IN THE COURT OF APPEALS
OF THE DISTRICT OF COLUMBIA

No. 21-CV-829

WILFRED WELSH,

Appellant

v.

BEVERLY MCNEIL, *et al.*,

Appellee

Appeal from Orders of
The Superior Court of the District of Columbia Civil Division
Case No. 2014 CA 429 B
Order dated October 16, 2019
The Honorable John Campbell
Orders dated November 1, 2021 and February 16, 2022
The Honorable Jason Park

BRIEF OF APPELLEE

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DATED: March 28,2023

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Appellees: Beverly McNeil and Alvin Elliott

Trial Counsel for Appellants: Steven G. Polin

Appellate counsel: Steven G. Polin

Appellant: Wilfred Welsh

Trial Counsel for Appellee: Michael C. Forster

Appellate Counsel: Michael C. Forster

There are no intervenors nor *amici curiae* in this matter.

I. ISSUES PRESENTED

1. Whether the Trial Court correctly granted summary judgment on Appellant's claims that the the lease entered into by Appellee did not violate the Rules and By-Law of the Chaplin Woods Homeowner's Association.

2. Whether the Jury Instruction given in the trial of Appellee's counterclaim on "Reasonable Accommodation" was a correct statement of the law.

3. Whether the jury award of damages to the Appellee in the amount of $15,000 was reasonable.

4. Whether the Appellant's appeal of the award of attorney's fees to Appellee's counsel as prevailing party is reasonable.[1]

II. HISTORY OF THE LITIGATION

These cases began in 2014. This is an appeal from the grant of summary judgment of Appellant's claim that the Appellee violated that Chaplin Woods Homeowners' By Laws, and the judgment entered by the Trial Court from the jury verdict in favor Appellee's counter claim. A jury found that Appellant had violated the reasonable accommodation provision of both the federal Fair Housing Act, 42 U.S.C. 3604(f)(3)(B) and the District of Columbia Human Rights Act, D.C. Code § 2-1402.21(d)(3)(B). In addition, the Appellant is appealing the award of attorneys' fees to Appellee's counsel as the prevailing party on the Fair Housing and D.C. Human Rights Act violation.

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[1]Appellant filed an Appendix which does not comply with the requirements of D.C. Ct. App. Rule 30(a) and (c). The Appendix does not contain a table of contents. Appellant's counsel was not consulted in the preparation or submission of the Appendix. The Appendix will be referred to as "App." Appellee will submit a supplemental appendix to include material required by the Rule.

The genesis of this case begins in 2009, when Beverly McNeil and her husband, Alvin Elliot rented their townhouse located in the Chaplin Woods Homeowner's Association ("HOA") to a group of recovering alcoholics and substance abuser known as "Oxford House-Texas Avenue." The lease was for a period of two (2) years. The HOA's By Laws require all property owners to submit leases to its Board of Directors for approval. Leases submitted to the Board in 2009 and 2011 were either not acted upon or rejected, but no formal action was taken by Board. In 2013, a third lease was submitted. This is the only lease that is germane to the issues of the Appellant's claim. In approximately June, 2013, the McNeils were informed by Mr. Welsh in his capacity as Acting Secretary of the Board of Directors that the Board would commence legal action because of their non compliance with the By-Laws on the lease issue. The McNeils responded, through their attorney, by requesting a reasonable accommodation pursuant to the federal Fair Housing Act, 42 U.S.C. §3604(f)(3)(B), that the By-Laws be waived or modified concerning the form of the lease to accommodate Oxford House-Texas Avenue. The reasonable accommodation was not addressed or responded to by the HOA's Board. Eventually, Mr. Welsh, ostensibly at the direction of the Board, referred the matter to legal counsel. In his referral to legal counsel, Mr. Welsh, however, intentionally, omitted the fact that the McNeils had requested a reasonable accommodation. The HOA'S legal counsel first learned of the Fair Housing Act implications, when contacted by counsel for the McNeils in response to the "Cease and Desist" he sent concerning the By-Laws violations. The HOA's legal counsel subsequently issued an opinion letter to the HOA opining that to refuse the accommodation request would subject it legal liability under the Fair Housing Act. After receipt of the opinion letter, and without the blessing of the Board of Directors, Mr. Welsh commenced his

lawsuit. A few months later, the Board approved the lease and informed Ms. McNeil in a letter signed by the President of the Board of Directors.

The Counterclaim filed by Appellants allege that Wilfred Welsh, the Appellee violated the federal Fair Housing Act, 42 U.S.C. §3601, et. seq ("FHA") and the District of Columbia Human Rights Act, D.C. Code § 2-1402.21 et. seq (DCHRA") by failing to present their reasonable accommodation to the Board of Directors and ultimately the HOA's attorney in a timely manner. In other words, it was alleged that he intentionally delayed and interfered with the reasonable accommodation request from being acted upon. The Appellees also alleged that he retaliated against them by not only filing his lawsuit against legal advice, but continuing with it after the Board approved the lease.

Both parties moved for summary judgement. The trial court granted both motions and dismissed both action finding that neither party had standing to bring their respective actions. Both parties appealed the order to the District of Columbia Court of Appeals. In *Welsh v. McNeil*, 162 A.3d 135 (D.C. 2017), this Court reversed the grant of summary judgment in both actions, finding both parties had standing to bring their claims, and remanded it to the trial court for further proceedings consistent with the remand order.

