property, Section 358 was discussed and analyzed in the broader context as it applied in general to the law of premises liability and on the question of when a duty of care is owing from a landlord. In Reyes the court ruled squarely "we endorse and apply the principles expressed in Section 358 of the Restatement (Second) of Torts (1965)…"

Noting that "[o]ur courts have frequently embraced the principles set forth in the Second Restatement on issue of premises liability," the court concluded:

> "We hold that the lessor's duty should be defined consistent with the precepts of Section 358 of the *Second Restatement*. As we have noted, that provision permits liability, even in the absence of a lessor's concealment, if the plaintiff demonstrates that lessor has failed to disclose a condition 'which involves unreasonable risk of physical harm to persons on the land' if
>
> '(a) the lessee does not know or have reason to know of the condition or risk involved, and
>
> (b) the lessor knows or has reason to know of the condition, and realizes or should realized the risk involved, and has reason to expect that the lessee will not discover the condition or realize the risk." Reyes, 456.

The Court further held:

> "…[A] proper evaluation of a lessor's duty should turn on the factors expressed in Section 358 of the Second Restatement, i.e.,
>
> (1) whether the [owner] had at least 'reason to know' of the allegedly dangerous condition and the risks involved, and
>
> (2) whether…the lessee did not know or have reason to know of the condition and the associated risk." Reyes, 461.

In this matter, the motion judge carefully considered and quoted from the factual record at length and properly applied the case law set forth above.

In regard to the factual record, in plaintiff's response to this defendant's motion and Statement of Undisputed Facts, the plaintiff *admitted* all of the following: (1) that the entire property was transferred solely to the tenant, (2) that this defendant retained no control over the property, (3) that this defendant had no responsibilities for any portion of the property, and (4) that the tenant, High Grade Beverage, had all responsibility to maintain the property in good condition and was responsible for all maintenance and repair which included the obligation to maintain electrical components such as the one on which plaintiff's decedent was working when he was critically injured. (Pa 300-301, 441).

In summary then, on the issue of control the motion record revealed the following in uncontroverted fashion:

The entire property was transferred out of the hands of this defendant, the property owner. The owner fully relinquished control. Responsibility for the property was conveyed *in toto* to a single tenant, years before the accident in question, including the maintenance and repair of the premises. The tenant accepted those responsibilities to the property, and performed in accordance therewith. No aspect of control or maintenance or repair was reserved to this defendant, the owner.

Here, the tenant, not this defendant, was in the best position to remedy the directory on the panel door. Consequently Section 9.01 of the lease, which required the tenant to keep the electrical and lighting in good condition and repair, controls the allocation of liability. The tenant, not this defendant, was in the best position to mitigate the risk of harm alleged.

The motion court also properly evaluated a lessor's duty under the principles of Section 358 of the *Second Restatement* as it was required to do pursuant to Reyes, *supra*.

Critical to the application of the principles of Section 358, particularly as it relates to this case, is that both requirements must be present, that is (1) proof that the lessor knows of the condition and simultaneously (2) proof that the tenant does not know of the condition. The Restatement and the case law discusses the

requirements in the conjunctive, not the disjunctive. The rule requires both, not one or the other.

As evidenced by uncontradicted testimony of the tenant's maintenance crew chief, Mr. Morris, the tenant was aware of the condition of the breaker box panel and directory long before the incident in question. As Mr. Morris said, "this sticks in my memory," and he "found out the hard way" as he and his co-workers at High Grade Beverage were "flipping on and off switches to see what turned it off and on" using "trial and error." (Pa 155). This was an issue known to High Grade Beverage because Mr. Morris recalls that three electrical contractors were "building High Grade Beverage" and "they didn't know what each of them was doing." (Pa 155). Asked about Line 36 on the directory on the panel door, Mr. Morris explained "the panels that were labeled weren't done right the first time," so "Pete Struble [Mr. Morris' supervisor] and I to the best of our ability and knowledge stayed after work one night and did trial and error and tried to label them right." (Pa 155-156).

