

Case No. A10-2146

State of Minnesota
In Court of Appeals

RAM Mutual Insurance Company,

Appellant,

vs.

Rusty Rohde, d/b/a Studio 71 Salon,

Respondent.

**RESPONDENT RUSTY ROHDE, D/B/A STUDIO 71 SALON'S
RESPONSIVE BRIEF**

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STATEMENT OF LEGAL ISSUE

WHETHER APPELLANT RAM MUTUAL INSURANCE COMPANY CAN SUSTAIN A SUBROGATION LAWSUIT AGAINST ITS INSURED'S TENANT, RESPONDENT ROHDE, WHERE MINNESOTA COMMON LAW IDENTIFIES THE TENANT AS A CO-INSURED UNDER THE RAM POLICY.

The trial court, Honorable Thomas P. Knapp presiding, determined that such a claim is barred by the *Bruggeman* case and its progeny, cited below, because *Bruggeman* identifies Rohde as an insured of RAM's for the losses at issue, and because Appellant RAM is prohibited from initiating a subrogation action against a party it insures. As a result, Judge Knapp dismissed RAM's case in its entirety as a matter of law upon Rohde's Motion for Summary Judgment.

Most apposite cases:

United Fire & Casualty v. Bruggeman, 505 N.W.2d 87 (Minn. Ct. App. 1993)

Blohm v. Johnson, 523 N.W.2d 14 (Minn. Ct. App. 1994)

Bigos v. Kluender, 611 N.W.2d 816 (Minn. Ct. App. 2000)

STATEMENT OF CASE

This is a subrogation lawsuit initiated by Appellant RAM Mutual Insurance Company (“RAM”), whose insured allegedly suffered water damage at a property it owns. RAM’s insured, JD Property Management, LLC (“JD Property”), owns a business property in Sauk Centre, Minnesota which consists of three separate units. One of the units in the facility was rented to Respondent Rusty Rohde d/b/a Studio 71 Salon (“Rohde”); which agreement is governed by a Commercial Lease Agreement dated December 12, 2004 (the “lease”). A-53.

While the lease was in force, Rohde replaced a pedicure chair in his salon. The task required that he run a new water line to the chair. Shortly thereafter, the new water line burst, causing a water leak in the salon.

Because the lease did not require Rohde to do so, he did not obtain primary first-party insurance coverage on the rented building.¹ Despite RAM’s suggestions otherwise, the lease was silent with regard to any party’s duty to obtain first-party property damage coverage for the premises at issue.

Rohde moved for summary judgment on the sole issue of whether RAM’s subrogation claims are barred by Minnesota common law as stated in *United Fire & Casualty v. Bruggeman*, 505 N.W.2d 87 (Minn. Ct. App. 1993). Despite the fact that *Bruggeman* dealt with a fire loss, the trial court determined that the principles of insurance law set forth in *Bruggeman* applied equally to the circumstances of the instant

¹ The only first-party insurance coverage obtained by Rohde was excess coverage for damage to the building which provides coverage when a primary policy’s limits of coverage have been exhausted.

case as a result of the parties' relative interests. In short, the holding of *Bruggeman* bars subrogation claims by a landlord's insurer against a tenant who is also an insured under the insurer's first-party property damage insurance policy. *Bruggeman* provides that a tenant who is not required in its lease to obtain first-party property damage coverage is a co-insured under the landlord's policy covering the same.

After being provided notice of Rohde's summary judgment motion, RAM decided to bring its own cross motion for summary judgment in the trial court. RAM essentially sought partial summary judgment on the issue of liability in its breach of contract claim. The trial court denied RAM's motion for the simple reason that each of its claims – all of which were brought as subrogee of JD Property – are barred under *Bruggeman*.

STATEMENT OF FACTS

RAM's Complaint alleges that, on February 4, 2008, a water line which feeds a pedicure chair at Rohde's Studio 71 Salon burst, causing damage to the real property. A-3-4. The leased premises are located at 201 Main Street, Suite #2 in Sauk Rapids ("Suite #2"). A-53. Because the water line had been installed by Rohde, RAM's Complaint alleges causes of action for (1) breach of contract, (2) negligence and (3) promissory estoppel.² A-4-6. As subrogee of JD Property, RAM seeks recovery of the payment it made to JD Property for repair of the property damage allegedly suffered at the insured premises in the amount of \$17,509.38. A-7.