The parties again filed cross motions for summary judgement in 2018. In an order dated October 19, 2019, the Court granted the Appellee's motion for summary judgment, and denied Appellant's motion on Fair Housing Act claims. A jury trial was held on Appellee's housing discrimination claims in October, 2021. The jury found Mr. Welsh liable for violating the reasonable accommodation provision of both the federal Fair Housing Act, and the D.C. Humans Rights Act. It found him not liable for retaliation. The jury awarded Ms. McNeil $15,000 in

damages. The Court partially granted Appellee's counsel attorneys' fees petition by awarding $87,640.00. The Court also awarded Ms. McNeil $2,538.50 in court costs.

III. COUNTERSTATEMENT OF THE GRANT OF SUMMARY JUDGMENT

`This case is an unfortunate saga of one lone member of the Chaplin Woods Homeowner's Association ("HOA"), Wilfred Welsh, the Appellee, to enforce its By-Laws. Unfortunately for Mr. Welsh, he did not have the support of the HOA in his quest. As his misguided quest proceeded, he ran afoul of the federal Fair Housing Act, 42 U.S.C. §3601, et. seq ("FHA") and the District of Columbia Human Rights Act, D.C. Code § 2-1402.21et. seq (DCHRA"). The HOA did not support his lawsuit because its legal counsel advised it that to refuse to accommodate the Appellants on the form of the lease would subject the it to legal liability under the Fair Housing Act.

The Appellees own a townhouse located at 4808 Texas Avenue, NE in the Chaplin Woods Homeowners Association. The owners of all houses in Chaplin Woods are governed by the HOA By-Laws. There is but one By-Law that is at issue: Section IX, Section 7 (App-25) which requires that all leases be approved by the HOA Board of Directors. The By-Laws forbid the subleasing of the townhouses.

The Appellees were introduced to the Oxford House concept in 2009. Oxford House is a concept whereby groups of recovering alcoholics and substance abusers live as the "functional equivalent" of a family under the Oxford House concept. All Oxford Houses are required to follow three rules: each chartered Oxford House must (1) be financially self-supported, (2) be democratically run, and (3) immediately expel anyone who relapses into drug and/or alcohol use. The leasing of a single family dwelling by an Oxford House means that an unincorporated association is the lessee. The lessee of 4808 Texas Avenue is Oxford House-Texas Avenue. Oxford

House-Texas Avenue has its own checking account and FEIN number. The residents of Oxford House-Texas Avenue make all the decisions concerning the operations of the house, including the voting in of new members, and enforcing rules such as payment of rent and expelling any resident who resumes the use of drugs and alcohol (App-328)

Germane to the grant of summary judgment is the 2013 lease. The issue of total compliance with Section IX, Section 7 of the By-Laws was an ongoing issue between the parties since 2009, when the Appellants decided to lease 4808 Texas Avenue NE to Oxford House-Texas Avenue, however the Board took no action on the 2009 and 2011 leases.

In May, 2013, Jill Durham, President of the Board of Directors advised Ms. McNeil that she had to submit a lease that complied with Article IX, Section 7. (App-59)

Ms. McNeil contacted Oxford House for help. Counsel for Oxford House wrote Ms. Durham a letter in June, 2013 to not only explain the Oxford House concept but to request a reasonable accommodation pursuant to the FHA, 42 U.S.C.§3604(f)(3)(B) by requesting that strict requirements of Article IX, Section 7 be modified or waived so that the Oxford House residents can reside in the dwelling of their choice. (App-62)

Mr. Welsh responded the same day and advised Counsel that he would present it the Board. Neither Ms. Durham nor the Board responded to the reasonable accommodation request.

On or about August 2, 2013, Ms. McNeil submitted the lease renew to the HOA for approaval. Mr. Welsh responded that the lease did not conform to the HOA By-Law, and Ms. McNeil followed up with an email requesting an explanation of the shortcomings of the lease. (App-53-580. Mr. Welsh did not respond to the request for clarification of the deficiencies of the submitted lease.

Instead, on or about August, 2013, Mr. Welsh directed the HOA's legal counsel to initiate legal action against the Appellants. (App-58). September 16, 2013, a "cease and desist" letter was sent to the defendant by the HOA's legal counsel which advised them to stop violating Article IX, Section 7 of the by-laws. (App-519). The “cease and desist letter” did not respond to June, 2013 reasonable accommodation request.

In a letter dated September 29, 2013, counsel for the Appellants' responded to the "cease and desist" letter by attaching a copy of the June, 2013 reasonable accommodation request.(App-369) Counsel for the HOA responded in part by stating that he was not aware of the request. (App-370).

On January 9, 2014, two weeks prior to the filing of this lawsuit by Mr. Welsh, the HOA's legal counsel issued an opinion letter that the lease in form submitted by the McNeils as Oxford House-Texas Avenue complied with the requirements of the By-Laws as a reasonable accommodation. (App-379).

Mr. Welsh then filed his lawsuit against Ms. McNeil and Mr. Elliott wherein he alleged that the Oxford House lease violated the HOA’s By-Laws. The Appellee’s file an answer and counterclaim, alleging that Mr. Welsh violated the federal Fair Housing Act and the D.C. Human Rights Act.

