

**FILED**

AUG 16 2011

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 299759

COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

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TRINITY UNIVERSAL INSURANCE COMPANY OF KANSAS,

Appellant,

v.

CORRINE COOK, et vir,

Respondents.

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OPENING BRIEF OF APPELLANT

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Joseph A. Grube, WSBA #26476  
Karen Orehoski WSBA #35855  
Ricci Grube Breneman, PLLC  
Attorneys for Appellant  
1200 Fifth Avenue, Suite 625  
(206) 624-5975

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## I. INTRODUCTION

This civil case arises from an apartment complex fire which occurred on May 13, 2009. The fire damaged Corrine Cook's apartment, as well as nine other apartments, and also caused extensive damage to the common areas of the building. Plaintiff-Appellant Trinity Universal Insurance Company (Trinity) insured the building affected, and paid more than \$850,000.00 to repair the damaged premises, less than \$50,000.00 of which was allocated to Corrine Cook's apartment. After determination that the fire started on the balcony of Corrine Cook's apartment as the result of a cigarette carelessly discarded by her husband Christopher Cook, a recent prison parolee and half-way house resident who did not live in the apartment with Corrine Cook and was not listed on the lease as a tenant, Trinity commenced this action against Corrine Cook and Christopher Cook for recovery of the amount paid.

Corrine Cook filed a Motion for Summary Dismissal on the grounds the claims against her are barred under Washington law because her lease does not contain an express provision that Trinity's policy of insurance did not cover her. Christopher Cook joined in the Motion without submitting any additional materials, relying on Corrine Cook's supporting materials and documents. Christopher Cook later submitted a

brief arguing that, although he was living at a half-way house as a recent parolee, he should be considered a tenant of the apartment, and argued for the same protections as Corrine Cook.

The trial court granted Corrine Cook's motion for summary judgment, and allowed Christopher Cook to set a new hearing date for the court to consider his arguments, after giving Trinity the opportunity to respond to his brief. At the subsequent hearing the trial court granted Christopher Cook's motion for summary judgment. This appeal follows.

For the reasons set forth below, Trinity seeks to have this court reverse the trial court's grant of Summary Judgment for two reasons. First, Washington law allows fire loss subrogation claims by landlords, or their assignees, against tenants for damage to property not covered by the lease regardless of whether the lease contains a provision that the landlord's insurance policy did not cover the tenant. Second, even if Washington law does not permit fire loss subrogation claims against tenants in the absence of explicit language in the lease that the landlord's insurance does not cover the tenant, Christopher Cook was not a tenant of the apartment building, and cannot claim that protection.

## II. ASSIGNMENTS OF ERROR

### A. Assignments of Error

Appellant assigns as error the following actions by the trial court:

1. The trial court erred by ruling as a matter of law that a landlord's insurer is prohibited from bringing a subrogation action against a tenant for damage to property which is not a subject of the lease.

2. The trial court erred by ruling that a negligent defendant, who is not a tenant, is entitled to the limited protections of *Cascade Trailer Court v. Beeson*.

### B. Issues Pertaining to Assignments of Error.

1. Was it error for the trial court to rule as a matter of law that a landlord's insurer is prohibited from bringing a subrogation action against a tenant for damage to property which is not a subject of the lease. (Assignment of Error No. 1)

2. Was it error for the trial court to rule that a negligent defendant, who is not a tenant, is entitled to the limited protections of *Cascade Trailer Court v. Beeson*. (Assignment of Error No. 2)

## III. STATEMENT OF THE CASE

On May 13, 2009 Christopher Cook was confined to a half-way house in Spokane, Washington, after having been released from prison. (CP

111). Christopher Cook and Corrine Cook were married at the time. (CP 109). Corrine Cook and her two daughters had relocated to the Spokane area to be near Christopher Cook when he was released from prison. (CP 120). Corrine Cook rented Apartment 9 in a multi-unit building which was part of Regal Ridge Apartments. (CP 107-108). The buildings were insured by Trinity Universal Insurance Company of Kansas. Corrine Cook purchased renter's insurance prior to moving to Spokane, which policy followed her to Spokane. (CP 119, 121).

During his stay in the half-way house Christopher Cook was allowed visitation from his family, and was allowed to spend time at Corrine Cook's apartment on Sundays after church. (CP 110-111). On May 13, 2009 Christopher Cook went to Corrine Cook's apartment after Corrine Cook had gone to work and her daughters had gone to school. (CP 113, 118). Christopher Cook let himself into the apartment with a key that had been left on the property for the use by the children. (CP 112, 116-117). One of the couple's daughter's had told Christopher Cook about the location of the key.(CP 117).

Christopher Cook smoked a cigarette while standing on the apartment's balcony. (CP 114). He discarded the cigarette into a plastic pail, which later ignited. (CP 115). The fire caused damage to Apartment 9,

a number of other apartments in the same building, the roof of the building, the building's exterior, and to heating, ventilation and cooling units. The fire also caused the landlord to incur other expenses associated with rebuilding, all in excess of \$850,000.00. Damage done to Apartment 9 was estimated at \$49,057.94 to repair. (CP 137-279).

