
**State of Minnesota
In Supreme Court**

RAM MUTUAL INSURANCE COMPANY,

Appellant,

vs.

RUSTY ROHDE d/b/a STUDIO 71 SALON,

Respondent.

APPELLANT'S BRIEF AND ADDENDUM

WILLENBRING, DAHL, WOCKEN
& ZIMMERMANN, PLLC
John Neal (#0387473)
Kirby Dahl (#20710)
318 Main Street
Box 417
Cold Spring, Minnesota 56320
(320) 685-3678

Attorneys for Appellant

RAJKOWSKI HANSMEIER, LTD.
Matthew W. Moehrle (#034767X)
11 Seventh Avenue North
Box 1433
St. Cloud, Minnesota 56302
(320) 251-1055

Attorneys for Respondent

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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Statement of the Issues

- (1) **Appellant alleges that Respondent (tenant) negligently caused water damage to the leased premises. The lease requires Respondent to keep the premises in good order and in a tenant-like manner and not to commit waste, among other things. Does *Bruggeman* and its progeny bar Appellant's subrogation claim where Appellant's insured (landlord) agreed to, and did, provide fire insurance, but where the lease did not require the landlord to insure against the peril of water damage?**

Trial Court Ruling: *Bruggeman* and its progeny preclude Appellant's subrogation claim where there is no agreement regarding fire insurance.

Court of Appeals' Ruling: The Court of Appeals affirmed the trial court's ruling and further extended *Bruggeman*. The Court of Appeals held that where there is no express agreement between the landlord and tenant regarding *first-party property insurance coverage*, the parties stand as co-insureds, thereby barring an insurer's subrogation suit against a tenant that negligently causes water damage. (Add. A-5) (emphasis added).

Cases: E.g., *United Fire & Casualty v. Bruggeman*, 505 N.W.2d 87 (Minn. Ct. App. 1993); *Nuessmeier Elec., Inc. v. Wweiss Mfg. Co.*, 632 N.W.2d 248 (Minn. Ct. App. 2001); *Osborne v. Chapman*, 574 N.W.2d 64 (Minn. 1998); *Blohm v. Johnson*, 523 N.W.2d 14 (Minn. Ct. App. 1994).

Statement of the Case

The trial court disposed of this case by way of summary judgment in Respondent's favor. The trial judge was the Honorable Thomas P. Knapp of the Seventh Judicial District, Stearns County. The Court of Appeals affirmed. (Honorable Judge Wright, Judge Schellhas, and Judge Willis, presiding).

Appellant (RAM) insured commercial property in Sauk Centre, Minnesota. Respondent (Rohde) rented the property and operated a beauty salon there. During his occupancy, Rohde installed new water lines to a pedicure machine. He did so without first obtaining his landlord's permission as required under the lease. The negligently installed water lines burst, causing water damage to the unit. RAM paid the landlord's insurance claim and brought subrogation claims against Rohde for breach of contract, negligence, and promissory estoppel.

The parties' lease agreement set forth the various perils the landlord was to insure. These perils included fire insurance, which the landlord obtained. The lease did not require the landlord to insure against water damage. Rather, it required Rohde to maintain the premises in a tenant-like manner and not commit waste, among other things.

Rhode sought summary judgment, claiming that RAM's subrogation action was barred by *United Fire & Casualty v. Bruggeman*, 505 N.W.2d 87 (Minn. Ct. App. 1993). The trial court and Court of Appeals agreed.

Statement of Facts

Rohde operates a beauty salon in a rental suite owned by RAM's insured, JD Properties. (App. 53). On February 4, 2008, a water line to a manicure chair burst within Rohde's salon, causing \$17,509.38 in damage. (App. 60; 75). RAM insures the commercial property where Rohde's salon is located. (App. 228). RAM paid its insured, JD Properties, for the loss. (App. 60). In turn, RAM initiated this suit to recover its subrogation interest. (App. 1-7).

The commercial property at issue contains three different suites, all of which are connected. (App. 72). Aflac Insurance occupies Suite 1. (App. 72). Rohde occupies Suite 2. (App. 72). And, Soak Centre, a launder mat, occupies the final suite. (App. 72). While most of the damage occurred to Rohde's unit (Suite 2), water also seeped into Suite 1, disrupting Aflac's business. (App. 72-73)

Upon investigation, RAM learned that "Rhode installed the pedicure chairs and [] additional plumbing lines in this rental property without [JD Properties'] knowledge or consent." (App. 73) (alterations added). RAM also learned that Rohde incorrectly installed the lines or used an inappropriate application in the process. (App. 75).

