

FILED

NO. 299759

OCT 06 2011

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DIVISION III
OF THE STATE OF WASHINGTON

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By _____

TRINITY UNIVERSAL INSURANCE COMPANY OF KANSAS, as
subrogee of MICHAEL AND VIRGINIA BERG,

Appellant,

v.

CORINNE COOK and CHRISTOPHER COOK, a married couple and the
marital community composed thereto,

Respondents.

BRIEF OF RESPONDENT CORINNE COOK

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I. STATEMENT OF ISSUES

Respondent Corinne Cook, one of the defendants in the underlying action, submits that the issues on appeal are as follows:

1. The trial court properly granted Mrs. Cook's motion for summary judgment because it was undisputed that she was not at fault for the fire at issue.

2. The trial court properly granted Mrs. Cook's motion for summary judgment because the lease did not contain an express provision that Trinity's insurance policy was not for her benefit.

3. The trial court properly granted Christopher Cook's motion for summary judgment of dismissal because it implements the policy of this Court's precedent.

II. STATEMENT OF THE CASE

Trinity's complaint alleged that Mrs. Cook rented an apartment in the South Regal Ridge Complex from Trinity's insured on September 13, 2008. CP 5 at paragraph 3.1.

According to the terms of the lease, occupancy was granted to Mrs. Cook, her two children, and any additional person provided they paid \$30.00 per day after the third day of their occupancy. CP 10. The lease did not

otherwise purport to limit or restrict the number of guests or visitors, or the frequency or duration of their visits. CP 10-23.

The leased premises included areas of the apartment complex other than the Cooks' unit. For example, it allowed the Cooks to use the facility's recreation room for themselves and for private parties. CP 16. The lease also permitted the Cook family to use the facility's parking garage. CP 18.

The apartment and the apartment complex were damaged in a fire that occurred on or about May 13, 2009. Trinity filed suit against Mr. and Mrs. Cook, alleging that the fire was the fault of either or both of them. CP 7 at paragraphs 4.1-4.4. Trinity insured the property against fire damage, and brought suit against the Cooks for subrogation—reimbursement for amounts paid to its insureds pursuant to its policy. CP 6 at paragraphs 3.4-3.6.

In two places the lease specifically refers to insurance, but only in the context of recommending or “strongly” recommending that tenants obtain renter's insurance for their personal property. CP 10; 18. Trinity admits that the lease did not contain an express provision stating that Trinity's insurance policy was not for the benefit of Mrs. Cook or her children. Appellant's brief at p. 5. Similarly, the lease contains no language stating that Trinity's policy did not benefit Mrs. Cook with respect to the actions of visitors or

guests; that the benefit of the policy was limited to the Cooks' rental unit; or that the policy was not for the benefit of visitors or guests. CP 10-23.

Mrs. Cook filed a motion for summary judgment of dismissal arguing that Trinity was not entitled to subrogation against her. CP 39-41. Mr. Cook also moved for summary judgment. CP 42-3; 306-7.

In its opposition to the Cooks' motions and on appeal, Trinity argued that Mr. Cook accidentally caused the fire with a discarded cigarette. CP 309-10; Appellants' brief at pp. 4-5. There is no evidence that Mrs. Cook caused the fire, and Trinity has always argued that Mr. Cook was at fault.

The trial court granted Mrs. Cook's motion for summary judgment on April 1, 2011. CP 284-6. Mr. Cook's motion for summary judgment of dismissal was granted on May 6, 2011. CP 320-22.

III. ARGUMENT

A. The trial court properly granted Mrs. Cook's motion for summary judgment because it was undisputed that she was not at fault for the fire at issue.

In its summary judgment opposition and in its appeal, Trinity vigorously argued that the fire was caused by Mr. Cook, and Trinity reiterates that same argument on appeal. Trinity has offered no evidence or

even argument suggesting that Mrs. Cook caused the fire. Accordingly, Trinity has no subrogation claim against her.