The motion judge was acutely aware of this factual record and the requirements of control and Section 358. She noted with great care and precision in her December 1, 2022 decision:

> "[v]iewing that testimony in the light most favorable to plaintiff, at some time prior to the retirement of Pete Strubel, Mr. Morris' s predecessor, the tenant, that is, defendant HGB's employees, knew about the electrical panel at issue, knew that Line 36 was the breaker that controlled the emergency light at issue, knew that particular circuit also controlled another light in the office, that they determined, and that they determined what the circuit breaker referenced on Line 36 controlled via trial and error, and after doing so, Mr. Morris and Mr. Struble stay after work to label the breakers properly. (T53).

The motion judge also considered plaintiff's argument, which was devoid of any factual foundation, that the condition existed before the property was given to the tenant. Following the tenets of Section 358 and interpretive case law, the motion court correctly rationalized that it doesn't matter because at some point before the accident the tenant was aware of the condition, a factor which nullifies imposition of liability. In a well-reasoned decision, the motion court concluded:

> "…[E]ven if the allegedly defective condition regarding the legibility of the electrical panel existed at the time defendant HGB Realty II provided defendant HGB [Beverage] with exclusive control of the premises, the tenant defendant HGB knew of the condition or had reason to know of the condition prior to decedent's accident, and defendant HGB [Beverage] had the opportunity and indeed attempted to remedy the condition prior to the accident at issue." (T53-54).

The court further concluded this defendant cannot be liable:

> "because the tenant had, if not had knowledge and tried to do something about it, certainly the testimony is undisputed that they were aware of

> the condition of the electrical panel box...." (T54).

The motion record was devoid of factual disputes on any salient facts. The motion court properly assessed and evaluated the facts in the context of the controlling law as set forth above. The motion court's ruling should be affirmed.

POINT II

THE MOTION COURT CORRECTLY APPLIED THE PRINCIPLES OF THE RESTATEMENT (SECOND) OF TORTS, SECTION 358, AS DISCUSSED IN THE REYES CASE, IN DETERMINING THE LEGAL ISSUE OF LESSOR LIABILTY IN GENERAL AND AS APPLICABLE TO ALL LEASEHOLD INTERESTS

Plaintiff's secondary argument is that the motion judge "relied upon" the Reyes decision in granting summary judgment relief to defendant and that this was error. (Pb 12). Although the motion court certainly did mention the Reyes case, and drew upon certain legal principles within it as expressed in the *Restatement of Torts*, it is a misstatement and mischaracterization to say that the basis of the court's decision in this case was the holding in Reyes.

Plaintiff argues that Reyes is "inapt to the present facts," and to some degree plaintiff is correct. (Pb 13). Reyes did not involve commercial industrial property as we have here. Reyes involved residential property (a summer house at the Jersey Shore). Reyes did not involve a long-term lease as we have here. Instead, the shore house was rented on a 'week-to-week' basis. The Court in Reyes took issue

with another residential property case from 1951, Patton v. The Texas Co., 13 N.J. Super. 42, (App. Div. 1951). In Patton the court held that the property owner had no duty "unless there had been fraudulent concealment of a latent defect." Reyes, 450. The Reyes court found that this ruling in Patton failed to consider all of the possible avenues for which liability could attach to a residential owner/lessor, and did not accurately reflect the current law. Reyes noted that the extant version of the *Restatement of Torts Section 358* actually provided that an owner could be liable in a wider variety of circumstances than merely "fraudulent concealment." The court noted the *Restatement* not only allowed for liability if the owner/lessor concealed a condition, but also if the lessor knew of the condition and the lessee did not know of the condition. Reyes, 449. The Reyes decision went on to discuss that Section 358 was updated in the *Restatement (Second) of Torts* in 1965, and at that time it imposed the same conditions for liability in the same circumstance. Ultimately, in its discussion of the progression of the law in a residential property setting, the court noted "obvious inroads" in the concerning residential landlords, citing as example multi-family dwellings. Id. 555. [2]

[2] By example, the court noted the further progression of lessor liability unique to residential leaseholds, not commercial, such as statutory building code requirements of residential landlords such as handrails, interior stairways, etc. See N.J.S.A. 52:27D, *et seq.* (American Building Officials Code). *Reyes*, 456-57.