² Although Defendant has generally denied the allegations against him, only limited discovery has been conducted thus far. In any case, evaluation of liability is irrelevant to Rohde's summary judgment motion, which is based exclusively on the law barring subrogation claims such as those made by RAM in this case.

The lease agreement between JD Property and Rohde identified certain obligations for obtaining (1) first-party insurance coverage for damages to personal property and (2) third-party liability coverage. The section of the lease entitled "Insurance" states, *in full*:

Insurance

25. The Tenant is hereby advised and understands that the personal property of the Tenant is not insured by the Landlord for either damage or loss, and the Landlord assumes no liability for any such loss. The Tenant is advised that, if insurance coverage is desired by the Tenant, the Tenant should inquire of Tenant's insurance agent regarding a Tenant's Policy of Insurance.
26. The Tenant is responsible for insuring the Premises for liability insurance for the benefit of the Tenant and the Landlord.
27. The Tenant will provide proof of such insurance to the Landlord upon the issuance or renewal of such insurance.

A-55. The characteristic of the lease which is most significant to the instant matter is that it is *silent* as to any duty to obtain first-party property damage coverage for the building itself.³ The choice-of-law provisions of the lease identify the laws of the State of Minnesota as the governing law when interpreting the agreement. A-56.

Defendant Rohde obtained insurance coverage as set forth in the lease. At the time of the alleged incident at issue, Defendant Rohde was insured under an American Family Businessowners Policy with effective dates of June 1, 2007 to June 1, 2008

³ As discussed, *infra*, RAM's assertion that the lease speaks to a requirement to obtain first-party property damage coverage (1) grossly misconstrues terms of the lease which have no relation to insurance requirements and (2) is based on lease language which was not discussed by the parties or the trial court in the summary judgment phase of trial and cannot be considered by this Court on appeal.

(“American Family policy”). A-137-212. As stated above, this policy provided the requisite third-party liability coverage as required by the lease agreement. A-141.

The American Family policy also provided property damage coverage for both the building and its contents, but only in excess of any such coverage afforded by RAM on the same premises; i.e. Suite #2 of the property in question. In this regard, the following provisions are found under the heading, “Section III – Common Policy Conditions (Applicable to Section I – Property and Section II – Liability)” in the American Family policy:

H. Other Insurance

1. If there is other insurance covering the same loss or damage, we will pay only for the amount of covered loss or damage in excess of the amount due from that other insurance, whether you can collect on it or not. .

A-178. The facts that (1) Defendant Rohde had no contractual duty to obtain primary first-party coverage – e.g. fire insurance – on his rented premises and (2) Rohde did not obtain primary insurance coverage on those premises are central to the forthcoming analysis under the *Bruggeman* case.

ARGUMENT

I. STANDARD OF REVIEW

When reviewing the dismissal of claims pursuant to Minn. R. Civ. P. 56, this Court reviews de novo “whether a genuine issue of material fact exists” and “whether the district court erred in its application of the law.” *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 77 (Minn. 2002). “A motion for summary judgment shall be

granted when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that either party is entitled to a judgment as a matter of law.” *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993) (citation omitted).

II. RAM’S SUBROGATION CLAIMS AGAINST ITS INSURED’S TENANT ARE BARRED

A. The Case of *United Fire & Casualty v. Bruggeman* Bars RAM’s Claims.

The case of *United Fire & Casualty v. Bruggeman*, 505 N.W.2d 87 (Minn. Ct. App. 1993) and its progeny provides the controlling caselaw in this matter. In *Bruggeman*, a landlord’s insurer brought a subrogation action against a tenant alleging negligence for damage to the building. *Id.* at 88. No agreement had been reached between the landlord and tenant for the provision of insurance coverage on the premises. *Id.* The landlord had obtained first-party fire insurance protection. *Id.* That policy ultimately provided coverage for the actual losses suffered in that case, which resulted from fire. *Id.* This Court affirmed the trial court’s determination that the tenants were “co-insureds” under the landlord’s first-party insurance policy and, therefore, could not be sued by the landlord’s insurer on a subrogation basis. *Id.* at 89-90. In reaching this decision, this Court, citing the majority position on the subject, stated the following:

The *Sutton* court recognized the landlord and the tenant were co-insureds because each had an insurable interest in the property – the landlord a fee interest and the tenant a possessory interest. In *Sutton*, as here, the party with the fee interest purchased fire insurance,

[a]nd as a matter of sound business practice the premium paid had to be considered in establishing the rent rate on the rental unit. Such premium was chargeable against the rent as an

overhead or operating expense. And of course it follows then that the tenant actually paid the premium as part of the monthly rental.

