

FILED

DEC 12 2011

COURT OF APPEALS
DIVISION III
CLERK OF COURT

No. 299759

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

TRINITY UNIVERSAL INSURANCE COMPANY OF KANSAS,

Appellant,

v.

CORRINE COOK, et vir,

Respondents.

REPLY BRIEF OF APPELLANT

Joseph A. Grube, WSBA #26476
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I. REPLY TO CORRINE COOK'S ARGUMENTS

1. CORRINE COOK'S ARGUMENT THAT THERE IS NO EVIDENCE SHE IS AT FAULT FOR THE FIRE IS RAISED NOW FOR THE FIRST TIME AFTER CONCEDED LIABILITY WAS NOT AN ISSUE IN THE TRIAL COURT, AND IS CONTRARY TO THE EVIDENCE IN THE CASE.

At the trial court level Corrine Cook argued she was entitled to summary judgement of dismissal regardless of how the fire started. CP 35. Corrine Cook now argues for the first time that the trial court was correct in granting summary judgment because there is no evidence she is at fault for the fire. At Page 15 of her brief to this court Corrine Cook correctly quotes the lease wherein it provides that "the tenant is responsible for all actions of visitors and guests" and that "tenants shall be financially responsible for visitors and guests." CP 15.

While it is true the evidence points to Christopher Cook as the person who started the fire, it is also true that tenant Corrine Cook is responsible for the actions of her guests, and is financially responsible for all visitors and guests. It is undisputed that Christopher Cook was not listed on the lease as a tenant, and Corrine Cook has never claimed Christopher Cook was a trespasser. Whether she struck the match or not, Corrine Cook is liable for the actions of Christopher Cook, a visitor and guest to the property.

2. CORRINE COOK IS NOT ENTITLED TO SUMMARY JUDGMENT OF DISMISSAL BASED ON THE CASCADE CASE BECAUSE THAT CASE PROVIDED LIMITED PROTECTIONS NOT APPLICABLE WHEN THE DAMAGE CAUSED IS OUTSIDE THE LEASEHOLD.

Corrine Cook next argues summary judgment of dismissal was warranted because the lease lacked an express provision that Trinity's insurance policy was not for her benefit. It is true the lease fails to explicitly so state. However, this is the precise situation Cascade Trailer Court argued to the Washington Supreme Court it was concerned about, where the tenant's negligence damages more than just the leasehold. This is the situation governed by *Millican of Washington, Inc. v. Wiekner Carpet Serv., Inc.*, 44 Wash.App. 409, 722 P.2d 861 (1986). In her brief, Corrine Cook acknowledges the holding of *Millican* and attempts to distinguish *Millican* on the grounds there was a specific subrogation waiver in the lease. The court in *Millican* clearly stated that subrogation would be allowed for damage to property not described by the lease. In *Cascade Trailer Court v. Beeson*, 50 Wash.App. 678, 749 P.2d 761 (1988)(rev. den 110 Wash.2d 1030 (1988)) the Court of Appeals expressly stated that "Cascade's fears that insurers would lose their subrogation rights against tenants who negligently injure other tenants is unfounded." *Id.* at 686, 749 P.2d 766.

All of Corrine Cook's arguments on this point miss the mark. Corrine Cook argues that, based on the "bright line" rule of *Sutton v. Jondahl*, 532 P.2d 478 (Okla. App. 1975) which was adopted by this court in *Cascade*, and case law from other jurisdictions which have discussed *Sutton* and *Cascade*, Corrine Cook does not bear any legal liability for subrogation. First, this court did not adopt the bright line test of *Sutton*. Instead, the court adopted "the reasonable expectations rationale of the Sutton line of cases" *Cascade* at 687, 749 P.2d 766. Second, the case law from other jurisdictions is not authority in Washington. The precedent applicable in this case is *Cascade* and *Millican*, both Washington cases which clearly enunciate the law in Washington. All arguments to the contrary invite this court to reverse its position in *Cascade*, and, in fact, outlaw subrogation claims by a landlord against a tenant.

3. CORRINE COOK'S ARGUMENT THAT CLAIMS AGAINST CHRISTOPHER COOK SHOULD BE DISMISSED BECAUSE THEY LEAD TO VICARIOUS LIABILITY FOR HER ARE CONTRARY TO WASHINGTON LAW

Next, Corrine Cook argues that Trinity's claims against Christopher Cook must fail because such claims make Corrine Cook vicariously liable for Christopher Cook's negligence. Corrine Cook argues the landlord should have drafted a lease provision warning Corrine Cook "that the policy did not protect her from personal liability for the

negligence of her guests or visitors.” First, the law does not require that a landlord draft a lease in which every possible scenario of liability and coverage therefore be expressed in the lease. One quickly senses the absurdity of the logical extensions of this argument. Second, the lease does explicitly state that Corrine Cook would be liable for the actions of her visitors and guests. Third, Corrine Cook did have a policy of insurance which provided coverage for her for personal liability, which liability she explicitly assumed when she signed the lease.

