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IN THE SUPREME COURT FOR THE STATE OF DELAWARE

ROBERT KRAVIS, Petitioner Below/ Appellant, v. JUSTICE OF THE PEACE COURT No. 17 and MHC MCNICOL PLACE, LLC Respondents Below/ Appellee.	:	No. 311,2022 On Appeal from the Superior Court of the State of Delaware, C.A. No. S22A-804-001

APPELLANT'S REPLY BRIEF

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JUSTICE OF THE PEACE COURT AND SUPERIOR COURT BOTH COMMITTED LEGAL ERROR BY DISREGARDING THE REQUIREMENTS OF THE DELAWARE AND FEDERAL FAIR HOUSING ACTS

A. Justice of the Peace Court Committed Legal Error by Failing to Determine the Validity of Kravis's Reasonable Accommodation Defense Under the Fair Housing Acts Although that Determination was Required by Law

1. Justice of the Peace Court did not Apply the Fair Housing Acts to Determine Whether Kravis was Entitled to Prevail on his Reasonable Accommodation Defense

A tenant with a disability is protected by the Delaware Fair Housing Act, 6 *Del. C.* § 4603A(a)(2), which provides that "a refusal to make reasonable accommodations in rules, policies, practices or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling" is discrimination, and the federal Fair Housing Act, 42 USC 3604(f)(3)(B) is, essentially, the same.[1] As discussed in Corrected Appellant's Opening Brief ("OB") at 17-18, if a tenant with a disability needs an accommodation and the accommodation would be a "reasonable accommodation" under the Fair Housing Acts, the landlord is obligated to provide it. McNicol recognizes that this is the correct proposition of law, *see, e.g.,* Respondent[] MHC McNicol Place, LLC's Answering Brief ("AB") at 10 ("the Delaware and federal

[1] Capitalized terms in this brief have the same meaning as in the opening brief.

Fair Housing Acts require a landlord to make a reasonable accommodation under certain conditions"). Much of its brief is devoted to unsupported argument that Justice of the Peace Court applied the Fair Housing Acts to reject Kravis's request for a reasonable accommodation.

McNicol asserts that "[t]he *de novo* panel, after considering all the evidence, including the reasonable accommodation request, issued their decision on March 21, 2022." AB 5, citing the *De Novo* Order. It repeats similar assertions throughout its brief without any additional citation to the record.[2] The only support McNicol claims for any of the assertions that Justice of the Peace Court applied the Fair Housing Acts is the *De Novo* Order. But the *De Novo* Order does

[2] *See, e.g.,* AB 7 ¶ 1(Justice of the Peace Court "considered Petitioner's reasonable accommodation request and still found that respondent had met its burden of proof"); *id.* ¶ 2 (the court "considered Petitioner's reasonable accommodation request to the court and … ultimately rejected [it] as required by the Delaware Fair Housing Act … and the United States Fair Housing Act …acts"); *id.* ¶ 3 (the court "analyzed Petitioner's reasonable accommodation request in light of the Fair Housing Acts"); AB 10 (asserting that a "finding by the Justice of the Peace Court, as affirmed by Superior Court, that such conditions [that must be present for a reasonable accommodation to be required by the Fair Housing Acts] did not exist here was not an error of law"); AB 11 (stating that the court "reviewed" whether "the landlord has met their burden of proof [relating to a defense sometimes raised in reasonable accommodation cases]); AB 12 (asserting that the court "definitively determined" that the accommodation request was not reasonable), AB 14-15 ("The Trial Court did not err as it in fact considered Petitioner's reasonable accommodation request, applied the applicable laws, and still found in favor of the landlord.").

not refer to, discuss or (explicitly or implicitly) rule upon the issues presented by the Fair Housing Acts.

The *De Novo* Order's entire discussion of Kravis's defense is:

> Kravis looks to the Court for an equitable resolution pursuant to 25 Del. C. § 5709. The court must consider equity for all parties. Had grandson and girlfriend applied in a timely manner, even prior to the judgment below, the outcome may have been different. Unfortunately, they did not. To allow the tenant to remain, with no change in conditions, would set a precedent that would handicap every landlord faced with the eviction of aged or infirm tenants, whose caregivers do not abide by the community rules.