Rohde's five-year lease extends from January 1, 2005 to December 31, 2010. (App. 53, ¶ 2). The Lease Agreement provides, in pertinent part, that:

The Tenant will not make or have others make alterations, additions or improvements or erect or have others erect . . . *plumbing fixtures* . . . or

make any changes to the Premises or otherwise without first obtaining the Landlord's written approval thereto.

(App. 56, ¶ 37) (emphasis added). The lease also provides a number of other relevant clauses, including:

Additional Right Reentry

19. If the Landlord reenters the Premises or terminates the Lease, then:
 - h. the Tenant will pay to the Landlord on demand:
 - ii. reasonable expenses as the Landlord incurs or has incurred in connection with . . . expenses of keeping the Premises in good order, repairing the same.

(App. 55, ¶ 19(h)(ii))

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. . . . [T]he Tenant will keep, repair, replace and maintain all glass, wiring, *pipes* and mechanical apparatus in, upon or serving the Premises in good and tenantable repair at its sole expense.

(App. 56, ¶ 35)

Care and Use of Premises

47. At the expiration of the lease term, the Tenant will quit and surrender the Premises in as good a state and condition as they were at the commencement of this Lease, reasonable wear and damages by the elements excepted.

(App. 57, ¶ 47)

Insurance

25. 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.

(App. 55, ¶¶ 25 & 26). As to insurance, Rohde ultimately obtained a business owner's policy, providing coverage to the landlord for the tenant's own negligence. (App. 41).

Rohde acknowledges that he installed the new waterlines without prior written consent. (App. 51). And, he admits that one of the lines he installed burst, causing damage to the rental premises. (App. 51). Finally, Rohde admits that he failed to notify JD Properties that he was installing new water lines in Suite 2. (App. 51). Accordingly, Rohde's actions were contrary to his obligations under the lease.

As to the landlord's obligations under the lease, it was obligated, among other things, to obtain fire insurance. (App. 56, ¶ 35). In this regard, the lease provided:

Tenant's Repairs and Alterations

35. 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.

(App. 56, ¶ 35). The landlord did obtain a commercial package insurance policy with RAM, which was in place on the date of the incident. (App. 228).

Argument

RAM appeals the Court of Appeals' decision, affirming the trial court's order and entry of summary judgment in favor of Respondent. The standard of review is *de novo*. See *Losen v. Allina Health System*, 767 N.W.2d 703, 707–09 (Minn. Ct. App. 2009) (“On appeal from summary judgment, we review *de novo* whether there are any genuine issues of material fact and whether the district court erred in its application of the law.”). To that end, the Court “must view the evidence in the light most favorable to the party against whom judgment was granted.” *Fabio v. Bellomos*, 504 N.W.2d 758, 761 (Minn. 1993).

Respectfully, the trial court and Court of Appeals erred in concluding that *United Fire & Casualty v. Bruggeman*, 505 N.W.2d 87 (Minn. Ct. App. 1993), and its progeny control this case. Under the parties' lease agreement, RAM's insured (landlord) agreed to, and did, provide fire insurance. The landlord was not required to provide coverage for the peril of water damage. And, Rohde (tenant) agreed to keep the premises in good order and in a tenant-like manner and not to commit waste, among other things.

The impetus to RAM's petition before this Court stems from a footnote within *Osborne v. Chapman*, 574 N.W.2d 64, 67 n.5 (Minn. 1998). There, this Court stated: “[I]n view of the principle that one is ordinarily held liable for his or her negligent acts, many courts adopting the *Sutton* approach have required some evidence that the parties to

the lease intended that the landlord would seek recovery from its insurer, rather than the tenant, in the event of a loss occasioned by the tenant's negligence." *Sutton* refers to *Sutton v. Johnahl*, 532 P.2d 478 (Okla. Ct. App. 1975)—the primary case the *Bruggeman* Court relied upon in reaching its decision. *See Bruggeman*, 505 N.W.2d at 89 (citing *Sutton*).