After the filing of the lawsuit, the HOA’s Board of Directors met in March, 2014 to consider the new Oxford House lease. Four of the five Board members were present, thereby constituting a quorum as term is defined in the Article III, Section 9 of the By Laws which states:

> **QUORUM OF BOARD OF DIRECTORS**. At all meetings of the Board of Directors, a majority of the Directors then in office shall constitute a quorum for the transaction of business, and the vote of a majority of the Directors present at a

meeting at which a quorum is present shall constitute the decision of the Board of Directors. (App-11).

On or about April 28, 2014, Sylvester Garvin, President of the HOA's Board of Directors, sent a letter on HOA letterhead, advising Ms. McNeil that the Oxford House lease submitted in 2013 had been approved.(App-37)

IV. SUMMARY JUDGMENT GRANTED ON APPELLANT'S CLAIMS

In 2014, Mr. Welsh filed a two count complaint alleging that the Appellee's Oxford House lease violated the HOA's By Laws. He sought injunctive and declaratory relief concerning his interpretation of the HOA's By Laws concerning the form of the lease. He also sought damages on a breach of contract theory that damages accrued in the form of fines that could be assessed due to the Appellee's continued violation of the By Laws. After remand from the DCCA, the Trial Court ordered another round of summary judgment motions from the parties. The trial court granted Appellees' motion, which resulted in dismissal of Mr. Welsh's claims

The Trial Court began its analysis with Mr. Welsh's claims for damages. Appellant alleged that the HOA was entitled to recover daily fines pursuant to its fine schedule for the lease violations. The Trial Court correctly pointed out that Appellant's parking fine argument was conclusory and failed to be supported by **any** evidence as required by D.C. SCR-56 (a) and (c).

The Trial Court rejected the Appellant's claim that the vote of the Board was illegal or not binding. According to the approval letter and minutes, four (4) out of the five (5) members were present for the vote on the lease. Mr. Welsh "excused" himself based on his lawsuit against the Appellant. The vote was 2-1 in favor of approving the lease. Mr. Welsh, argued, unsuccessfully that his non participation was an abstention as opposed to an "excusal" or "recusal." The Trial Court

correctly found that he had a conflict of interest because of his lawsuit against Ms. McNeil and that the "excusal' was proper under the circumstances. Relying on Judge Glickman's analysis that the Board's president notification to Ms. McNeil was an official act of the Board, and as a result Mr. Welsh no longer had any rights to enforce the By-Laws because the Board had acted resulting in a grant of a summary judgment to the Appellees. (App-87)

The Trial Court found that summary judgment was proper as a matter of law in that Appellant failed to produce any evidence as required by SCR-Rule 56 to support his claims.

V. ARGUMENT

A. STANDARD OF REVIEW AND APPLICABLE LAW

"Summary judgment is appropriate only when there are no material facts in issue and when it is clear that the moving party is entitled to judgment as a matter of law." *CB Richard Ellis Real Estate Servs., Inc. v. Spitz*, 950 A.2d 704, 710 (D.C. 2008) (internal quotation marks and citations omitted). "Although we must view the record in the light most favorable to the non-moving party, . . . mere conclusory allegations are insufficient to avoid entry of summary judgment." Id., at 710-11. In fact, the "mere existence of a scintilla of evidence . . . will be insufficient; there must be evidence on which the jury could reasonably find for the [non-moving party]." *Carmelita Jones v. Nat'l R.R. Passenger Corp*., 942 A.2d 1103, 1106 (D.C. 2008) (internal quotation marks and citations omitted). "Whether summary judgment was properly granted is a question of law, and our review is therefore de novo." *CB Richard Ellis Real Estate Servs*., at 710 (internal citations omitted). *Jones v. Thompson*, 953 A.2d 1121, 1124 (D.C. 2008).

B. APPELLANT FAILED TO COMPLY WITH RULE 56 REQUIREMENTS

The requirements to obtain a grant of summary judgment or to defeat such a motion are the same and are set out in SCR-Rule 56(c). In order to obtain summary judgment the moving party must show that there are no material facts in dispute, and that as a matter of law judgment must be granted. Likewise, to defeat a motion for summary judgment, the non moving party must show that there exists material facts in dispute. SCR-Rule 56 (c) requires the following:

> (c) Procedures.
>
> (1) Supporting factual positions. A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:
>
> > (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or
> >
> > (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.D.C. SCR-Civil Rule 56.

Mere conclusory allegations on the part of the non-moving party are insufficient to stave off the entry of summary judgment. *Graff v. Malawer*, 592 A.2d 1038, 1040 (D.C. 1991). *Musa v. Cont' Ins. Co.*, 644 A.2d 999, 1002 (D.C. 1994); *Teru Chang v. Inst. for Pub.-Private P'ships, Inc*., 846 A.2d 318, 323-24 (D.C. 2004); *Hamilton v. Howard Univ*., 960 A.2d 308, 318 (D.C. 2008).

Appellant's opposition to the motion for summary judgment as well as his cross motion for summary judgment completely fails to meet the Rule 56(c) requirements. He presented no evidence, other than his interpretation of the By-Laws to support his Rule 56 burden. He does not include in his motions or opposition, any affidavits, declarations, deposition statements, interrogatories or electronically stored information, that he is either entitled to damages or that the decision of the Board is non binding.