[*Sutton v. Jondahl*, 532 P.2d 478, 482 (Okla. Ct. App. 1975).] This sharing of proprietary interests and the expenses associated with protecting them gives rise to the co-insured relationship.

Id. at 89. This Court limited its holding that a tenant is a “co-insured” under first-party property insurance to the subrogation context.⁴ *Id.*

The reasoning in *Bruggeman* was again relied upon by this Court in a later case entitled *Bigos v. Kluender*, 611 N.W.2d 816 (Minn. Ct. App. 2000). In *Bigos*, as in *Bruggeman*, a landlord’s insurance company had already reimbursed the landlord for losses as a result of property damage to rented premises and was pursuing a subrogation claim against the allegedly-negligent tenants. *Bigos*, 611 N.W.2d at 822-823. The *Bigos* court began its analysis on the subject by stating, “An insurance company cannot subrogate against its own insured under general principles of insurance law.” *Id.* at 822; citing *United States Fire Ins. Co. v. Ammala*, 334 N.W.2d 631, 634 (Minn. 1983). As was the case in *Bruggeman*, this Court determined in *Bigos* that no express agreement existed between the landlord and tenants which obligated the tenants to obtain their own fire insurance. *Id.* at 823. On these facts, the *Bigos* court determined that the situation was the same as that in *Bruggeman* and affirmed the trial court’s dismissal of the subrogation action. *Id.* In reaching this decision, this Court concluded that the case

⁴ As reasoning for this, the *Bruggeman* court commented that, while the insurable risk of property damage to the premises is the same to the landlord and tenant, those parties would instead have separate insurable risks for damages as a result of loss of use of the property; i.e. rental income versus business income. *Bruggeman*, 505 N.W.2d at 89.

relied upon by the landlord's insurer, *Osborne v. Chapman*, 574 N.W.2d 64 (Minn. 1998), was distinguishable and did not overrule *Bruggeman* because the *Osborne* opinion dealt with a direct claim by a landlord against a tenant and did not involve a subrogation claim. *Bigos*, 611 N.W.2d at 823.

Another case which supports affirmation of the district court's dismissal of RAM's claims, and which was decided on the principles of *Bruggeman*, is *Blohm v. Johnson*, 523 N.W.2d 14 (Minn. Ct. App. 1994). *Blohm* presents the most analogous situation to the instant case with regard to the lease language requiring certain forms of insurance coverage. As with the cases discussed above, *Blohm* dealt with a subrogation action by a landlord's insurance company against the allegedly-negligent tenants for property damage to the premises due to fire. *Id.* at 15. A written lease existed in *Blohm*, "which obligated Johnson, as tenant, to 'carry his own liability and other insurance coverage for his business operations.'" *Id.* at 16. *Blohm*'s insurer argued that the *Bruggeman* holding was limited to situations in which no written lease existed between the landlord and tenant. *Id.* The *Blohm* court disagreed, stating the following:

The holding of *Bruggeman* was not so limited. Rather, *Bruggeman* applies to any landlord/tenant situation where there is no express agreement covering the provision of fire insurance for the building. *Bruggeman*, 505 N.W.2d at 89. **The lease agreement here required Johnson to maintain insurance for his business operations but not fire insurance for the building.**

Id. (emphasis added). The *Blohm* court thus upheld the dismissal of the subrogation action against the tenant pursuant to *Bruggeman*. *Id.*

The instant matter is analogous to *Bruggeman*, *Bigos*, and *Blohm* in all key respects. Here, as in those cases, a subrogation lawsuit was commenced by the landlord's insurer, RAM, against the tenant, Rohde, for physical damage to the rented premises⁵. The cases are also similar because the lease agreement between RAM's insured and Rohde did not contain any requirement that Rohde obtain primary insurance coverage for such losses. This fact makes the instant matter particularly similar to the *Blohm* case, in which the lease was silent as to the need for first-party property damage coverage, but where similar provisions existed in the lease requiring the tenant to carry liability insurance and other coverages pertaining to the tenant's operations. Even so, RAM argues that the *Bruggeman* case is not applicable here because the lease agreement between JD Property and Rohde required Rohde to obtain certain insurance coverage for the benefit of both parties. However, the insurance requirements in the lease only apply to "liability insurance." As discussed above, the lease is completely silent as to the need for first-party property damage coverage to the building itself (or "fire insurance" as it is referred to in *Bruggeman* and *Blohm*). This is true despite the fact that the lease indicates that first-party property damage coverage for the tenant's "personal property" was to be obtained by the tenant, if desired. The fact that the lease specifically notifies the tenant of its duty to obtain coverage for personal property, while remaining silent on the need for