At the trial level, RAM argued that *Bruggeman* is inapplicable and *Osborne's* rationales should control this case. (App. 222–223). On appeal, RAM argued the same thing and further urged the Court of Appeals to adopt the approach alluded by *Osborne*. (App. 304 and 305). RAM urges the same thing here.

The *Osborne* footnote was in effect referring to the case-by-case approach utilized by other jurisdictions. *Osborne*, 574 N.W.2d at 67 n.5 (citing cases that follow this approach). Absent an agreement that one party to the lease would provide insurance for the peril that caused damage, the case-by-case approach looks at the *actual* terms of the parties' lease agreement to determine whether a subrogation action against a negligent tenant should proceed. This approach differs from the harsh "no subrogation" rule set forth in *Bruggeman*. Numerous Courts have heavily criticized the no-subrogation approach and the rationales supporting it. This criticism stems, in part, from the fact that the no-subrogation rule is based on assumptions and fictions, while at the same time ignoring the actual terms of the parties' contract.

The case-by-case approach avoids these issues and makes sense under the current situation. The inequities found in *Bruggeman* are not present here. Among the many differences, we are dealing with a commercial lease as opposed to the residential lease found in *Bruggeman* and *Sutton*. RAM urges the Court to adopt the case-by-case approach here or at least find that *Bruggeman* is inapplicable and that the terms of the parties' lease should control.

I. THE PRINCIPLES OF SUBROGATION AND THE DIFFERING APPROACHES UTILIZED IN THE LANDLORD/TENANT CONTENT

A. Principles of Subrogation

When an insurer pays an insurance loss it can usually pursue an action against the tortfeasor through subrogation. 16 COUCH ON INSURANCE § 222:5 (Lee R. Russ 3d ed. 2005) (“[O]n paying a loss, an insurer is subrogated in a corresponding amount to the insured’s right of action against any other person responsible for the loss, such that the insurer is entitled to bring an action against this third party whose negligent or other tortious or wrongful conduct caused the loss.”). Subrogation, in effect, allows an insurer to stand in the shoes of the insured and inherit the rights the insured would otherwise have against the tortfeasor. *Weber v. Sentry Ins.*, 442 N.W.2d 164, 167 (Minn. Ct. App. 1989) (“With subrogation, unlike reimbursement, the insurer stands in the shoes of the insured.”); *see also* 73 AM. JUR. 2D *Subrogation* § 1 (2001) (“Subrogation, a legal

fiction, is broadly defined as the substitution of one person in the place of another with reference to a lawful claim or right.”).

The purpose of subrogation is the “working out of an equitable adjustment between the parties by securing the ultimate discharge of a debt by the person who in equity and good conscience ought to pay it.” 16 COUCH ON INSURANCE, at § 222:8. More fitting to the landlord-tenant scenario, subrogation stands for the proposition that “[w]here the property of one person is used in discharging an obligation owed by another . . . under such circumstances that the other would be unjustly enriched by the retention of the benefit thus conferred, the former is entitled to be subrogated to the position of the obligee.” RESTATEMENT OF RESTITUTION: QUASI CONTRACTS AND CONSTRUCTIVE TRUSTS § 162 (1937).

Generally, when an insurer pays for an insurance loss under a policy of insurance, then pursues a third-party tortfeasor, the insurer proceeds under principles of equitable subrogation. *See Wasko v. Manella*, 849 A.2d 777, 781–82 (Conn. 2004) (“[I]nsurers that are obligated by a preexisting contract to pay the losses of an insured proceed in a subsequent action against the responsible party under the theory of equitable subrogation, and not conventional subrogation.”); *see also Medica, Inc. v. Atlantic Mut. Ins. Co.*, 566 N.W.2d 74, 77 (Minn. 1997) (discussing the difference between equitable and conventional subrogation). As the name suggests, equitable subrogation is based on

principles of equity with or without regard to a contract. *Medica, Inc.*, 566 N.W.2d at 77 (citing *Westendorf v. Stasson*, 330 N.W.2d 699, 703 (Minn. 1983)); *see also* 73 AM. JUR. 2D *Subrogation* at § 4 (“‘Equitable subrogation’ is not a matter of contract and does not arise from any contractual relationship between the parties, but rather, it takes place as a matter of equity.”). Equitable subrogation arises from common law and “its purpose is to place the charge where it ought to rest, by compelling the payment of the debt by him who ought in equity to pay it.” *Medica, Inc.*, 566 N.W.2d at 77 (internal quotations omitted).