He offers no resolutions of the Board to support his interpretation possible imposition of parking fines is in fact damages to himself, much less the HOA. He offers no more than conclusory allegations that such material facts exists. This argument was addressed by Judge Glickman in *Welsh v. McNeil, 162 A.3d 135, 148 (D.C. 2017): "*At oral argument in this appeal, the court inquired as to what monetary damages Welsh hoped to recover. His counsel responded that Welsh seeks to be compensated for his attorney's fees and costs (including the value of his own time) incurred in prosecuting this litigation against the McNeils. Welsh contends that his expectation of being awarded attorney's fees and costs pursuant to the Bylaws if he prevails on his claim against the McNeils suffices by itself to support his standing to pursue the litigation. But that is not so. "[A] party's interest in pursuing litigation in order to be awarded attorney's fees [and costs] cannot by itself create the requisite live controversy 'where none exists on the merits of the underlying claim.'" (footnote omitted). His claim fails, as the Trial Court, correctly pointed out, because the Board did not levy any fines against the McNeils for the lease violations and Welsh presented no evidence that it did so. (App at 86). Thus, the Trial Court properly granted summary judgment on this issue.

The Trial Court correctly granted summary judgment for his failure to comply with Rule 56.

The same is true of his argument that the decision of the Board to approve the 2013 lease is illegal. He eschews the analysis provided by Judge Glickman in *Welsh* at 149-50: " In the present case, even if the President was mistaken about the meaning and validity of the Board's March 27 vote (a matter on which we do not opine), he acted in his official capacity and within the ordinary scope of his duties under the Bylaws as the chief executive officer and presiding Director of the Association in communicating with the McNeils about the Board's decision regarding their lease.[footnote omitted] If the President did not have actual authority to declare the McNeils' lease approved, he had apparent authority to do so based on his official position, the surrounding circumstances, and the Bylaws." Mr. Welsh presents no evidence that the President acted without real or apparent authority. Rather, he makes conclusory allegations concerning the validity of the vote. Further, he offers no legal authority for his position. As such, the Trial Court correctly granted the McNeil summary judgment motion

For the reasons stated above, it is requested that the Court affirm the grant of summary judgment to the Appellees.

VI. APPEAL FROM THE JURY VERDICT

It appears that Appellant is raising two claim that the jury verdict find that he violated the FHA and DCHRA's reasonable accommodation provision is sufficiency of the evidence, and the jury instruction on reasonable accommodation is incorrect as a matter of law.

The Appellant failed to preserve the sufficiency of the evidence of the claim by his failure to make a D.C SCR Rule 50 motion during the trial, however, it is not clear from his brief as to whether he is actually challenging the sufficiency of the evidence.

The reasonable accommodation jury instruction is supported by the analysis found in DCCA opinion from the appeal earlier in this case, *Welsh v. McNeil*, 162 A.3d 135, 156 (D.C. 2017).

The Appellant also appeals from the jury award of damages to the Appellee as unreasonable. Finally, Appellant challenges the award of attorneys fee as excessive, but this challenge must fail since he did not appeal the order awarding attorneys fees.

VII. STATEMENT OF THE CASE - JURY TRIAL

Whit Holden, an original founder of Oxford House and Oxford House, Inc. representative testified concerning the Oxford House concept. Evidence was presented that Oxford House-Texas Avenue is a residence for recovering alcoholics and substance abusers that operate under the principles of Oxford House, Inc. Each house must be democratically run, financially self supported, and expels any resident that relapses.(App-327). All leases are required to be in the name of the individual Oxford House. (App-329). Leases signed in an individual residents name are not accepted. There are no individual leases in an Oxford House. (App-330). Each resident pays her equal share of expenses into the house bank account which is the name of the house. The rent, utilities, and other common household expenses are paid from this bank account. The money is managed by five (5) elected house officers. (App-331).

The policy reason for the lease being in the name of the individual Oxford House as opposed to an individual is to insure that there are "no bosses" running an Oxford House. (App-338). This insures the democratic process.

Jason Fisher, former Chaplin Woods HOA attorney testified concerning the reasonable accommodation request made by Ms. McNeil. In 2013, he was approached by Mr. Welsh concerning enforcement of the HOA By-Laws against a homeowner, which turned out to be Ms.

McNeil. (App-365). On or about September 16, 2013 he wrote a "cease and desist" letter to Ms. McNeil. He does not recall Mr. Welsh providing him with a copy of the lease or any other material related to the use of the McNeil House by Oxford House-Texas Avenue. The letter referenced a violation of the By-Laws which prohibits subleasing. (App-367). In response to the "Cease and Desist" he received a letter from counsel for Ms. McNeil forwarding him the a reasonable accommodation request made to the HOA in June, 2013. This was the first time Mr. Fisher had seen the reasonable accommodation request. (App-369). He was not aware of the June, 2013 reasonable accommodation request prior to receiving the September 16, 2013 letter from counsel. Mr. Welsh did not forward the June, 2013 reasonable accommodation request to him. (App-376). After receiving the correspondence from Ms. McNeil's attorney, Mr. Fisher contacted the HOA to discuss the reasonable accommodation request.