Subrogation is the principle that an insurer that has paid a loss under an insurance policy is entitled to all the rights and remedies belonging to the insured against third parties with respect to any loss covered by the policy. *Mut. Of Encumclaw Ins. Co. v. USF Ins.*, 164 Wn.2d 411, 423, 191 P.3d 866 (2008). An insurer entitled to subrogation stands in the shoes of the insured and is entitled to the same rights and *is subject to the same defenses as the insured*. *Id.* at p. 424, (emphasis added). Thus, in order to recover in subrogation against Mrs. Cook, Trinity had to establish that she was at fault. There is no such evidence, so the trial court properly granted Mrs. Cook's motion for summary judgment.

B. The trial court properly granted Mrs. Cook's motion for summary judgment because the lease did not contain an express provision that Trinity's insurance policy was not for her benefit.

Trinity suggests that Mrs. Cook can be liable for damage to portions of the apartment complex other than her apartment even though there was no express agreement that the landlord's insurance with Trinity was not for Mrs. Cook's benefit. Trinity mistakenly suggests that this possibility is consistent with this Court's decision in *Cascade Trailer Court v. Beeson*, 50

Wn.App. 678, 749 P.2d 761 (1988) (rev. den. 110 Wn.2d 1030 (1988)).

In *Beeson* this court established a “bright line” test: A landlord’s fire insurance carrier cannot subrogate against a tenant unless the lease agreement expressly states that the landlord’s policy does not benefit the tenant.

Like this case, *Beeson* involved a subrogation claim in which a landlord’s insurer sought damages from the defendants, who were the landlord’s tenants. The carrier sought to recover amounts paid to the landlord pursuant to its insurance policy for damages caused by a fire. *Id.* at p. 679.

The trial court granted summary judgment in favor of the tenants. The landlord’s insurance carrier appealed, urging the court to adopt a rule that a landlord’s insurance carrier can subrogate against tenants unless the landlord and tenants had expressly agreed otherwise. In other words, the landlord’s insurance carrier argued that it should have a right of subrogation unless subrogation was expressly excluded by the terms of the lease.

The *Beeson* Court observed that there were two conflicting lines of cases regarding the potential liability of a tenant in subrogation for damages to the landlord’s premises. One line of cases held that the landlord’s insurance is presumed to be held for the tenant’s benefit as a co-insured in

the absence of an express agreement to the contrary. The seminal opinion from this line of cases was *Sutton v. Jondahl*, 532 P.2d 478 (OK. Ct. App. 1975).

The other, second line of cases held that tenants are liable in subrogation actions for their negligence unless there was an express agreement with their landlords that the tenants would *not* be liable. *Beeson, supra*, at p. 681 (emphasis added). This second line of cases expressed the rule urged by the landlord's carrier in *Beeson*.

The *Beeson* Court adopted the Sutton Rule: "Where the landlord has secured fire insurance covering a leased premises, the tenant can reasonably expect the insurance to cover him as well, *unless the parties have specifically agreed otherwise.*" *Id.* at p. 686 (emphasis added). Stated another way, the parties must expressly agree that the landlord's insurance *does not* benefit the tenant. In the absence of such an agreement, the landlord's carrier cannot subrogate against tenants.

This Court noted that the precise issue was "one of first impression in Washington." *Id.* at p. 684. However, the Court noted that three Washington cases had "touched" on the subject, including *Millican of Washington, Inc. v. Wienker Carpet Serv., Inc.*, 44 Wn.App. 409, 722 P.2d 861 (1986).

In *Millican, supra*, a commercial tenant negligently caused a gas explosion which damaged the tenant's leasehold, other portions of a commercial building in which the leased premises were located, and adjacent buildings. The landlord and the tenant had signed a lease which contained a subrogation waiver clause whereby the landlord and the tenant relinquished their respective rights of recovery against each other for any losses resulting from perils *insured by their respective casualty insurance policies*. *Millican, supra*, at p. 411 (emphasis added). Millican's insurance company reimbursed Millican for some of its losses, but not all of them. *Id.*

Millican filed suit against the defendants. The trial court entered findings of fact, conclusions of law, and a judgment whereby Millican was barred from recovery for insured losses, but Millican was allowed to recover for damages to portions of its premises not described in the lease, including adjacent structures. *Id.* The trial court's decision was based upon the language of the subrogation waiver—the parties' express agreement—and the Court of Appeals affirmed based upon the language of the subrogation waiver—the parties' express agreement. *Id.* at p. 416.