4. CORRINE COOK’S ARGUMENT THAT ALL GUESTS WOULD HAVE TO OBTAIN THEIR OWN INSURANCE POLICY IS IMMATERIAL TO THE LIABILITY ISSUES IN THIS CASE

Finally, Corrine Cook suggests to the court that Trinity’s argument “suggests that potential visitors or guests to an apartment complex would have to obtain their own policies of insurance to protect them from subrogation claims for damage to or destruction of apartment complexes.” Corrine Cook’s argument suggests that visitors to an apartment complex are not liable for damage to or destruction of the property. They are. If a person, who is not a tenant and therefore not in privity with the landlord, damages or destroys the landlord’s property that person is liable to the damage caused. There is no lease between the landlord and visitors or guests. Therefore, the limited protections of *Cascade* do not apply.

Whether such a person has chosen to insure themselves against such damage or destruction is a separate question, not at issue in this case.

II. REPLY TO CHRISTOPHER COOK'S ARGUMENTS

1. CHRISTOPHER COOK WAS NOT A TENANT OF CORRINE COOK'S APARTMENT ON THE DAY HE STARTED THE FIRE, AND EVEN IF HE WAS, HE IS ENTITLED TO ONLY THE LIMITED PROTECTIONS OF *CASCADE*.

As Trinity understands Christopher Cook's brief, he claims (1) he is a tenant at Corrine Cook's apartment, and (2) he is entitled to the protections of *Cascade* as Corrine Cook because the two are married. As to tenancy, Christopher Cook was not entitled to reside at the apartment Corrine Cook rented. He was not listed on the lease, he was only allowed to visit the apartment for a few hours each week, and he spent the rest of his time at a half-way house. His intentions, and those of his family, are irrelevant. Christopher Cook may have intended to move into the apartment at some point in the future, but there are all manner of potential intervening events, such as a violation of parole, which could have rendered the intentions moot. The issue here is whether he was a tenant at the time he started the fire. As stated in Trinity's Opening Brief, Christopher Cook did not have a key to the apartment. He let himself into the apartment without the knowledge or consent of Corrine Cook. The State of Washington prohibited him from being in the apartment except for a few hours after church on Sundays. As Christopher Cook correctly

points out to the court, the RLTA defines a tenant as one who is “entitled to occupy a dwelling unit primarily for living or dwelling purposes under a rental agreement.” Christopher Cook was not so entitled. He admits he was required to occupy another dwelling unit. The fact that a correctional facility is excluded from the RLTA only means the provisions of the RLTA with respect to tenants rights do not apply to correctional facilities. It does not change the plain meaning of words. Christopher Cook was occupying another dwelling unit on the date of the fire, and was not entitled to occupy Corrine Cook’s dwelling.

With respect to Christopher Cook’s argument that he is entitled to the same protections under *Cascade* as Corrine Cook, Trinity reiterated its position that a tenant is entitled to only limited protections, and is still liable for damage to property not part of the leasehold.

III. CONCLUSION

This court previously addressed the precise issue Plaintiffs now raise: Whether subrogation may be pursued by a landlord (or its insurer) against a tenant for damages to parts of the landlord’s property other than the leasehold for which there is a contractual relationship between the landlord and tenant. This court previously answered that question in the affirmative, and should again. Under the reasonable expectations doctrine, no tenant could ever reasonably expect to be held blameless for damages to

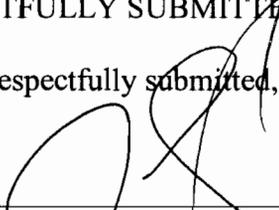
property they do not rent, and for which their rent is not reasonably used as insurance premium.

Further, Christopher Cook, an inmate of the Washington correctional system cannot be deemed to have been a tenant as he had no right to be anywhere other than where the State told him to be. He is responsible for his negligence and the damage directly attributable to that negligence.

For these reasons this court should reverse the trial court and remand this case for further proceedings.

RESPECTFULLY SUBMITTED this 8th day of December 2011.

Respectfully submitted,



Joseph A. Grube, WSBA #26476
Ricci Grube Breneman, PLLC
Attorney for Appellants

CERTIFICATE OF SERVICE

I, Joseph A. Grube, certify that all at times mentioned herein I was and now am a citizen of the U.S. and a resident of the State of Washington, over the age of 18 years, not a party to this proceeding or interested therein, and competent to be a witness therein. My business address is that of Ricci Grube Breneman PLLC, 1200 Fifth Avenue, Suite 625, Seattle, Washington 98101. On December 8, 2011, I caused a copy of the foregoing BRIEF to be served on the following parties:

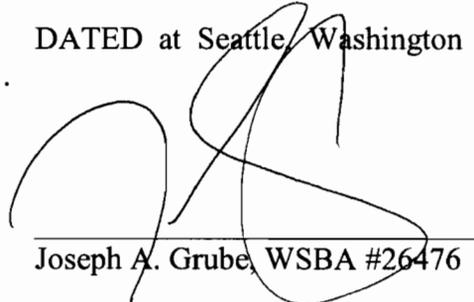
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I DECLARE UNDER PENALTY OF PERJURY UNDER WASHINGTON LAW THAT I HAVE READ THIS DECLARATION, KNOW ITS CONTENTS, AND I BELIEVE THE DECLARATION IS TRUE.

DATED at Seattle, Washington this 8th day of December, 2011.



Joseph A. Grube, WSBA #26476