The fact that a party had the foresight to purchase insurance coverage typically does not relieve a tortfeasor for its wrongdoing. Indeed, this Court has stated that “insurance coverage of the plaintiff has no effect on the liability of a defendant for a tort. This is on the theory that defendant cannot escape liability for his wrong because of insurance bought and paid for by plaintiff.” *Donohue v. Acme Heating Sheet Metal & Roofing Co.*, 8 N.W.2d 618, 619 (Minn. 1943). Subrogation typically would include this principle, namely that the tortfeasor cannot escape its wrong because the insured had insurance coverage. *Bruggeman*, 505 N.W.2d at 89–90, however, limits this principle.

Bruggeman, 505 N.W.2d at 89–90, holds that an implied waiver of subrogation exists between a landlord and tenant where there is “no express agreement as to which party shall be responsible for obtaining fire-insurance coverage for the rental property.”

See also Blohm v. Johnson, 523 N.W.2d 14, 16 (Minn. Ct. App. 1994) (“*Bruggeman* applies to any landlord/tenant situation *where there is no express agreement covering the provision of fire insurance* for the building.”) (emphasis added). In this circumstance, the tortfeasor escapes his wrong.

B. Subrogation in the Landlord/Tenant Context: Two Positions

There exists across the varying jurisdictions a divergence of opinion as to whether a landlord’s insurer can pursue a subrogation claim against a negligent tenant. The first approach, known as the “no subrogation” rule bars an insurer from pursuing such claim. Robert V. Spake, Jr., *The Roof is on Fire: When, Absent an Agreement Otherwise, May a Landlord’s Insurer Pursue a Subrogation Claim Against a Negligent Tenant?* 63 WASH. & LEE REV. 1743, 1751 (2006). This approach is largely based on the fiction that a tenant is a co-insured under the landlord’s policy. This is true regardless as to whether the insurance policy actually names the tenant as a policyholder; and, it largely ignores the terms of the parties’ lease. It follows, according to this approach, that since an insurer cannot sue its own insured for negligence, likewise it cannot sue the tenant—the fictional insured.

A second approach is the “pro-subrogation” rule, or “anti-*Sutton*” approach. *Id.* (utilizing the term “pro-subrogation”); *Am. Fam. Mut. Ins. Co. v. Auto-Owners Ins. Co.*, 757 N.W.2d 584 (S.D. 2008) (utilizing the term “anti-*Sutton*”). This approach rejects the

premise that a tenant is a co-insured under the landlord's insurance policy. *Am. Fam. Mut. Ins. Co.*, 757 N.W.2d at 590–91 (discussing the jurisdictions that follow this approach and their reasoning). Accordingly, a landlord's insurer can sue a negligent tenant, absent an express agreement to the contrary. This approach represents an opposite extreme view when compared to *Bruggeman*.

The final approach is the “case-by-case” method. This approach looks at the parties' lease agreement along with other evidence to determine whether the tenant could reasonably expect subrogation. More importantly, this approach avoids assumptions and fictions presented by the no-subrogation approach of *Sutton* and adopted by *Bruggeman*. In effect, this approach upholds the freedom of contract.

1. *The No-Subrogation Approach*

The impetus to the no-subrogation approach is *Sutton v. Jondahl*, 532 P.2d 478 (Okla. Ct. App. 1975). There, Jondahl rented a home from the Suttons. *Id.* at 479. While Jondahl's 10-year-old son was experimenting with a chemistry set, a flame erupted from the heated chemicals and set some nearby curtains on fire. *Id.* The fire damaged the rental home and in turn the Sutton's insurer paid the loss. *Id.* The insurer sued Jondahl in subrogation and a jury returned a verdict in its favor. *Id.* The main issue on appeal was whether an insurer can maintain a subrogation action against a policyholder's tenant. *Id.* at 481.

The *Sutton* Court, prior to addressing the issue, noted that subrogation is a matter of equity with the main purpose of placing “the burden of bearing a loss where it [o]ught to be.” *Id.* at 482. The Court further noted that equity “is a fluid concept depending *upon the particular facts and circumstances* of a given case for its applicability.” *Id.* (emphasis added). To that end, the Court held that “under the facts and circumstances in this record” insurance subrogation would not lie. *Id.* (emphasis added).