A018; J.P. Dkt. 3/21/2022.

The court's characterization of Kravis's defense as "look[ing] to the Court for an equitable resolution" and its citation of § 5709, which generally permits equitable defenses, indicates that it thought it had unfettered authority to make a decision it considered fair. The Fair Housing Acts give special protection to people with disabilities, so they limit judicial discretion. *see* OB 17-18. By expressly relying on and referring only to the court's view of fairness, the *De Novo* Order shows that the Court was not applying the Fair Housing Acts.

Just as the court's explanation of its rationale shows that it was not considering the Fair Housing Act requirements, what the court did not say shows, too, that it was not considering the Fair Housing Act requirements. As shown at OB 17-18 (quoting *Samuelson v. Mid-Atlantic Realty Co., Inc.,* 947 F.Supp. 756,

759 (D.Del. 1996), under the Fair Housing Acts, a landlord is required to accommodate a person with a disability by changing a generally applicable rule so as to make its burden less onerous on the person with a disability, if that accommodation is both necessary to allow the tenant an equal opportunity to use and enjoy a dwelling and "reasonable" under the Fair Housing Acts. The court's rejection of Kravis's defense discussed neither of these issues.

The *De Novo* Order contains no discussion of whether the accommodation, which would have enabled caretaking by Losonczy and Jacobs, was necessary for Kravis to use and enjoy his home. Likewise, it did not discuss reasonableness under Fair Housing Act standards. As discussed at OB 25 (quoting, *Hovsons, Inc. v. Twp. of Brick*, 89 F.3d 1096, 1104 (3d Cir. 1996)(citations omitted)), in order to establish that a requested accommodation is not reasonable a landlord must "prove that it could not have granted the variance without imposing undue financial and administrative burdens, imposing an undue hardship … or requiring a fundamental alteration in the nature of the program..."). None of this was addressed in the *De Novo* Order.[3] The court was not applying the Fair Housing Acts.

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[3] Ironically, while there is no indication the Order that Justice of the Peace Court considered these matters, McNicol argues at AB 2-3, 13-14, 19, without citation to the record, that it had good reasons for denying Kravis's request. Those arguments might be relevant to the Fair Housing Act issue Justice of the Peace Court should have decided, but they are irrelevant to the issue before this court - whether Justice of the Peace Court committed legal error by failing to apply the Fair Housing Acts and whether Superior Court erred by not recognizing that error.

That Justice of the Peace Court knew it was not considering the requirements of the Fair Housing Acts is confirmed by the *De Novo* Order's ruling on Kravis's discovery requests and trial subpoena. As discussed at OB 23-25, the requests and subpoena sought information related to the reasonable accommodation defense. The court stated it was ruling against the discovery and subpoena because "the information requested is not relevant." A017. Even McNicol recognizes that the court did so because it did not consider the Fair Housing Acts relevant to the case. *See* AB 13 ("It was not error for the JP Court to conclude, and Superior Court to affirm, that the evidence relating to the fair housing law was not relevant ….").

Justice of the Peace Court's decision to resolve the case on the basis of what it considered fair to landlords and tenants, rather than on the basis of what the Fair Housing Acts required was legal error. Where there is a controlling statute, courts must apply the statute, *see, e.g., Smith v. Gordon*, 968 A.2d 1,15 (Del. 2009) ("Where the General Assembly enacts a comprehensive statutory scheme that reflects a public policy … any modifications in that policy must be made by the legislature.")(citing cases)(substantive ruling superseded by statute). *Cf. Whalen v. On–Deck, Inc.,* 514 A.2d 1072, 1073–74 (Del.1986) (holding that the Supreme Court would defer to the General Assembly as the proper forum to seek a change

in law). Deciding a case on the basis of what judges think is fair is not the same as deciding a case on the basis of what a statute requires.