Part of his duties as counsel to the HOA is to advise it of the implications of receiving such a reasonable accommodation and how to properly respond to it. (App-377). Mr. Fisher wrote an opinion letter dated January 9, 2014 to the HOA's Board of Directors, wherein he opined that the McNeil reasonable accommodation request should be granted. (App-379).

Former Oxford House-Texas Avenue resident, Brenda Washington, testified. She signed the lease on behalf of Oxford House-Texas Avenue. Ms. Washington is a recovering addict and resided at Oxford House-Texas Avenue from 2008-2018. She also testified that all the residents of Oxford House-Texas Avenue are recovering alcoholics and substance abusers.(App-394). She moved into Oxford House because it was a safe play to stay because all of the residents were sober and because of the Oxford House rules. (App-398). Ms. Washington signed the 2013 lease on behalf of Oxford House-Texas Avenue, as well as the addendum to the lease. (App-403-404). She would not sign

the lease in her own name if she was asked. (App-404). She stated that having the lease in the name of an individual house member would create problems such as that person relapses and refuses to leave. (App-405). She testified that no one is in charge at the Oxford House because it is democratically run. (App-406). She testified that the recovery process works better this way because the house runs democratically because no one person can run the house. She stated that there are no individual leases. (App-408).

Ms. McNeil testified. She stated that she owns the proprety located at 4808 Texas Avenue, SE in the Chaplin Woods HOA. (App-437). She is familiar with Oxford House and decided to rent the house as an Oxford House in 2009 (App-438), due to a family emergency. She agreed to lease the house to the entity known as Oxford House-Texas Avenue after learning about the Oxford House concept and the reasons for the lease being in the name of the house. (App-440).

She turned in the 2009 initial lease to the HOA after being contacted by Mr. Welsh. The tardiness was due to the family emergency. (App- 443). When she was advised that the 2009 lease was not compliant with the By-Laws, she made several requests for help in making the lease compliant. (App-448). Mr. Welsh and other members of the Board refused to help her in getting the lease in compliance with By-Law. The process became contentious and derogatory statements were made to Ms. McNeil. (App-452).

She submitted a second lease in 2011. (App-454). The 2011 lease had all of the HOA required addendums including parking, and the tenants to be held jointly and severally liable. (App-458-59). This was agreed to by Brenda Washington signing on behalf of Oxford House-Texas Avenue. (App-459). There were several exchanges of email correspondence with Mr. Welsh concerning the 2011 lease. He advised Ms. McNeil that it did not comport to the By-Laws and that

he would turn the matter over legal counsel.(App-463). She never received a resolution from the HOA disapproving the 2009 lease. (App-464). She stated that the tone of the emails received from Mr. Welsh, and the lease approval process from 2009 overwhelmed her. (App-467). Mr. Welsh wanted the names of all Oxford House residents. This was originally done in 2009, but in 2011 she gave him the name of a contact person. (App-468). The 2011 lease was not submitted on a timely basis. Notwithstanding his threats to turn the lease matter over to the HOA's counsel for legal action, Mr. Welsh did not do so. The only correspondence Ms. McNeil had with anyone concerning the lease was Mr. Welsh. (App-469). Mr. Welsh did not submit the lease to the Board for approval because he felt it was non complaint. He did not believe the lease could be signed on behalf of Oxford House-Texas Avenue or that the Oxford House operated as a family. (App-475-76). The Board did not pass a resolution denying approval of the 2011 lease (App-494).

In May, 2013, Ms. McNeil received a letter from HOA Board of Directors threatening legal action if she did not submit a lease that complied with the By-Laws. (App-499). After receipt of the letter, she contacted Oxford House, Inc., who referred her to Steven Polin, counsel for Oxford House, Inc. He wrote a letter dated June 13, 2013 to Jill Durham, President of the Board of Directors, explaining the Oxford House concept and requesting a reasonable accommodation on behalf of Ms. McNeil, the Oxford House-Texas Avenue residents, and Oxford House, Inc. pursuant to the federal Fair Housing Act to waive or modify the applicable By-Law provision so that the lease would be in compliance. (App-500). The request was to waive Section 7,i, ii and iii of the By Laws. The Board of Directors never responded to the request. Mr. Welsh, however, did respond to letter on the same date it was received and advised that the Board could not respond because it was not fully constituted. He also stated that he was confident that the HOA could go to court and obtain *ex*

parte order restraining Ms. McNeil. In discussing the request to waive the By-Law provisions, Mr. Welsh stated: " A waiver for one homeowner in my opinion prejudices that one homeowner over the the others, which in my view violates the equal principle of the very covenant signed by all.' (App-504).

Ms. McNeil submitted the 2013 lease to the HOA in July, 2013, together with all the required addendums. Approximately a month letter she followed up with a letter stating that she had previously submitted the lease and that she had not received a response. According to the By-Law the lease is approved if no response is received in 15 days. Mr. Welsh wrote to her on August 23, 2013, advising here that the lease did not comply with the By-Laws and that the matter was being turned over to legal counsel. (App-515). The letter made her feel that she was in jeopardy of losing her house.(App-518).

Approximately two weeks later, Ms. McNeil recieved a 'Cease and Desist" letter from the HOA's attorney for alleged violations of Section 7, ii and iii, which is the subsection addressing subleasing. (App-519). The "Cease and Desist" letter made her feel like she was losing her house. The letter did not address the reasonable accommodation request. (App-520). The lease was ultimately approved by the HOA on March, 2027 (App-522).