The Court fashioned its rule out of whole cloth. The rule rests on three shaky assumptions unsupported by the record.

First, the Court held that “the law considers the tenant as a co-insured of the landlord absent an express agreement between them to the contrary.” *Id.* The Court never cited any authority for this proposition. Instead, it exists according to the Court, because of “relational reality” that both the landlord and tenant have the same insurable interests in the property. *Id.*

Second, the Court determined that the Suttons “had to” consider the insurance premium in establishing the Jondahl’s rental rate. *Id.* It follows, according to the Court, “that the tenant actually paid the premium as part of the monthly rental.” *Id.* Therefore, the tenant has to be a co-insured. *Id.* The Court, however, never cited any evidence in the record to support the idea that the Suttons actually did consider their insurance

premiums in calculating the monthly rent, or whether Jondahl's rent payments were actually used to pay the Sutton's insurance premiums.

Finally, the Court assumed that a tenant ordinarily relies upon the landlord to provide fire insurance for the parties' insurable interests. *Id.* Again, there was nothing in the record indicating that Jondahl relied upon the Suttons to obtain insurance. And, there certainly was no data or support for the wholesale proposition that all tenants ordinarily rely upon their landlords in obtaining such insurance.

Eighteen years later, Minnesota adopted the *Sutton*, no-subrogation approach. *United Fire & Casualty Company*, 505 N.W.2d 87 (Minn. Ct. App. 1993). There, the Bruggemans negligently caused a fire, destroying the space they rented from Jeneak Brothers Properties. *Id.* at 88. Jeneak Brothers' insurer, United Fire, paid \$81,275 for the loss and in turn instituted a subrogation action against the Bruggemans. *Id.* A jury returned a verdict in favor of United Fire on the issue of negligence. *Id.* The court, however, denied recovery on the basis that the Bruggemans were co-insureds to the Jeneak Brothers. *Id.*

The Court of Appeals affirmed, relying on *Sutton*. *Id.* Specifically, the Court held that an implied waiver of subrogation exists between a landlord and tenant where there is "no express agreement as to which party shall be responsible for obtaining fire-insurance coverage for the rental property." *Id.* at 89–90. The parties did not have a written lease

agreement and there was no oral arrangement as to who should provide insurance. *Id.* at 88. In turn, the Court agreed with the assumptions of the *Sutton* Court. *Id.* at 89.

The Court further reasoned that the co-insured rule is the most efficient way of allocating the risk, otherwise property would be insured many times over by landlords and tenants. *Id.* The Court rejected the reasoning applied by anti-*Sutton* jurisdictions, whom refuse to apply the no-subrogation approach because it fails to place the burden where it ought to be, namely the negligent party. *Id.* at 89. The Court said these jurisdictions disregard the principle that “a co-insured relationship is established because the tenant indirectly pays the insurance premium.” *Id.* Yet, like the *Sutton* Court, the *Bruggeman* Court failed to cite any record evidence that the Bruggemans’ rent payments were used to cover the Jeneak Brothers’ insurance premiums.

The Court also reasoned that the no-subrogation approach is fair because insurers know the inherent risks associated with rental property. *Id.* According to the Court, insurers can increase premiums to account for tenant risks; or, they can require the landlord to undertake certain precautions. *Id.* The Court neglected to discuss the idea that insurers may rely on terms within a lease, such as anti-waste provisions, to ensure risks are properly allocated before actually issuing a policy on the property.

Moreover, the Court failed to consider that shifting these risks to the insurer unnecessarily drives up insurance premiums. Since insurance premiums are a function of

monthly rent under the *Bruggeman* Court's reasoning, it follows that increased premiums will in turn drive up rental costs. *See Rausch v. Allstate Ins. Co.*, 882 A.2d 801, 815 (Md. 2005) ("The courts that have denied subrogation on the assumption that the tenant was a co-insured because the tenant was, in fact, paying the insurance premiums never apparently considered whether the expectation by the parties to the insurance contract that subrogation was available served to reduce the premiums and thus inured to the benefit of the tenant.").

In the end the *Bruggeman* Court's rationales were premised on the same assumptions discussed in *Sutton*. These assumptions fail to consider the reality of the parties' situation and the actual terms of their lease.