The rental contract between Defendant Corinne Cook and Regal Ridge Apartments does not contain an express provision stating that Corrine Cook would not be covered under the landlord's fire insurance. The only tenants named on the rental agreement are Corrine Cook and her two daughters. (CP 122-136). Defendant Christopher Cook was not a tenant of Regal Ridge Apartments.

#### **IV. SUMMARY OF ARGUMENT**

The trial court erred by ruling as a matter of law that a landlord's insurer is prohibited from bringing a subrogation action against a tenant for damage to property which is not a subject of the lease. The trial court further erred by ruling that a negligent defendant, who is not a tenant, is entitled to the limited protections of *Cascade Trailer Court v. Beeson*.

#### **V. DISCUSSION**

##### **A. Standard of Review**

Summary judgment shall be granted if the pleadings, depositions,

answers to interrogatories and admissions on file, together with the affidavits, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c). An appellate court reviews a grant or denial of summary judgment de novo. *Green v. American Pharmaceutical Co.*, 136 Wash.2d 87, 94, 960 P.2d 912 (1998).

#### **B. Discussion of Assignments of Error**

- 1. The trial court erred by ruling as a matter of law that a landlord's insurer is prohibited from bringing a subrogation action against a tenant for damage to property which is not a subject of the lease.**

Corrine Cook claimed in her Motion for Summary Judgment of Dismissal that because the lease in this case does not contain an express statement that Trinity's policy of insurance does not cover her for fire losses, under operation of Washington law she is deemed a co-insured on the Trinity policy, and subrogation by Trinity is prohibited. Corrine Cook relies on *Cascade Trailer Court v. Beeson*, 50 Wash.App. 678, 749 P.2d 761 (1988) (rev. den. 110 Wash.2d 1030 (1988)). In *Cascade*, Division III of the Court of Appeals adopted the "reasonable expectation" rationale of *Sutton v. Jondahl*, 532 P.2d 478, 481 (Okla. App. 1975). The *Sutton*

doctrine is a bright line rule stating that subrogation is not available to a landlord's insurance carrier because the tenant is considered a co-insured of the landlord, absent an express agreement to the contrary.

Although the *Cascade* court cites the *Sutton* rule, it does not follow the bright line rule. Instead, the *Cascade* holding "focuses on the parties' expectations" and what the parties intended with respect to the fire insurance coverage. *Cascade*, at 687-88,749 P.2d 766. The *Cascade* court discussed three Washington cases which formulated the holding. First, in *Rizzuto v. Morris*, 22 Wash.App. 951, 592 P.2d 688, *review denied*, 92 Wash.2d 1021 (1979), the court denied subrogation rights to a landlord's insurer against a commercial tenant who negligently caused a fire. The lease contained a clause exempting the lessee from liability for damage by fire. The landlord and tenant had discussed fire insurance and the landlord had told the lessee that he carried fire insurance on the leased building. The court concluded the parties intended that the fire insurance cover the lessee.

Second, in *Millican of Wash., Inc. v. Wienker Carpet Serv., Inc.*, 44 Wash.App. 409, 722 P.2d 861 (1986), a gas explosion caused by a tenant's negligence damaged the tenant's leasehold *and other portions of the building in which the leasehold was located*. The landlord and tenant had waived claims against each other by language in their lease for losses

resulting from fire and other coverages provided by their insurance policies. The court held that the waiver barred recovery only as to the insured losses on the leasehold premises. The damage to the other portions of the building was unrelated to the leasehold. The court noted that the "lessee's rent payments cannot be deemed to be paying for insurance on separate property, and it would be unfair to deny an insured a right of recourse against the wrongdoer." *Millican*, at 419, 722 P.2d 861.

The third case, *Washington Hydroculture, Inc. v. Payne*, 96 Wash.2d 322, 635 P.2d 138 (1981), involved a case where fire destroyed the leased premises. The landlord pursued the tenant on the basis that the lease required the tenant to "maintain" the leasehold and return it to the landlord in as good a condition as when leased. The court concluded "maintain" did not mean to rebuild, and recovery was denied.

After reviewing these cases the *Cascade* court then stated:

Whether rent covers all of a landlord's expenses, including insurance premiums, is not the critical question. Rather, the issue concerns the parties' reasonable expectations. Where the landlord has secured fire insurance covering the leased premises, the tenant can reasonably expect the insurance to cover him as well, unless the parties have specifically agreed otherwise. Why? -because the tenant is in privity of contract with the landlord, and he has a property interest in the premises the insurance protects. **This rationale would not extend to cover a tenant for negligence which does not damage the shared property interest, i.e., the**

**leasehold itself. Thus, 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. (emphasis supplied). The "fear" that the Cascade opinion assures against is this exact case - a situation where a tenant with insurance negligently destroys or damages common areas and/or neighboring units leased by "other tenants." The last two sentences quoted above mirror the holding in *Millican*, supra. It is clear the *Cascade* court did not intend to bar all subrogation actions by a landlord against a tenant in the absence of the specific language in the lease excluding coverage. Claims for damage to other portions of the building are unrelated to the leasehold, and survive *Cascade's* holding.