Mr. Welsh sued her in January, 2014 for violations of the By-Law related to the Oxford House-Texas Avenue lease. The lawsuit made her feel that her financial well being was being placed in jeopardy. It made her feel afraid. (App-524).

She testified that since 2009 she has been trying to get the Oxford House-Texas Avenue leases approved by the HOA. She stated that the entire process made her very anxious. She has spent money flying from Las Vegas where she resides to attend court ordered mediation. In terms

of damages, she had to take to take two (2) weeks off of work, incur airfare, lodging, and food expenses. She has easily spent $6,000 on out of pocket expenses. She stated that the emotion strain of the lawsuit, the fear of losing her home was overwhelming. (App-535). She works for the Salvation Army helping to find housing for Veterans with disabilities. (App-536). She has seen a therapist because of this lawsuit and other issues. (App-537).

Mr. Sylvester Garvin testified for the Plaintiff. He has lived in Chaplin Woods for 20 years. He's served on the Board of Directors four times. He knows both Ms. McNeil and Mr. Welsh. (App-621). He became a current Board member in September, 2013. He did not know that Mr. Welsh has referred the Oxford House lease issue to the HOA attorney. (App-622). He and Mr.Welsh met with Jason Fisher, the HOA attorney concerning the lease issue. Mr. Fisher subsequently sent the HOA a legal opinion that the reasonable accommodation request should be granted in January, 2014. (App 625-6). After receipt of the Fisher letter, Mr. Welsh subsequently filed a lawsuit against Ms. McNeil and her husband for HOA By-Law violations. He did not notify or seek HOA Board approval for the filing of the lawsuit. (App-627). After Appellant filed his lawsuit, the Board met concerning the Fisher opinion letter. The Board was concerned about liability under the federal Fair Housing Act. The Board did not want to take any action that would incur fair housing liability. (App-629).

The Board held a meeting to approve the lease in March, 2014. Four Board members were present. The vote was 2-1, with Mr. Welsh excusing himself because of the lawsuit against Ms. McNeil. (App-633).

Mr.Welsh acknowledged that he received the June 14, 2013 reasonable accommodation made on behalf of Ms. McNeil, Oxford House, Inc. and the Oxford House-Texas Avenue residents to

waive the requirements of Section 7, 1 2 and 3 of the By Law. He also admitted he responded to the letter the same day it was received. (App-1112). He admitted that he was responding in his official capacity as Assistant Secretary of the HOA. (App-1118). He admitted his response went beyond advising that he would bring it to the Board's attention; he also offered his personal opinion of the reasonable accommodation request. (App-1114). He admitted that at no time did Ms. McNeil represent to him that Oxford House, Inc. was leasing 4808 Texas Avenue, notwithstanding his previous statements. (App-1116).

He sent a letter to Ms. McNeil, a copy of which went to all HOA members, that the Oxford House lease issue was being referred to the HOA's legal counsel for appropriate action. (App-1126). He sent the lease to Jason Fisher, but did not send the reasonable accommodation letter. (App-1127). He and Mr. Garvin met with Jason Fisher in November, 2013 and discussed the reasonable accommodation request among other items. (App-1139). He received Mr. Fisher's opinion letter but disagreed with the legal opinion on granting the reasonable accommodation. (App-1141,1144). Mr. Welsh tried discharging Mr. Fisher the same day he sent the opinion letter to Board. (1147). Mr. Welsh did not have Board approval to terminate Mr. Fisher. (App-1149).

Appellant objected to the "Reasonable Accommodation" jury instruction. He claims it unfairly shifted the burden to Mr.Welsh. He complains that he cannot be held liable because he is only one Board member.

VIII. STANDARD OF REVIEW FOR JURY INSTRUCTION

A "party is entitled to a jury instruction upon the theory of the case if there is sufficient evidence to support it." *George Washington Univ. v. Waas*, 648 A.2d 178, 183 (D.C. 1994). In deciding whether a proposed instruction on a party's theory of the case was properly denied, the

record is reviewed in the light most favorable to that party. *Nelson v. McCreary*, 694 A.2d 897, 901 (D.C. 1997). A trial court has broad discretion in fashioning appropriate jury instructions, and its refusal to grant a request for a particular instruction is not a ground for reversal if the court's charge, "considered as a whole, fairly and accurately states the applicable law." *Psychiatric Inst. of Washington v. Allen, 509 A.2d 619, 625* (D.C. 1986). "The accuracy of a jury instruction presents a question of law that is reviewed *de novo*." *Brown v. United States*, 881 A.2d 586, 593 (D.C. 2005). Ultimately, "error in denying an instruction can be harmless" if we can conclude "with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error." *Dennis v. Jones*, 928 A.2d 672, 676 (D.C. 2007) (internal citations omitted). *Wash. Inv. Ptnrs. of Del., LLC v. Sec. House*, 28 A.3d 566, 577 (D.C. 2011).