2. *The Case-by-Case Approach*

In contrast to the no-subrogation rule, the case-by-case approach respects the terms of the parties' lease agreement. *See Am. Fam. Mut. Ins. Co. v. Auto Owners Ins. Co.*, 757 N.W.2d 584, 594 ("This Court finds and concludes that the case-by-case approach is the best approach to employ in the landlord-tenant context because it applies basic contract principles."). Unlike the rigid and harsh results of the no-subrogation rule, the case-by-case approach is flexible. It looks "to the reasonable expectations of the parties to the lease, as determined from the lease itself and any other admissible evidence." *Rausch v. Allstate Ins. Co.*, 882 A.2d 801, 806 (Md. 2005). More

importantly, it “avoids . . . making assumptions and adopting fictions that are largely conjectural, if not patently illogical, and instead applies basic contract principles and gives proper credence to the equitable underpinning of the whole doctrine of subrogation.” *Id.* at 814.

Rausch, which involved two consolidated cases, provides a model and explanation for this approach. In the first case, the Rausches rented a residential dwelling insured by Allstate. *Id.* at 803. The Rausch lease contained two relevant provisions. The first required them to maintain “adequate personal liability insurance.” *Id.* at 804. The second provision prohibited the Rausches from doing anything in contravention of any insurance policy. *Id.* at 803. This suggested that the landlord would maintain fire insurance. *Id.* at 804. However, there was no clear indication that the landlord would carry such insurance. *Id.* In the end, a fire destroyed the residence when Ms. Rausch failed to turn off an electric range. *Id.* at 804. Allstate paid for the loss and brought a subrogation action against the Rausches.

In the second case, Ms. Harkins rented a unit within an apartment complex. *Id.* at 805. The lease agreement required Ms. Harkins to carry renters insurance, reimburse the landlord for damage done by the tenant, and return the premises in the same condition as when she found it. *Id.* During the lease, Ms. Harkins failed to extinguish a candle in her bedroom, which caused a fire and extensive damage to the second floor of the complex.

Id. at 805–06. Hartford Insurance Company—the landlord’s insurer—paid for the loss and brought a subrogation suit against Ms. Harkins. *Id.*

The main issue before the Court was whether a tenant is, as a matter of Maryland law, an implied co-insured of the landlord, absent an express provision to the contrary. *Id.* 816. While the Court ultimately adopted the case-by-case method as the better approach, it surveyed the jurisdictions and the differing reasons against the *Sutton* rule.

As *Rausch* indicates, many courts reject the *Sutton* rule because it displaces basic market principles with fictional assumptions. For example, *Sutton* assumes the tenant indirectly pays the insurance premium as part of the rent price, but at the same time it “ignores the fact that more often than not the market, *i.e.*, supply and demand, is the controlling factor in fixing and negotiating rents.” *Rausch*, 882 A.2d at 813 (citing *Page v. Scott*, 567 S.W.2d 101 (Ark. 1978)). These courts also point out that under the *Sutton* rationale, one must also assume that the tenant “paid the taxes on the property and the cost of construction or purchase of the house, not to mention cost of repairs and maintenance.” *Am. Fam. Mut. Ins. Co. v. Auto-Owners Ins. Co.*, 757 N.W.2d 584, 591 (S. D. 2008). Something that seems far-fetched and illogical.

Second, under *Sutton* the landlord and tenant share insurable interests in the property as a matter of law. This, however, “disregards the fact that these are separate estates capable of being separately valued and separately insured.” *Rausch*, 882 A.2d at

813 citing *Neubauer v. Hostetter*, 485 N.W.2d 87 (Iowa 1992)). Moreover, if the tenant were truly a co-insured under the policy then that tenant would be entitled to some of the insurance proceeds. *Rausch*, 882 A.2d at 813 (citing *56 Associates ex rel. Paolino v. Frieband*, 89 F.Supp.2d 189 (D.R.I. 2000)). In reality, however, if the tenant loses his or her possessory interest in the property due to a fire that tenant generally has no right of recovery under the landlord's policy. *Rausch*, 882 A.2d at 815.

Third, *Sutton* adopts the co-insured principle from the permissive-user principle found in auto-insurance policies. See *Sutton*, 532 P.2d at 482 (stating that a tenant is a co-insured under the landlord's policy, "comparable to the permissive-user feature of automobile insurance."). However, as the *Rausch* Court states, "Permissive users are regarded as insureds under such a policy because the policy expressly provides coverage for them, usually by including them in the definition of 'insured.'" *Rausch*, 882 A.2d at 815. (alteration and emphasis added).