In short, the entire discussion and analysis in Reyes was in the context of residential leaseholds only, with no mention or thought given to commercial industrial lessors/lessees. To that extent Reyes had little to do with this case.

However, the benefit of Reyes was that it exhaustively tracked the legal principles associated with the leasing of property *in general* as that topic was treated and analyzed by the *Restatement of Torts* going back almost ninety years to 1935. In doing so the Reyes decision left no doubt that consideration of the principles of Section 358 is required and appropriate when determining the liability of a lessors in general:

> "…[A] proper evaluation of a lessor's duty should turn on the factors expressed in Section 358 of the Second Restatement, i.e., (1) whether the [owner] had at least 'reason to know' of the allegedly dangerous condition and the risks involved, and (2) whether…the lessee did not know or have reason to know of the condition and the associated risk." Reyes, 461.

Thus, in evaluating this defendant's duty under the facts of this case, the motion judge properly gave consideration to the factors of Section 358, and appropriately determined that no liability can attach because "the testimony is undisputed that they [the tenant] were aware of the condition of the electrical panel box…" (T54).

Plaintiff argues that "Reyes progeny has further expanded on these inroads…." (Pb 14). In making this statement plaintiff is making reference to the observation in Reyes that there have been "obvious inroads" in the law concerning the duty of lessors. However, as noted above, Reyes involved a week-to-week summer shore house rental, not a commercial industrial lease, and the observation of progression of the law since 1951 in Patton was in reference to residential properties and "particularly involving multiple-family dwellings." Reyes, 454. (In making this observation the court made it clear its observations were confined to *residential* property, noting how covenants of habitability and implied warranties "have been imputed into residential leases…" Id.

Finally, it is noteworthy that even in the Reyes case the court did not permit one aspect of the plaintiff's claim to proceed, and did so on the same rationale applied by the motion court in this case.

The plaintiff had claimed that the landlord was liable for defects in a platform leading from a deck. Id., 444. Plaintiff secondarily claimed the landlord was liable for lack of a handrail. Id., 444. The record indicated that the tenant was *aware of* the handrail condition. Id., 462. Thus, the court ultimately held:

> "However, with respect to the handrail, Columbia [the tenant] acknowledged in her deposition testimony that she was aware, at some point before her father's accident, that the deck had no such feature. It is immaterial that the lack of a handrail did not 'concern' her at the time. Her awareness of that particular condition, as the lessee of the premises, absolves the [landlord] of liability for the handrail under *Section 358 of the Second Restatement*." Reyes, 462.

POINT III

ALTHOUGH THERE IS NO LEGAL AUTHORITY SUPPORTING PLAINTIFF'S ARGUMENT THAT THIS COURT SHOULD ABANDON ITS FOCUS ON CONTROL (OR LACK THEREOF) IN EVALUATING LESSOR LIABILITY, EVEN IF THIS COURT WERE TO APPLY THE FACTORS OF HOPKINS THE RESULT WOULD BE THE SAME

In its final argument, plaintiff contends that this Court should ignore the long-standing principles expressed in McBride and Geringer v. Hartz Mountain Dev. Corp., 388 N.J. Super. 392 (App. Div. 2006) and should instead should analyze a lessor's duty under Hopkins v. Fox & Lazo Realtors, 132 N.J. 426 (1993). (Pb 16-17).

Putting aside that Hopkins, again, involved only residential property, plaintiff cites no precedential legal authority in support of its plea to this Court that it should reject the "control" analysis discussed in Point I above, which has for so long been

relied upon by our courts as the proper basis for determining lessor liability. (Plaintiff cites only to a brief unreported decision, Albert v. Pathmark Stores, Inc., 2019 N.J. Super. Unpub. LEXIS 1586, 2019 WL 3003822 (App. Div. July 10, 2019) certif. denied, 240 N.J. 1 (2019.) [3]

Plaintiff's argument that the "control" analysis should be rejected in favor of Hopkins runs directly counter to the Supreme Court's most recent decision on lessor liability in Shields v. Ramslee Motors, 240 N.J. 479 (2018). There the Court said:

> "Recently, in *JH v R&M Tagliareni, LLC*, this Court emphasized the importance of control in imposing a duty on a landlord, finding that 'a landlord has a duty to exercise reasonable care against foreseeable dangers arising from the use of those portions of the rental property over which the landlord *retains control.*" (emphasis in original) Shields, 491.