A. THE REASONABLE ACCOMMODATION INSTRUCTION GIVEN BY THE COURT IS AN ACCURATE STATEMENT OF THE LAW

As recovering alcoholics and substance abusers, Oxford House-Texas Avenue and its residents are a protected class under the federal Fair Housing Act, 42 U.S.C. §3602(h) and the District of Columbia Human Rights Act, D.C. Code § 2-1402.21,et. seq. Appellant has not proffered any legal authority or facts that the “Reasonable Accommodation” instruction is not an accurate statement of the law. The instruction is based on the evidence presented at trial. It is also based on existing case law concerning the effects of delaying consideration of a reasonable accommodation request. *Groome Res., Ltd. v. Par. of Jefferson*, 234 F.3d 192, 199 (5th Cir. 2000) (This denial can be both actual or constructive, as an indeterminate delay has the same effect as an outright denial.

In the instant case, the district court was well within its discretion to decide that a reasonable accommodation was denied by the unjustified delay of the Parish officials.)

Therefore, a factual basis to add this language exists. The theory put forward by Appellee is that Mr. Welsh, though his position as Acting Secretary to the Board, used his authority to delay and impede prompt consideration of the reasonable accommodation request. In his brief, he overlooks his testimonial admissions and evidence from other witnesses that he acted to delay consideration of the reasonable accommodation request, and, further, that he disagreed with the legal analysis provided by the HOA's attorney that the Board should grant the accommodation. His argument is that the Board should have been a defendant and that he did not have the power to prevent the Board from considering the request is unavailing. The accommodation request was made in June, 2013. Due to Mr. Welsh's conduct in delaying or impeding consideration of the accommodation request, especially his actions in not forwarding to the HOA attorney when he requested legal action against the Appellee for failure to to submit a By-Law compliant lease in August, 2013. As a result of his delaying action, the lease was not addressed by the Board until March, 2014, nearly nine (9) months later, when it was granted. This is the scenario referenced in *Groome.*

The role of Mr. Welsh in delaying action on the reasonable accommodation request was addressed by Judge Glickman In *Welsh* at 156. He stated "Thus, even though Welsh may not have had the power, as a single member of the Board of Directors, to decide whether the Association would grant or deny the requested accommodation, the McNeils proffered evidence that Welsh had and exercised the power to prevent a timely review and determination of the request. "The failure to make a timely determination after meaningful review amounts to constructive denial of a

requested accommodation, 'as an indeterminate delay has the same effect as an outright denial.'" The fact that the Board eventually did consider the request and that the McNeils ultimately received the accommodation they sought does not mean Welsh cannot be found liable for the delay. "The Act is violated when a reasonable accommodation is first denied, regardless of remedial steps that may be taken later." That Welsh was only a single member of the Board of Directors does not mean he cannot be held individually liable if, in that capacity or otherwise, he personally committed or contributed to a violation of the Fair Housing Act or the Human Rights Act. Judge Glickman relied on *Groome Res. Ltd.*, 234 F.3d at *199 (5th Cir. 2000); Bhogaita v. Altamonte Heights Condo. Ass'n*, 765 F.3d 1277, 1286 (11th Cir. 2014)(The failure to make a timely determination after meaningful review amounts to constructive denial of a requested accommodation, "as an indeterminate delay has the same effect as an outright denial."). *Bryant Woods Inn v. Howard Cty*., 124 F.3d 597, 602 (4th Cir. 1997); *United States v. Town of Garner,* 720 F. Supp. 2d 721, 729 (E.D.N.C. 2010)(same.)

> The "Reasonable Accommodation" jury instruction states this proposition. "A person refuses to grant a reasonable accommodation request by denying a request he or she has the authority to grant, ***or by preventing the person or entity who has the power to grant a reasonable accommodation request from making a timely review and determination of such a request***. (Emphasis added).

The Appellant has not proffered any case law, analysis or evidence from the record that the inclusion of this part of the instruction was erroneous and prejudicial. While there is no perceived error in the instruction. If there was it was harmless. "[A]n error will be harmless, and will not be reversible, when the instructions the court actually gave adequately presented the defense theory and

properly informed the jury of the applicable legal principles involved, despite the erroneous omission." *Dennis v. Jones*, 928 A.2d 672, 678 (D.C. 2007).[2]

For the reason, the it is requested affirm the jury verdict.

IX. THE AWARD OF DAMAGES WAS REASONABLE

The jury awarded Ms. McNeil an award of $15,000 in damages. This is based on the actual out of pocket expenses she testified to in the amount of approximately $6,000 as well as the anxiety, stress and fear of losing her home as a result of the acts of the Appellant. The award is reasonable considering that this started in 2009, and litigation began in 2014, and trial finally being held in 2021. “Notwithstanding the jury's broad discretion in awarding damages, its award must be supported by "substantial evidence." *Doe v. Binker*, 492 A.2d 857, 860 (D.C. 1985). "While damages are not required to be proven with mathematical certainty, there must be some reasonable basis on which to estimate damages." *Romer v. District of Columbia,* 449 A.2d 1097, 1100 (D.C. 1982).

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[2]Appellant makes a brief and misleading argument that the trial court prevented him from presenting evidence that the children of the Oxford House-Texas Avenue residents were causing a direct threat to the safety of the HOA residents. Appellant does not provide a citation to the record for this assertion. He relies on 42 U.S.C. § 3604(f)(9): “Nothing in this subsection requires that a dwelling be made available to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others.” The standard for the introduction of such evidence is specific evidence that the tenancy would cause a direct threat to the health and safety of others. a dwelling need not be made available to an individual whose tenancy can be shown to constitute a direct threat and a significant risk of harm to the health or safety of others. *Roe v. Sugar River Mills Assocs*., 820 F. Supp. 636, 640 (D.N.H. 1993); see also, *Oxford House-Evergreen v. Plainfield*, 769 F. Supp. 1329, 1343 (D.N.J. 1991)"Generalized assumption, subjective fears, and speculation are insufficient to prove the requisite direct threat to others."