⁵ It is inconsequential that the damages suffered in the instant matter were a result of water leakage as compared to the fire damage in the cases discussed herein. Both perils are covered under first-party property damage insurance. The only significant facts in this regard are that all of the cases – including the instant matter – resulted from property damage to the rented premises, which was covered by the landlord's first-party insurance policy.

insurance coverage on the building itself, can only lead to the conclusion that JD Property intended its policy with RAM to provide first-party coverage for damage to the premises. Regardless of how the facts are viewed in this case, there is no evidence that Rohde had an obligation under the lease to obtain first-party coverage for damage to the premises.

Another similarity between the above cases and the instant matter is that, here, the landlord indeed obtained the first-party insurance which has already provided coverage for the claimed losses resulting from water damage. Furthermore, the landlord, JD Property, and tenant, Rohde, had the same insurable interest in the rented premises with regard to damage to the real property. JD Property's interest in the property was one of fee ownership and Rohde's interest was possession of the property. As discussed in *Bruggeman*, it would have been redundant and a waste of resources for both JD Property and Rohde to obtain primary first-party coverage for property damage to the rented premises. Indeed, Rohde did not obtain primary coverage for such losses and instead elected only to obtain coverage which was "excess" over other available coverage. Thus, the fact that Rohde obtained excess first-party property damage coverage is inconsequential because it did not provide the same coverage as was obtained by JD Property from RAM. Rohde did not obtain primary coverage on the same level as the RAM policy.

For the above reasons, under the holding of the *Bruggeman* case and its progeny, Rohde's rent payments partially contained payments of the premiums on the RAM first-party insurance policy, which renders Rohde a co-insured under that policy. According to the general principles of insurance law, RAM cannot bring a subrogation claim against

Rohde on behalf of Rohde's co-insured, JD Property. The dismissal of RAM's claims in their entirety should be affirmed.

B. The Question of whether the Premises at Issue was Completely Destroyed is Immaterial to the Issue on Appeal.

As the purported basis for rendering *Bruggeman* inapplicable to the instant case, RAM points out that Studio 71 Salon was not completely destroyed as a result of the water leak and that Rohde did not lose his possessory interest in the property after the water leak at issue. Because Rohde did not entirely lose a possessory interest in the property, argues RAM, *Bruggeman* should not apply. But these arguments ignore the clear holding and rationale of *Bruggeman* and its progeny. There is no discussion in any of the case relied upon by Rohde that subrogations claims such as the one by RAM in this case are barred *only* when a property is completely destroyed. The principles of the above cases rest simply on the fact that both the landlord and tenant have an interest in a property which is physically damaged. Nothing in those cases requires an analysis of the extent of damage or relative impact of the losses.

C. The *Osborne* Case on which RAM Relies is Distinguishable.

The only authority on which RAM directly relies is *Osborne v. Chapman*, 574 N.W.2d 64 (Minn. 1998). But *Osborne* is distinguishable because it deals with a category of damages – lost rent – which is altogether different in nature than the damages at issue in the instant matter of cost of physical repairs to real property. According to the Minnesota Supreme Court, *Osborne* is distinguishable from the *Bruggeman* case (and, thus, the instant case) because the landlord and tenant do not share an insurable interest in

lost future rents as they do with regard to the “respective real property interests of landlords and tenants.” *Id.* at 67. While *Bruggeman* dealt with insurance coverage for physical damage to the real property, which benefitted both the tenant and landlord, *Osborne* dealt with coverage for lost rental income, which benefitted only the landlord. *Id.* On this point, the court stated, “Such coverage plainly exists for the benefit of the landlord, not the tenant, for it is the landlord whose income from the rental property is cut off when a casualty renders the premises uninhabitable.” *Id.*

The instant matter is on-point with *Bruggeman* and its progeny because it deals with the same type of loss – physical repairs to real property – for which *both* the landlord and tenant have an insurable interest. None of the damages claimed by RAM in this case represent anything other than the cost of repairing physical damage to real property.⁶

Unlike in *Osborne*, none of the claimed damages here are for lost rent or other loss of use of the property, which are damages only suffered by the landlord. As a result, *Osborne* provides no authority to the instant matter. For these reasons, this Court should rely on *Bruggeman* and its progeny and affirm the dismissal of RAM’s claims as a matter of law.