It is noteworthy that the same argument that Hopkins should be applied to evaluate commercial lessor liability in *lieu* of McBride and Geringer was made in the Shields matter, and Supreme Court chose not to adopt that change. Instead, the Shields court noted simply that the plaintiff had contended that the factors of

[3] Plaintiff also cites to *Geringer*, 403-405 (Pb 11) suggesting that it held a lessor can be liable if a condition "predates" a lease. This is not correct. The term "predate" never appears in the *Geringer* case. The claim against the landlord was partially reinstated for a different reason: because the record showed that the landlord "kept its hand in" the design of the condition that caused the plaintiff's fall. *Geringer*, 403. There is no such evidence in this record.

Hopkins should be applied, and then the Court arrived at the same outcome. Shields, 494.

As to the first factor, the relationship of the parties, the Supreme Court aptly noted "[b]y contrast, the landlord here had no relationship with the plaintiff." Id., 493. As to the second factor, the nature of the risk, the Court noted this inquiry focuses on the risk is foreseeable and whether it is fair to place the burden of preventing harm upon the defendant. The Court found this factor favored the landlord, and that "fairness dictates that [the tenant], with control over the driveway, and the tools on hand to eliminate the risk, should be solely responsible…" Id., 493. As to the third factor, opportunity and ability to exercise care, the Court viewed this as "similar to our analysis of control." Id., 494. Noting that reasonableness depends in part on the practicability of preventing the harm, the Court said "it would be impractical to require the landlord here to prevent the harm…on property that it does not control." Id., 494. This was true because "the landlord does not maintain a presence on the property and does not have access to information about the condition the property" and the tenant did. Id., 494. Finally, as to the fourth factor, public interest in the proposed solution, the Court said that holding the landlord liable for conditions of property that were demised to its tenant "would not serve any public policy interest." Id., 494.

Thus, even though no authoritative law has been cited to support a claim that the Hopkins factors should be applied here in *lieu* of the "control analysis" which has been relied upon for so many years in McBride and Geringer, following the Supreme Court's rationale in Shields reveals that the outcome is the same.

Application of the Hopkins factors in this case yields the same result. This defendant had no relationship with the plaintiff whatsoever. It is unfair to place a burden on this defendant where it had no oversight of the demised premises and therefore the risk was not known or foreseeable. This defendant had no ability to exercise care, it transferred full control to the tenant and kept no presence on the property at all. It hardly serves any public interest to hold an absent landlord responsible for conditions of premises as to which had relinquished all control for years. In fact, the opposite is true. It is better public policy to require that the tenant, who is actively occupying the property and who has contractually agreed to be responsible for repairs, including electrical, and who has the personnel and tools and equipment to address such hazards (and who is aware of the condition), to be responsible for such conditions.

In the final analysis, the Shields Court made it plain:

> "In short, an analysis of the *Hopkins* factors against the factual backdrop of this case leads to the conclusion that fairness precludes the landlord's liability for plaintiff's injuries – just as our application of the classic control-based liability analysis specific to the landlord-tenant context dictates that, in fairness, the entity with control over the property is the entity that should be held responsible. We decline to hold the landlord responsible for property over which it had relinquished control."
>
> Shields, 494.

CONCLUSION

For the reasons set forth herein, this defendant respectfully requests this Court enter an order affirming the order of the trial court in granting summary judgment to HGB Realty 2, LLC as a matter of law.

Respectfully submitted,

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HGB Realty 2, LLC

By: /s/ Joseph M. Gaul, Jr.
JOSEPH M. GAUL, JR., ESQ.