Another of the three Washington cases cited by *Beeson* was *Rizzuto v. Morris*, 22 Wn.App. 951, 592 P.2d 688 (rev. den. 92 Wn.2d 1021 (1979)) in which the court rejected a claim for subrogation against a commercial tenant

who had negligently caused a fire that damaged the landlord's premises. The parties' lease agreement contained a clause exempting the tenant from liability for fire damage. The landlord and the tenant had discussed fire and insurance, and the landlord had advised the tenant that landlord carried fire insurance on the leased building. Accordingly, the trial court concluded that the parties intended that the landlord's fire insurance policy would benefit the tenant. As in *Millican, supra*, the crux of the court's ruling in *Rizzuto* was the express agreement between the parties.

Finally, in *Washington Hydroculture, Inc. vs. Payne*, 96 Wn.2d 322, 635 P.2d 138 (1981), a landlord filed suit against its tenant after a fire destroyed the landlord's premises. The landlord argued that the tenant was liable for damages because of the lease's so-called "yield up" clause which required the tenant to return the premises to the landlord at the end of the lease term in the same condition as when the tenant took possession of them, reasonable wear and tear accepted. The court in *Washington Hydroculture* ruled against the landlord because a tenant's agreement to maintain the premises does not mean rebuilding them after a fire.

In summary, *Beeson, supra*, and the Washington cases which it cited stand for the proposition that landlords and tenants can contract between themselves with respect to a tenant's potential liability in subrogation for fire

damage to the landlord's premises. However, a landlord's fire insurance policy is deemed to benefit the tenant and subrogation is unavailable unless the lease contains express language stating that the tenant is liable despite the landlord's insurance.

Trinity attempts to narrow the rule in *Beeson, supra*, by relying on dicta which it has misinterpreted. See Appellants' brief at pp. 6-9. Based on the dicta, Trinity suggests that it can subrogate against Mrs. Cook for damage to the apartment complex other than the Cooks' rental unit.

In explaining its reasons for adopting the *Sutton* rule, the court wrote that:

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 fear that insurers would lose their subrogation rights ***against tenants who negligently injure other tenants*** is unfounded.

Id. at p.686. (emphasis added).

Trinity suggests that the foregoing language contemplates a tenant's liability for portions of the landlord's damaged premises other than the rental unit leased by the tenant, and even if this is not expressly stated in the lease.

However, Trinity misconstrues this language, which answered Cascade's argument that insurers of tenants would lose their subrogation rights against other tenants. Thus, this dicta appears to focus on the legal rights and duties between co-tenants and their insurers, not the rights and duties between tenants and landlords (and the landlord's insurer) for damage to the landlord's premises.

Other jurisdictions which have adopted the "Sutton Rule" have rejected Trinity's argument, holding that a landlord's insurer cannot subrogate against tenants who caused a fire that damaged an entire building, and not just the tenants' apartment. Examples include *Datell Family Ltd. Partnership v. Wintz*, 250 S.W.3d 883 (Tenn. App. 2007); *Middlesex Mut. Assur. Co. v. Vaszil*, 279 Conn. 28, 900 A.2d 513 (2006), and *North River Ins. Co. v. Snyder*, 804 A.2d 399 (Me. 2002).

In *Datell*, *supra*, the insurance company for an entity that owned an apartment building brought suit against a tenant, alleging that the tenant had negligently caused a fire in her unit which had damaged the unit and also the building. The trial court granted the tenant's motion for summary judgment on the grounds that the tenant was, in the absence of a provision of a lease agreement to the contrary, an implied, co-insured under the landlord's fire insurance policy. The subrogated carrier appealed.