In the present case Corrine Cook's apartment was one of many damaged by the fire. If this Court is inclined to allow the grant of summary judgment to Corrine Cook based on *Cascade*, that ruling must be limited to merely prohibit recovery of damages to the leasehold of Apartment 9 only. Trinity is entitled to pursue Corrine Cook for the balance of the damages incurred, consistent with the holdings in *Millican* and *Cascade*.

- 2. The trial court erred by ruling that a negligent defendant, who is not a tenant, is entitled to the limited protections of *Cascade Trailer Court v. Beeson*.**

The holding in *Cascade* is grounded in contract law, wherein the "parties' reasonable expectations" and the tenant's "privity of contract with the landlord" lead to the holding that the landlord is presumed to carry insurance for the tenant's benefit. Christopher Cook was not a tenant of this property. *Cascade* applies only to tenants and construes their contracts with the landlord.

Under Washington law a "tenant" is a person who is entitled to occupy a dwelling unit primarily for living or dwelling purposes under a rental agreement. RCW 59.18.030 (19). Christopher Cook attempted to argue that because he was in custody in a halfway house, the halfway house cannot be considered his dwelling or residence under the definition of the term "residence". However, Christopher Cook also pointed out that "dwelling unit" is defined by Washington law as a part of a structure which is used as a "sleeping" place by one person or by two or more people maintaining a common household. RCW 59.18.030 (5) That term would apply to the halfway house where Christopher Cook was residing at the time of the fire.

Perhaps more germane to the issue at hand, Christopher Cook has produced no evidence to suggest that he was "entitled" to occupy the

apartment which Corrine Cook had leased. In fact, the opposite is true. Under the terms of his release from prison Christopher Cook was required to remain at the halfway house and under supervision of the State Department of Corrections' employees. He was allowed limited contact with his family in that they were allowed to visit him three times a week, and he visited them at their apartment one time per week. In other words, Christopher Cook's movements were not free and unfettered throughout the community, but were regulated by the Department of Corrections. If Christopher Cook truly were "entitled" to occupy the apartment that Corrine Cook had leased then he would have been living there on the date of the fire. However, he was not "entitled" to occupy that dwelling unit because he was required to reside at the halfway house.

Christopher Cook also appears to be arguing to this Court that an analysis of community property law shows that Christopher Cook is entitled to the benefit of tenancy under the lease as it is a benefit which inures to the community. Christopher Cook cites the Court to a number of cases wherein courts have held that the obligations of one spouse are the obligations of the community. This argument fails to recognize that under the law of any jurisdiction a person in Christopher Cook's standing, that being a felon in a halfway house not residing at the property, could

certainly be held liable for a contractual arrangement into which his spouse had entered presumably for the benefit of the community. However, because Christopher Cook was in custody of the State of Washington at the time and was not entitled to reside at the property, his position is more akin to that of a guarantor on a promissory note. The actual benefit of residing at the property does not inure to Christopher Cook due to his custody status, but the obligation to pay does. Christopher Cook can cite this Court to no case law which indicates that he was entitled to reside at the property under the terms of the lease.

Even assuming this Court determines Christopher Cook has established tenant status under the lease at issue, the *Cascade* case does not provide the benefit Christopher Cook is seeking. A plain reading of the *Cascade* case, as explained above, reveals that the Washington Supreme Court allowed an exception to the general rule of prohibiting subrogation against a tenant. That is because *Cascade* follows the “reasonable expectations” doctrine. When a tenant’s negligence causes damage to other common areas not part of the leasehold, subrogation is still permitted.

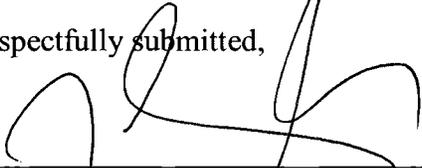
## VI. CONCLUSION

The trial court erred by granting summary judgment to Corrine Cook and Christopher Cook. The *Cascade* case does not prohibit

subrogation by a landlord's insurer against a tenant for fire damage to property not subject to the lease. Christopher Cook was not a tenant of the landlord's property at the time of the fire, and is not entitled to any protection from subrogation that a tenant may enjoy. The grants of summary judgment should be reversed, and this action sent back to the trial court for further proceedings.

RESPECTFULLY SUBMITTED this 15th day of August 2011.

Respectfully submitted,



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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 August 15, 2011, I caused a copy of the foregoing BRIEF to be served on the following parties:

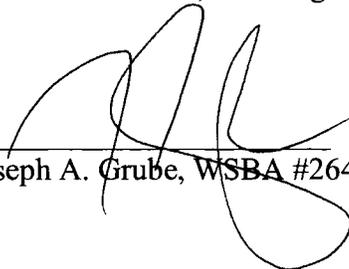
Via Fax and U.S. Mail:

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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 15<sup>th</sup> day of August, 2011.

  
\_\_\_\_\_  
Joseph A. Grube, WSBA #26476