Dated: October 4, 2023

THE ESTATE OF SEAN KING AND LISA KING, INDIVIDUALLY, AND AS ADMINISTRATRIX AD PROSEQUENDUM ON BEHALF OF THE ESTATE OF SEAN KING, Plaintiffs, v. HIGH GRADE BEVERAGE, INC.; HGB REALTY 2, LLC; ANTHONY DEMARCO; DENISE DEMARCO CRUTCHLEY; DIANA BATTAGLIA; JOSEPH HGB REALTY, LLC; ELIZABETH HGB REALTY, LLC; JOSEPH A. DEMARCO; ELIZABETH DEMARCO; and/or JOHN DOES 1-15 and/or JANE DOES 1-15 (fictitious individuals); and ABC CORPORATIONS 1-15 (fictitious business entities); Defendants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. 001419-22T4 On Appeal From: SUPERIOR COURT OF NEW JERSEY LAW DIVISION, CIVIL PART MORRIS COUNTY DOCKET NO.: MRS-L-2048-19 Hon. Rosemary E. Ramsey, J.S.C. Civil Action

BRIEF OF APPELLANTS, THE ESTATE OF SEAN KING AND LISA KING, INDIVIDUALLY, AND AS ADMINISTRATRIX AD PROSEQUENDUM ON BEHALF OF THE ESTATE OF SEAN KING

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PRELIMINARY STATEMENT

HGB REALTY 2, LLC's ("HGBR2's" or "Defendant's") ostrich in the sand approach to its legal obligations led to the tragic death of Sean King. HGBR2 does not dispute that it knew about the faulty electrical panel box which ultimately caused Mr. King's demise. Furthermore, HGBR2 does not dispute that it consciously chose to take no action despite this known and appreciable danger. Instead, HGBR2 attempts to evade liability for its nonfeasance by claiming that it had no duty to act. HGBR2's argument is unavailing and relies upon misapplied case law and a distorted factual picture which overlooks HGBR2's ability to ameliorate this appreciatable danger well in advance of Mr. King's death.

As HGBR2 knew, or should have known, about the defective electrical panel box prior to leasing the property located at 86 Canfield Avenue, Randolph, New Jersey (the "Property"), and did nothing to ameliorate this known danger, HGBR2 should not be permitted to evade liability for the consequence of its inaction. Imposing a duty of care on HGBR2 for the electrical panel box comports with notions of basic fairness and public policy and will help ensure that incidents like the one that caused Mr. King's tragic death are prevented rather than encouraged. Accordingly, given the facts of this case, the underlying law, and considerations of basic public policy, the grant of Summary Judgment to HGBR2 must be reversed and this matter must be permitted to proceed to trial.

LEGAL ARGUMENT

I. Hopkins v. Fox & Lazo Realtors Provides the Applicable Legal Test to Determine a Landlord's Liability for a Defective Condition on the Property

A. § 358 of the Restatement (Second) of Torts Cannot Be Inflexibly Applied to the Controlling Facts

HGBR2's attempt to have this Court inflexibly apply § 358 of the Restatement (Second) of Torts ("Section 358") to determine whether a duty of care exists ignores controlling precedent. While Section 358 is not *per se* bad law, it cannot be rigidly applied to determine whether the lessor of commercial property owes a duty of care. See Meier v. D'Ambose, 419 N.J. Super. 439, 449 (App. Div. 2011) (conducting an analysis under Hopkins v. Fox & Lazo Realtors, 132 N.J. 426, 436 (1993) to assess a landlord's liability for a faulty furnace rather than inflexibly applying Section 358). See also § 358 of the Restatement (Second) of Torts (liability is imposed on the landlord for a physical condition of the property where (a) the lessee does not know or have reason to know of the condition or the risk involved, and (b) the lessor knows or has reason to know of the condition).

As explained by the Appellate Division in Meier v. D'Ambose, 419 N.J. Super. 439, 449 (App. Div. 2011)

> The lessor . . . has a non-delegable duty of care to third parties to avoid a hazardous condition of his property. Whatever may be the terms of a lease and the duties of lessor and lessee as to each other, the lessor cannot by virtue of the lease release himself from potential liability to third parties.

Ibid.

Accordingly, HGBR2's tenant's ("HGB") claimed knowledge of the defective electrical panel does not establish a lack of duty on HGBR2's part to ameliorate this dangerous condition. Rather, the factors which are controlling to the existence of a duty of care are those outlined by the Supreme Court in Hopkins v. Fox & Lazo Realtors, 132 N.J. 426 (1993). Shields v. Ramslee Motors, 240 N.J. 479, 484 (2020) is instructive on this point.