The Tennessee Court of Appeals reviewed the case law from other jurisdictions including *Beeson, supra*, and also *Sutton, supra*. The court characterized the *Sutton* approach as the modern trend favored by legal commentators. *Datell* at p. 888. The *Datell* court characterized the *Sutton* rule as persuasive for four reasons: (1) It corresponds with the reasonable expectations of a party; (2) it is in accord with the commercial realities involved in insuring residential lease properties; (3) it comports with sound economic policy; and (4) it provides greater certainty of the law. *Id.* at p. 892.

With regard to the reasonable expectations of the parties, the Court noted that a residential tenant has a possessory interest in a portion of the landlord's property, and therefore would expect the landlord to procure insurance on the entire rental property. Concomitantly, a reasonable residential landlord would not expect each of his tenants to independently purchase insurance to protect the entire building, because the landlord has the greater insurable interests—the reversionary and fee interests. *Id.* A reasonable insurer, which has adjusted its rates based on the nature of the property and the knowledge that the landlord would rent apartment units to tenants, would expect to pay the landlord for damage caused by a fire negligently started by a tenant. *Id.* Accordingly, as reflected in the *Sutton*

approach, “all parties involved would reasonably expect a residential tenant to be considered a co-insured under the landlord’s insurance policy unless the parties had expressly agreed otherwise.” *Id.*

The *Datell* court also relied upon the economic realities of the relationship between the landlord and the tenant. Although the landlord may actually send the premium check to the insurance company for the fire insurance, the tenant ultimately pays for insurance through rental checks, because the landlord considers costs including insurance when setting rent. If the tenant is ultimately the source of the insurance payment, “simple equity” would suggest that he be able to benefit from that payment unless he has clearly bargained away that benefit. *Id.* (citing *Tate v. Trialco Scrap, Inc.*, 745 F. Supp. 458, 473, (M.D. Tenn. 1989)).

Furthermore, the *Datell* court noted that it would be economic waste to require tenants in a multiunit dwelling to each insure the entire building against his or her own negligence. *Id.* at p. 893.

Finally, as a matter of policy, the *Sutton* rule promotes certainty and prevents gamesmanship. The *Sutton* rule requires landlords to place express subrogation provisions in their leases when drafting them. Such language places tenants on notice that they need to purchase liability insurance. *Id.* (citation omitted). Requiring a tenant to specifically bargain for the benefit

of the landlord's insurance policy allocates a risk to a tenant, "the party least likely to be aware of the status of the law and the party's respective responsibilities." *Id.*

In *Middlesex, supra*, the insurance company for a landlord brought suit against a tenant and the tenant's father, who had co-signed the lease for his son for damages caused by a fire. The insurance company alleged that the fire had been caused by the son, who had damaged the entire building by burning a candle in his apartment while entertaining a guest. *Middlesex, supra*, at p. 32; 900 A.2d at p. 515-16. The trial court granted the motion of the tenant and his father for summary judgment of dismissal, but the intermediate Court of Appeals reversed. The Connecticut Supreme Court reversed the Court of Appeals and reinstated the order of dismissal in favor of the tenant and his father. Like the Tennessee Court in *Datell*, the Connecticut Supreme Court held that allowing the insured to subrogate against the tenant would create a strong incentive for every tenant to carry liability insurance in an amount necessary to compensate for the value, or perhaps even the replacement cost, of the entire building, irrespective of the portion of the building occupied by the tenant. *Id.* at p. 35; 900 A.2d at p. 517.

In *North River, supra*, the Supreme Court of Maine expressly held

that the insurer could not subrogate for damages to the entire apartment complex, stating that “no, a residential tenant may not be held liable in subrogation to the insurer of the landlord for damages paid as a result of a fire, absent an agreement to the contrary—that is, absent an express agreement in the written lease that the tenant is liable in subrogation for damage to the apartment complex.” *Id.* at p. 400.