The Appellant offers no factual or legal argument that damages award was unreasonable. Appellant believes it should be reduced to $6,0000 but does not provide a legal basis for doing so. The jury had a basis for awarding damages in the amount of $15,000.

X. THE AWARD OF ATTORNEYS FEES WAS REASONABLE

Both the federal Fair Housing Act 42 U.S.C. §§ 3613(c)(2), and the D.C. Human Rights Act, D.C. Code § 2-1402.01 provide for the award of reasonable attorneys fees to the prevailing party.

Litigation in the matter was extended over a period of seven years. Litigation of this matter was time consuming and difficult, both because of the complexity and novelty of the legal issues and the extensive discovery involved. There were two rounds of cross motions for summary judgment. A trip fo the DCCA. Briefing and oral argument before the DCCA. Based on the history of the litigation, Counsel submitted a fee petition for all of his work on the housing discrimination claims from the onset of the litigation in the amount of at a discounted amount of $219,681.00. The Trial Court, however, in an exercise of discretion, reduced that amount to $87,640, reasoning that only the work committed to the case after the remand from the DCCA should be considered. This was reduced award was not appealed.

Appellant filed his notice of appeal from the judgment on the jury verdict and damages on November 29, 2021. Appellant did not appeal the judgment and order the attorneys fees petition entered on February 16, 2022, and as such has waived his right to appeal the award of attorneys fees. D.C. Ct. App. Rule 4(a)(6).

Even if, the Court deems the appeal of the attorneys fees timely, it must fail. The Trial Court in fixing the timeline from the grant of summary judgment through trial for evaluation of whether the hours expended by counsel made a finding that 125.7 hours was reasonable. In addition, the

Trial Court rejected the argument put forth by Appellant that since Ms. McNeil only achieved partial success, a finding on no liability on the retaliation claim, that the award of $87,000 was unreasonable. The Trial Court made the following finding, which should be upheld: The Court declines to adjust the fee award downward in light of Ms. McNeil's purported lack of success on her counterclaim. "At the crux of the Court's determination as to the reasonableness of the hours billed by Ms. McNeil's counsel is the significance of the overall relief the counter-plaintiff obtained, not a review of her success as to every allegation in the crossclaim. See *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983) (recognizing that courts should focus on the significance of overall relief obtained by the plaintiff because counsel's time is devoted to litigation as a whole, leading to difficulties dividing hours spent on individual claims) (overturned on other grounds); *Nat. Motion by Sandra, Inc. v. D.C. Comm'n on Human Rights*, 726 A.2d 194, 198 (D.C. 1999) (affirming trial court's decision not to reduce overall fee award simply because the plaintiff lost on the issue of back pay because that claim was interrelated with the greater, ultimately successful, discrimination claim); *Ginsberg* v. *Tauber*, 678 A.2d 543, 552 (D.C. 1996) ("A trial court . . . should be wary of awarding a result-based fee [over an hourly rate] unless the attorney seeking such a fee has obtained the client's agreement to that arrangement at the beginning of the representation.").

The Supreme Court has also rejected Plaintiff's proportionality argument based on the amount of damages awarded. The Court held that "[a] rule that limits attorney's fees in civil rights cases to a proportion of the damages awarded would seriously undermine Congress' purpose in enacting § 1988[] [s]ince Congress enacted § 1988 specifically because it found that the private market for legal services failed to provide many victims of civil rights violations with effective access to the judicial process." *City of Riverside v. Rivera*, 477 U.S. 561, 576 (1986).

District of Columbia
Court of Appeals

REDACTION CERTIFICATE DISCLOSURE FORM

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

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

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

   - An individual's social-security number
   - Taxpayer-identification number
   - Driver's license or non-driver's' license identification card number
   - Birth date
   - The name of an individual known to be a minor
   - Financial account numbers, except that a party or nonparty making the filing may include the following:

     (1) the acronym "SS#" where the individual's social-security number would have been included;
     (2) the acronym "TID#" where the individual's taxpayer-identification number would have been included;
     (3) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
     (4) the year of the individual's birth;
     (5) the minor's initials; and
     (6) the last four digits of the financial-account number.

2. Any information revealing the identity of an individual receiving mental-health services.

3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

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

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

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

/s/ Steven G. Polin
Signature

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21-CV-829
Case Number(s)

3/29/2023
Date

CONCLUSION

WHEREFORE, for the reasons stated above it is requested that the grant of summary judgment on Appellant's claims be affirmed, as well as the jury verdict on liability, the award of damages and attorneys fees.

Respectfully submitted,

/S/ Steven G. Polin

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CERTIFICATE OF SERVICE

I hereby certify that a copy of Appellee's brief was sent by Case File Express to Michael Forster,, Forster Law Firm, LLC., 2007 Vermont Avenue, NW., Washington, D.C. 20001 this 31st day of March, 2023.

/S/ Steven G. Polin

Steven G. Polin