B. The Hopkins Factors Control the Analysis in the Present Matter.

HGBR2's reliance on Shields is misplaced as Shields does not stand for the proposition that a landlord is free to neglect known and appreciable dangers where it no longer controls the subject property. In Shields, the New Jersey Supreme Court examined whether a commercial property owner owed tenant's invitees a duty to clear snow and ice from the property's driveway. In determining whether a duty of care existed, the Court found that control of the property was not dispositive and that a duty analysis under New Jersey law should be reviewed under the four factors espoused in Hopkins v. Fox & Lazo Realtors, 132 N.J. 426 (1993). Under these factors, the Court did ultimately find that a duty of care did not exist under the facts present in Shield. However, the facts present in Shield are hardly akin to those present here.

In conducting the duty of care analysis espoused in Hopkins, the Shields Court focused its analysis on the second and third Hopkins factor; respectively, the nature of the attendant risk and the opportunity and ability to exercise care. Examining these factors, the Court explained that the transient nature of the hazards posed by winter weather weighed against imposing a duty on the lessor. See Shields, 240 N.J. at 493. The Court then found that it would be impractical to require the landlord to prevent the harm accompanying temporarily slippery conditions. Id. at 494.

As opposed to the hazardous winter weather conditions present in Shields, the defective electrical panel was not a transient danger, and ameliorating this condition would have hardly been impractical for HGBR2. HGBR2's reliance on Shields is therefore misplaced, and when the facts of the present matter are analyzed through the framework provided by Hopkins, it is apparent that HGBR2 owed a duty of care.

II. Under Hopkins, HGBR2 Owed a Duty of Care to King

In Hopkins, the New Jersey Supreme Court departed from the traditional, categorical approach to premises liability based on the status of the plaintiff and reasoned that "[w]hether a person owes a duty of reasonable care toward another turns on whether the imposition of such a duty satisfies an abiding sense of basic fairness under all of the circumstances in light of considerations of public policy." 132 N.J. at 439. The Court provided four factors to consider in making this inquiry; "the relationship of the parties, the nature of the attendant risk, the opportunity and

ability to exercise care, and the public interest in the proposed solution." Ibid. Under the principles espoused in Hopkins and the facts present in this case, a duty of care owed by HGBR2 must be found to exist.

A. Given the Nature of the Attendant Risk a Duty of Care on HGBR2's Part Must be Found to Exist

An examination of the nature of the attendant risk in this matter, i.e. the faulty electrical panel, supports finding the existence of a duty of care of care on HGBR2's part. See Davis v. Devereux Found., 209 N.J. 269, 296 (2012) (This inquiry focuses on the issue of whether the risk is foreseeable, whether it can be readily defined, and whether it is fair to place the burden of preventing the harm upon the defendant). Here, the faulty electrical panel did not comply with code. The defects of the electrical panel were not concealed and could be discovered. An attentive landlord should have been able to easily appreciate the risk of electrocution posed by this danger. See Reyes v. Egner, 404 N.J. Super. 433, 456-58 (App. Div. 2009) (finding that code violations may be evidential if not conclusive of the lessors' potential breach of a duty); Parks v. Rogers, 176 N.J. 491, 494, 496 n.1, (2003) (noting potential code violation in discussing duty to warn of dangerous condition on property). This defect did not arise while the tenant had exclusive use and control of the property, and instead existed well before the ratification of the 2016 Lease agreement with HGB. HGBR2 has not proffered any basis for not repairing this

defect prior to leasing the property except for disclaiming legal responsibility for making such corrections.

As the landlord, HGBR2 should not be permitted to evade responsibility for the property by avoiding either the discovery of potentially fatal defects or avoiding the repair of such defects. This purposefully evasive approach to property ownership contravenes the generally accepted rule that landowners have the duty to make their premises reasonably safe. See Zentz v. Toop, 92 N.J. Super. 105, 112-13 (App. Div. 1966) (The landowner's duty includes the obligation of making a reasonable inspection to discover defective and hazardous conditions). Had HGBR2 acted as a reasonably prudent landlord, HGBR2 could have discovered this defective condition and ameliorated the associated risk prior to entering into the 2016 lease. That HGBR2 chose not to do so is ultimately unfair to King, who paid the ultimate price for this decision.