⁶ In its Brief, RAM alleges that a tenant in a unit neighboring Rohde’s, AFLAC Insurance, suffered temporary business interruption as a result of the water leak at issue in this case. Appellant’s Brief, p. 3. But a review of the record on appeal reveals that the monies demanded by RAM in its Complaint in the instant lawsuit constitute only the estimated cost of repairs of the building itself. A-60-69 Because no consequential damages such as AFLAC’s business interruption losses are part of this lawsuit, it cannot be said that any of the damages in this case are similar to the consequential damages for lost rental income in *Osborne*.

D. The Fact that the Property Damage at Issue in the Instant Matter was Caused by Water as Opposed to Fire is Inconsequential and does not Render the *Bruggeman* Opinion Inapplicable.

In its Brief, RAM relies heavily on the fact that the property damage at issue in the instant matter was caused by water as opposed to fire; yet RAM offers no explanation for why principles of insurance law should be applied differently in cases involving damage to a physical structure resulting from fire as opposed to damage to a structure resulting from a water leak. Both scenarios involve the loss of control of a natural element which caused damage to real property. Additionally, RAM's arguments on this point are internally inconsistent in its memorandum. Stated otherwise, even though RAM claims that the several analogous cases on which Rohde relies are distinguishable because they dealt with fire loss, the *only* case on which RAM places direct reliance – *Osborne v. Chapman*, 574 N.W.2d 64 (Minn. 1998) – is also a case which dealt with a fire loss. RAM has provided no case law or other authority for the proposition that damages to real property resulting from a water leak should be treated any differently than damages to real property from fire. The rationale for the *Bruggeman* opinion should apply equally to water damage as it does for fire damage; that a landlord's insurer cannot subrogate against an alleged negligent tenant for the cost of repair of the premises where no agreement existed between the two as to which was obligated to carry first-party property damage insurance. See *United Fire & Casualty v. Bruggeman*, 505 N.W.2d 87, 89 (Minn. Ct. App. 1993).

III. WHETHER DEFENDANT WAS NEGLIGENT IS IMMATERIAL TO HIS SUMMARY JUDGMENT MOTION

According to the Minnesota Supreme Court in *Osborne* (the only case on which RAM relies), “The *Bruggeman* court held that an insurance company had no right of subrogation against a negligent tenant for payments it made to the landlord to cover damage to the structure because the landlord and tenant were ‘co-insureds’ under the landlord’s fire policy.” *Osborne*, 574 N.W.2d at 66-67; citing *Bruggeman*, 505 N.W.2d at 89 (emphasis added). Thus, according to the *Osborne* court, the question of whether Rohde was negligent in causing RAM’s claimed damages has no bearing on the fact that RAM has no right of subrogation against its insured’s tenant. Despite this topic being a non-issue, RAM in its Brief continues to discuss facts and admissions which tend to show that Rohde was negligent in causing the water leak – just as it did in the summary judgment proceedings below. In his written materials to the trial court, Rohde even allowed the court to assume he was negligent with respect to the damages at issue. Rohde makes the same concession for the purposes of this appeal, because such a determination has no bearing on the outcome of the issues on appeal except to further support the similarities between this case and *Bruggeman* and its progeny. According to the plain language of *Bruggeman* and later cases which rely upon it, RAM has no right of subrogation against Rohde. This is true regardless of the several ways in which RAM’s Complaint attempts to characterize the nature of RAM’s claims against Rohde; i.e. negligence, breach of contract, etc. Despite an assumption that Rohde was negligent in

causing the water damage at issue, the dismissal of RAM's claims pursuant to *Bruggeman* should be affirmed.

IV. PLAINTIFF MISCONSTRUES THE INSURANCE REQUIREMENTS IN THE LEASE

The part of the lease which is relevant to insurance coverage states, "The Tenant is responsible for insuring the Premises for liability insurance for the benefit of the Tenant and the Landlord." A-55. The plain language of this phrase requires the tenant, Rohde, to obtain a liability insurance policy which will protect both the tenant and the landlord, alike, from third-party liability claims. But, in its Brief, RAM argues that this phrase requires Rohde to obtain liability insurance which benefits only him but would pay monies to the landlord, JD Property, if the tenant is negligent in causing a loss such as the one currently at issue. Appellant's Brief, p. 14. There are several problems with this argument.