At AB 14 McNicol invokes Justice of the Peace Court's rationale for rejecting the defense, that "[t]o allow the tenant to remain, with no change in conditions, would set a precedent that would handicap every landlord faced with the eviction of aged or infirm tenants, whose caregivers do not abide by the community rules." A18. That rationale is both incorrect and a rejection of the legislative decisions embodied by the Fair Housing Acts. It is incorrect because it would not "handicap" every landlord who seeks to evict an infirm tenant. It would handicap only those landlords who wish to evict a tenant who is entitled by the Fair Housing Acts to be excused from the lease requirement that underlies the eviction case. It would have no effect on a landlord who wishes to evict a tenant who does not establish to the landlord's, or, if necessary, a court's, satisfaction that he is entitled under the Fair Housing Acts to be excused from the lease requirement in issue.

2. Justice of the Peace Court's Rationale for Denying Kravis's Reasonable Accommodation Request Contravened the Fair Housing Acts

Justice of the Peace Court indicated that the outcome of the case might have been different "[h]ad grandson and girlfriend applied in a timely manner. A018. Kravis's opening brief addressed this by explaining why Kravis's reasonable

accommodation request had to be considered by the trial court notwithstanding its view that the applications for occupancy were not timely under the Landlord Tenant Code. A request for reasonable accommodation must be considered whenever it is made, as long as the request is made before actual possession is lost, *see* OB 20-21, because "[a] discriminatory denial under the FHAA can occur at any time during the entire period before a tenant is actually evicted*." Hirsch v. Hargett*, 2019 WL 2613453, at *5 (C.D. Cal. June 26, 2019).

McNicol makes two responses to this point. First, it asserts Kravis has no authority for his position. AB 17. To the contrary, Kravis cited five federal cases and one state supreme court case showing that the Fair Housing Acts require consideration of a request for reasonable accommodation if the request is made before an actual loss of possession.[4] *See* OB 20-21. Affording a tenant the right to request a reasonable accommodation for as long as he is in a dwelling is in accord with the strong federal policy of facilitating the ability of tenants to make reasonable accommodation requests. A joint statement of HUD and the United States Department of Justice, entitled Reasonable Accommodations Under the Fair Housing Act (May 17, 2004), quoted in *Bos. Hous. Auth.*, *supra*, 898 N.E.2d 848, 859 (Mass. 2009), provides that a disabled resident or an applicant for housing

[4] The state supreme court decision, *Bos Hous. Auth. v. Bridgewaters,* 898 N.E.2d 848 (Mass. 2009) is pertinent here because it was applying the federal Fair Housing Act.

"makes a reasonable accommodation request whenever she makes clear to the housing provider that she is requesting an exception, change, or adjustment to a rule, policy, practice, or service because of her disability.... An individual making a reasonable accommodation request does not need to mention the Act or use the words 'reasonable accommodation.'"

Second, McNicol asserts that Justice of the Peace Court had discretion to reject the reasonable accommodation request as untimely even if it was made during the statutory window for reasonable accommodation requests. AB 18. McNicol offers no citation of law to support this claim. That is not surprising since if the legislature provides a right, one would not expect the courts to change it.

As noted, the fair housing statutes themselves and the cases interpreting them hold that a person with a disability may raise a request for reasonable accommodation until an actual eviction occurs. OB 20-21.

Furthermore, in *Bridgewaters*, the Massachusetts Supreme Court stated that a person with a disability can effectively ask for a reasonable accommodation "by apprising the judge [in an eviction proceeding] of his need for an accommodation." *Bridgewaters,* 898 N.E.2d at 859. In that case, the tenant effectively asked the judge for the accommodation by "opposing his eviction, asking to remain in his apartment, and stating that he was being successfully treated for his disabilities . . . [and he] indicated that the relief he sought was that the [landlord] depart from its

policy of evicting tenants for engaging in a violent act, and reinstate his tenancy." *Id.*