B. HGBR2's Opportunity and Ability to Exercise Care Counsel In Favor of the Existence of a Duty

The danger posed by the defective electrical panel box is inapposite to the hazard examined in Shield, which was transient and not easily discoverable. See Shields, 240 N.J. at 494 (noting slippery conditions are not easily determinative by landlord). The defect inherent in the electrical panel box existed in advance of the 2016 lease. As the defect arose prior to the commencement of the landlord tenant relationship between HGBR2 and HGB, HGBR2's claimed lack of control of the

property did not prevent it from exercising care over the defective electrical panel box. Exercising care would not have been impractical or financially ruinous for HGBR2, as such care would have simply required HGBR2 to bring the electrical system on the property up to code.

While HGBR2 can argue about its lack of control, the import of Section 358, and the history of landlord tenant relationships in New Jersey, New Jersey law does not, and cannot, permit a landlord to ignore ameliorating an obvious and potentially fatal property defect. Doing so would encourage inattentive ownership of real property. The law does not favor such purposefully evasive conduct, and even a cursory review of controlling legal standards in New Jersey shows that the law is on a slow and determined march to impose further protections for those entering another's property rather than actively discouraging an owner's responsibility for their owned premises. See generally, Reyes v. Egner, 404 N.J. Super. 433, 450 (App. Div. 2009) (outlining continued expansion of premises liability claims against land owners). Accordingly, as HBGR2 knew, or should have known, about defective electrical panel and had ample opportunity to correct this patent code violation, a duty of care must be found to exist.

C. Public Policy Counsels Strongly In Favor of Finding a Duty of Care on HGBR2

Established public policy in New Jersey provides that a landlord is not permitted to disregard a potentially fatal and easily discoverable condition on the property, assign control of the property to a tenant, and then avoid any liability which arises from this discoverable defective condition See J.H. v. R & M Tagliareni, LLC, 239 N.J. 198, 218 (2019) (citing Scully v. Fitzgerald, 179 N.J. 114, 121-22 (2004) (noting that generally a landlord's duty arises when the harm is foreseeable and the landlord has sufficient control to prevent it); Potomac Aviation, LLC v. Port Auth. of N.Y. and N.J., 413 N.J. Super. 212, 226-27 (App. Div. 2010) (scope of a duty is determined under the totality of the circumstances, and must be reasonable under those circumstances); Monaco v. Hartz Mt. Corp., 178 N.J. 401, 414 (2004) (finding a landowner must exercise reasonable care including making reasonable inspections of its property and taking such steps as are necessary to correct or give warning of hazardous conditions or defects); Dwyer v. Skyline Apartments, Inc., 123 N.J. Super. 48, 52 (App. Div. 1973) (finding duty of care exists where landlord knew or should have been known about defective condition, so that he had an opportunity to correct it).

A landlord cannot be permitted to disregard repairing a code violation which poses a serious and potentially fatal risk which the landlord knew or had the ability to discover prior to leasing the property. See Reyes, 404 N.J. Super. at 458 (“an

owner of property is directly responsible for compliance with the building codes . . . and a violation of code may be evidential if not conclusive of the lessors' potential breach of a duty."). Where there is such a serious, and easily discoverable, code violation, the landlord of the property must be required to ameliorate this condition prior to assigning control of the property to the tenant. Allowing an opposite policy to prevail would unreasonably imperil those entering and coming into contact with the property and would encourage landlords to either remain obtuse to discoverable defects, or disregard the need to repair such defects prior to transferring control of the property. Public policy and general considerations of the public's welfare do not countenance such purposefully inattentive property ownership.

Accordingly, HGBR2, as the landlord of the Property, should be found to have owed a duty of care to inspect the Property and ameliorate the defective electrical panel box prior to assigning the Property to HGB.

CONCLUSION

For the reasons set forth herein, Plaintiffs respectfully request reversal of the Order for Summary Judgment in favor of HGBR2.

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Dated: December 4, 2023