These cases explain how Trinity’s argument contradicts the “reasonable expectations of the parties,” which were the basis of the court’s decision in *Beeson, supra*. In many instances, a fire in a tenant’s apartment also causes damage to other parts of the apartment complex. Trinity’s argument suggests that each individual tenant would have to insure the apartment complex other than his or her own unit against catastrophic damage or loss. It is unreasonable and economic waste to require dozens of tenants to each obtain policies for the same structure.

C. The trial court properly granted Christopher Cook’s motion for summary judgment of dismissal because it implements the policy of this Court’s precedent.

Trinity argues that the trial court erred when it granted Mr. Cook’s motion for summary judgment of dismissal because Mr. Cook was not a

tenant, and *Beeson, supra*, does not apply to him. According to Trinity, it should be allowed to subrogate against Mr. Cook.

Trinity's argument is, in effect, an attempt to circumvent *Beeson, supra*, and hold Mrs. Cook and her marital community vicariously liable. Such a result is inconsistent with the rationale of the "bright line" test in *Beeson, supra*.

According to *Beeson, supra*, if the landlord wanted to permit Trinity to subrogate against Mrs. Cook for the acts or omissions of Mr. Cook, the landlord should have drafted the lease agreement such that it contained express language warning Mrs. Cook that the policy did not protect her from personal liability for the negligence of her guests or visitors. By failing to include such language, the landlord did not alert Mrs. Cook, and every other tenant in the apartment complex, that their reasonable expectations were mistaken and that they were obliged to obtain insurance against the risk of vicarious liability for catastrophic loss to the entire complex caused by their visitors.

Trinity may suggest that it can subrogate against Mrs. Cook because the lease provides that "the tenant is responsible for all actions of visitors and guests" and that "tenants shall be held financially responsible for visitors and guests." CP 15. Any such argument violates the "bright line" in *Beeson*

because this language does not expressly state that Trinity's policy does not benefit tenants with respect to the acts or omissions of their guests or visitors.

In *Beeson, supra*, the tenants had agreed in the lease "not to negligently destroy any part of the premises, and to yield up the premises at the end of the term as good condition as when possession was taken, reasonable wear and tear accepted." *Id.* at p. 687. The *Beeson* court held that such language "does not indicate the parties intended to limit the benefit of the insurance to the landlord. A tenant could sign the written lease at issue and reasonably never contemplate that if the premises were destroyed by a fire he negligently caused, his landlord's insurer could collect damages from him." *Id.* at p. 687. Similarly, Mrs. Cook's lease contained no express provision that Trinity could collect damages from her if the premises were destroyed by a fire caused by her family or visitors.

Because of the "bright line" rule in *Beeson, supra*, and its rationale as explained in detail in *Datell, supra*, Trinity's argument for subrogation against Mr. Cook is even more attenuated. It 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. This is an even greater economic waste

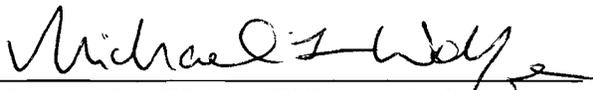
than that which is rejected by *Sutton, supra*, and its progeny, including *Beeson, supra*.

IV. CONCLUSION

The trial court properly granted Mrs. Cook's motion for summary judgment of dismissal. She was not at fault for the fire, so Trinity has no right to subrogate against her. Furthermore, Trinity admits that the rental agreement between its insureds and Mrs. Cook did not contain an express provision stating that she was not covered under Trinity's fire insurance policy. According to this Court's controlling precedent, in the absence of such an express provision, Trinity cannot subrogate against Mrs. Cook, either directly or vicariously.

DATED this 6th day of October, 2011.

RANDALL | DANSKIN, P.S.

By 
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CERTIFICATE OF SERVICE

I hereby certify that I caused to be served a true and correct copy of the **BRIEF OF RESPONDENT CORINNE COOK** on the 6th day of October, 2011, addressed to the following:

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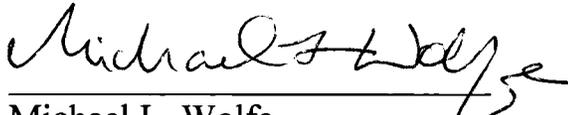
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