Recognizing that Kravis made a reasonable accommodation request on January 3, 2022 so that Losonczy and Jacobs could reside in his home in order to care for him, McNicol refers a AB 3-4 to a letter it sent on February 4 that said the request was not ripe for decision by it because Kravis had not yet returned to his home and told him the request would be held open until he returned to the community and the court had rendered its decision. The assertion that Kravis hadn't returned to his home is inconsistent with the *De Novo* Order, which states that Kravis "returned home[] January 3 or January 4, 2022." A018. If that were true, it would negate the basis for McNicol's contention that the accommodation request was not ripe for decision by McNicol. But Kravis's counsel wrote in a filing relating to the discovery and subpoena dispute that Kravis was discharged from a nursing home on February 7, 2022, so counsel does not rely on the January 3 date in responding to McNicol's argument.

There are other reasons to reject McNicol's assertion that the reasonable accommodation request was not ripe for decision by it at the time of the February 4 letter. McNicol cites no authority to support its Catch-22, that a landlord need not consider a request for reasonable accommodation that would enable a person with a disability to have live-in assistance when he returns back to his home from a care

facility until the tenant is already back in the home needing live-in assistance and a court has decided if he should be evicted because he did not obtain permission for the live-in care. More important, whether Kravis returned to his home on January 3 or 4 or on February 7, at the time of the *de novo* trial he was back in his home, with his live-in caregivers, so his need for the accommodation was unquestionably ripe when Justice of the Peace Court made its decision.

McNicol asserts that Kravis "relies on a blanket, and patently false, presumption that upon a reasonable accommodation [request, sic] being made, the landlord is *required* under state and federal law to provide that accommodation." AB 10 (emphasis in original). Of course, Kravis does not rely on a proposition of law that is so incorrect, and the very next sentence of McNicol's brief, which quotes a sentence from Kravis's brief, shows that is not Kravis's position. The sentence McNicol quotes from Kravis's brief says "'Where a landlord is violating the Fair Housing Acts by proceeding with an eviction complaint instead of granting the accommodation, the Justice of the Peace Court would be committing legal error by entering a judgment for possession.'" *Id.*, quoting OB 13. The determinative issue on Kravis's defense to McNicol's case was whether McNicol was required by the Fair Housing Acts to provide him with an exemption from the requirement that tenants not permit persons unapproved by McNicol from living

with them. The trial court's primary error of law was not recognizing that it had to measure McNicol's conduct against the statutes.

B. Superior Court Erred by Failing to Reverse the Justice of the Peace Court Decision Because that Court Did Not Evaluate Kravis's Defense in Accordance with the Fair Housing Acts' Requirements.

Stating at AB12 that Superior "Court properly held that it was limited to merely reviewing the record for 'fundamental errors,'" McNicol asserts that by failing to present a fundamental error, Kravis asked Superior Court to do more than it may do on *certiorari* review. To the contrary, the errors presented to Superior Court included Justice of the Peace Court's failure, shown by the *De Novo* Order, to apply the Fair Housing Acts to Kravis's reasonable accommodation defense. Justice of the Peace Court's failure to apply statutes the parties agree are applicable, *see* 1-2 *supra,* is a classic example of a fundamental error of law that may be considered on *certiorari* review. *See Maddrey v. Justice of the Peace Court 13,* 956 A2d 1204, 1214 (Del. 2005)(recognizing that relief is available under *certiorari* when there is a statement on the face of the record showing the court did not apply the correct burden of proof). Analogously, in the case *sub judice* the face of the record shows that Justice of the Peace Court applied the wrong substantive law.

Determining from the record – most importantly in this instance the *De Novo* Order – whether the trial court erred by failing to apply the Fair Housing

Acts was indisputably within Superior Court's *certiorari* jurisdiction. Superior Court was not asked to "weigh evidence and review the JP Court's factual findings," as McNicol contends at AB12. Kravis asked it to rule that his "request for reasonable accommodation was relevant to his defense" and that the Justice of the Peace Court decision "be reversed and the case remanded to the trial court so it can decide – on the basis, *inter alia*, of the information it said was irrelevant – whether the accommodation Kravis requested was a reasonable accommodation under the fair housing statutes." Appellant's Opening Brief in Support of the Petition for Writ of Certiorari, p. 13 (A076).