First, the plain language of the lease does not support RAM's interpretation of its requirements. The phrase requiring Rohde to obtain "liability insurance for the benefit of the Tenant and Landlord" plainly means that he is to obtain a liability policy of insurance which protects both he and his landlord, alike, from third-party liability claims. The phrase says nothing about either party insuring against negligent acts so that the other party can collect under such insurance.

Second, at best, RAM's argument merely creates an ambiguity in the language of the lease. In such an instance, Rohde still benefits from the interpretation of the lease which is most favorable to him. See *Untiedt v. Grand Laboratories, Inc.*, 552 N.W.2d

571, 574 (Minn. Ct. App. 1996)(“When faced with an ambiguous contract, we construe its terms against the drafter in the absence of a clear showing that the parties intended a contrary meaning.”)(citations omitted). A contract is ambiguous if its language is reasonably susceptible of multiple interpretations. *Current Technology Concepts, Inc. v. Irie Enters., Inc.*, 530 N.W.2d 539, 543 (Minn. 1995). Whether a contract is ambiguous presents a question of law. *Id.* Thus, because RAM’s insured, as landlord, drafted the lease and because Rohde’s interpretation of the lease is reasonable, Rohde’s interpretation of the lease is what must be examined in this summary judgment context.

Because such an interpretation of the lease language at issue places on Rohde only a duty to obtain liability coverage protecting himself and his landlord from third-party claims for damage, there is no support for RAM’s arguments that the lease somehow obligated Rohde to obtain coverage which would pay benefits to his landlord on a subrogation claim similar to the one at issue here. As a matter of law, this Court should dismiss RAM’s interpretation of the lease and any related argument by RAM that the lease language required Rohde to obtain insurance coverage for first-party property damage.

V. RAM HAS RAISED NEW ISSUES ON APPEAL WHICH CANNOT BE CONSIDERED BY THIS COURT

The second issue discussed in RAM’s Brief, which involves an argument related to the waste provisions of the lease agreement, goes beyond the scope of appealable issues. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (explaining that an appellate court will not consider matters not argued to and considered by the district

court). RAM did not make any argument to the trial court based on the waste provisions of the lease and the trial court did not discuss the waste provision of the lease in its Memorandum and Order for Summary Judgment. RAM should not be allowed to raise any issues relating to the waste provisions of the lease agreement on appeal.

Nevertheless, RAM's arguments pertaining to the section of the lease entitled "Tenant's Repairs and Alterations" grossly misconstrues the requirements of the lease as it pertains to insurance coverage on the rented premises. The lease language at issue provides:

Tenant's Repairs and Alterations

35. The Tenant covenants with the Landlord to occupy the Premises in a tenant-like manner and not to permit waste. The tenant will at all times and at its sole expense, subject to the Landlord's repair, maintain and keep the Premises, reasonable wear and tear, damage by fire, lightning, tempest, structural repairs, and repairs necessitated from hazards and perils against which the Landlord is required to insure excepted. . . .

A-56. RAM attempts to argue that the above language somehow requires the landlord, JD Property, to obtain fire insurance coverage but not other forms of first-party property damage coverage. But the plain language of this section says nothing of which types of insurance is required under the lease. Recall that the lease includes a separate section which governs required insurance policies and is silent as to which party is to obtain first-party property damage coverage of any kind with regard to the building itself. Instead, the language above does nothing more than to provide a list of exceptions to the rule of which repairs are to be made by the landlord. Furthermore, the language does not

identify fire damage as a “peril against which the Landlord is required to insure.” That phrase and the phrase “damage by fire” are two entirely separate items on the list of perils which do not trigger a duty of repair by the tenant.

Because the above language cannot be construed to require any party to obtain fire insurance, it remains true that the lease is silent as to which party is obligated to obtain such coverage on the property. As a result, *Bruggeman* and its progeny apply to bar RAM’s subrogation claims.

CONCLUSION

For the above reasons and those presented at the oral argument on these matters, Respondent Rusty Rohde d/b/a Studio 71 Salon respectfully requests that this Court affirm the district court’s summary judgment order in which Appellant’s claims were dismissed in full.

Dated this 8th day of February, 2011.

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