As detailed at OB 13-14 Superior Court's memorandum opinion shows that the only statute it considered when dismissing the Petition for Writ of Certiorari was the Landlord Tenant Code. McNicol disputes this at AB 15, stating "the Court balanced all relevant laws, rules and statutes with prior Supreme Court jurisprudence." McNicol cites nothing to support this assertion. There is nothing it can cite because Superior Court's entire discussion of its reasons for concluding that McNicol was entitled to prevail in the summary possession action, does not cite or even mention any law other than the Landlord Tenant Code. Mem. Op. ¶ 12. The Fair Housing Acts are relevant, and Superior Court erred when it considered only the Landlord Tennant Code. Mem. Op. ¶ 12.

C. Justice of the Peace Court Committed Legal Error when it Denied the Discovery Requests and Subpoena Because it Considered the Tardiness of Losonczy and Jacobs Made Facts Relating to the Reasonable Accommodation Defense Irrelevant

Kravis's discovery requests and trial subpoena sought information pertaining to McNicol's standards for permitting occupancy, its reasons for denying Losonczy and Jacobs' applications, and documents upon which the decisions to deny the applications were purportedly based. *See* OB 24 n. 6; A037. Kravis sought the information and documents because, if there were standards, reasons, and documents underlying McNicol's decision to deny the applications, they would be relevant under the Fair Housing Acts to arguments McNicol might advance in opposition to Kravis's claim of entitlement to the accommodation. *See supra* at 12; A033-038. Justice of the Peace Court ruled that the information was not relevant because of the timing of the applications. A017. McNicol argues at AB 18 Justice of the Peace Court was entitled to deny the reasonable accommodation request as tardy, even though it was filed during the statutory window. AB 18. That was error because, as discussed *supra* at 7 and at OB 20-21, the request for a reasonable accommodation had to be considered since it was filed during the statutory window.

D. Superior Court by Failing to Review Justice of the Peace Court's Discovery and Subpoena Decisions that were Shown on the Face of the Record to Be the Result of Legal Error

Superior Court declined to review the Justice of the Peace Court rulings on the discovery request and the trial subpoena because it did not view them as a proper subject for *certiorari* review. *See* Mem. Op. ¶ 14. McNicol asserts at AB 17-18 that Superior Court was correct because it would have had to review and weigh evidence in order to decide whether Justice of the Peace Court had erred.

That is not correct. The record does not show that there is or has ever been a dispute before Justice of the Peace Court or Superior Court, over when the Losonczy and Jacobs applied for permission to reside in Kravis's home or when Kravis requested a reasonable accommodation. Kravis has not argued that the time of the applications was not what McNicol says they are at AB 3, so there was never a need for Superior Court to review and weigh evidence as to those facts. On the discovery and subpoena issue, Superior Court was only called on to decide whether the trial court committed legal error when it relied on the timing of the applications as its basis for finding the information sought by the discovery and subpoena to be irrelevant. Appellant's Opening Brief in Support of the Petition for Writ of *Certiorari*, p. 18 (A081).

CONCLUSION

For the reasons stated above and in his opening brief, Petitioner below - Appellant Kravis requests this Honorable Court to rule that a tenant who establishes that he is entitled under the Fair Housing Acts to a reasonable accommodation excusing him from a lease requirement may not be evicted on the basis of that violation, and to reverse the decisions below and remand this matter to Justice of the Peace Court with the direction that the discovery already requested be produced, that a new trial be held so that he will be able to obtain and present the evidence relevant to his reasonable accommodation defense, that Justice of the Peace Court will decide the case under the proper legal standard, and future tenants with disabilities who come before Justice of the Peace Court in eviction cases will have the correct law applied to their cases.

Respectfully submitted,

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