Fourth, an insurance policy is like other contracts subject to contract principles. *Rausch*, 882 A.2d at 813 (citing *56 Associates* 89 F.Supp.2d at 193). Absent language to the contrary, it is not for the courts to rewrite the contract and add an additional policyholder in order to achieve a subjective result. *Rausch*, 882 A.2d at 813 (citing *56 Associates*, 89 F.Supp.2d at 193).

Fifth, while the *Sutton* approach utilizes equitable principles in reaching its decision, it at the same time ignores the inequity of letting the negligent tenant escape liability. *Rausch*, 882 A.2d at 807 n.4 (citing 16 COUCH ON INSURANCE § 222:8 (Lee R. Russ, 2d ed. 2000)). The case-by-case approach avoids this automatic result. *Rausch*, 882 A.2d at 815. At the same time, it avoids a potential double recovery by the landlord. *Id.* If anything, as the *Rausch* Court stated, allowing a subrogation claim against a negligent tenant may further public policy, not frustrate it. *Id.* (stating that “equitable principles . . . if anything, favor the enforcement of subrogation claims by insurers.”).

In the end, the *Rausch* Court noted that basic principles of contract law should apply when an insurer brings a subrogation claim against an alleged negligent tenant. *Id.* at 815–16. Against this backdrop, no right of subrogation can exist unless the landlord could otherwise bring suit against the tenant. *Id.* at 816; *see also Dix Mut. Ins. Co. v. LaFramboise*, 597 N.E.2d 622, 625 (Ill. 1992) (stating that an “insurance company may assert a right of subrogation against the tenant for the fire damage if: (1) the landlord could maintain a cause of action against the tenant and (2) it would be equitable to allow the insurance company to enforce a right of subrogation against the tenant”).

3. *Majority v. Minority View*

The Court of Appeals, in reaching its decision of *Bruggeman*, stated that *Sutton* was the majority position. *See Bruggeman*, 505 N.W.2d 87, 88 (“The first and leading

case to state the majority position is *Sutton*.”). That no longer appears to be the case today.

The *Rausch* Court surveyed opinions across the jurisdictions and identified cases falling within one of three different camps. *Id.* at 811, 813, 814 n.11. Approximately, nine cases allow an insurer to bring a subrogation claim against a negligent tenant, absent language to the contrary (“pro-subrogation”). *Id.* at 813 (citing *Page v. Scott*, 567 S.W.2d 101 (Ark. 1978); *Neubauer v. Hostetter*, 485 N.W.2d 87 (Iowa 1992); *Britton v. Wooten*, 817 S.W.2d 443 (Ky. 1991); *Zoppi v. Traurig*, 598 A.2d 19 (N.J. Super. 1990); *Galante v. Hathaway Bakeries, Inc.*, 6 A.D.2d 142, (N.Y. Super. 1958); *Winkler v. Appalachian Amusement Co.*, 79 S.E.2d 185 (N.C. 1953); *Regent Ins. Co. v. Economy Preferred Ins. Co.*, 749 F.Supp. 191 (C.D. Ill. 1990); *56 Associates ex rel. Paolino v. Frieband*, 89 F.Supp.2d 189 (D.R.I. 2000)). Interesting, *Rausch* identifies *Osborne v. Chapman*, 574 N.W.2d 64 (Minn. 1998), as falling within this class.

As to the “middle” approach, or case-by-case method, *Rausch* identifies approximately 21 cases that fall within this category. *Rausch*, 882 A.2d 814 n.11 (citing *General Acc. Fire & Life Assur. Corp. v. Traders Furniture Co.*, 401 P.2d 157 (Ariz. Ct. App. 1965); *Page v. Scott*, 567 S.W.2d 101 (Ark. 1978); *Fire Ins. Exchange v. Hammond*, 99 Cal.Rptr.2d 596 (Cal. Ct. App. 2000); *U.S. Fidelity & Guar. v. Let's Frame It*, 759 P.2d 819 (Colo. Ct. App. 1988); *Middlesex Mut. Assur. Co. v. Vaszil*, 873

A.2d 1030, 1032 (Conn. Ct. App. 2005); *Pettus v. APC, Inc.*, 293 S.E.2d 65 (Ga. Ct. App. 1982); *Bannock Bldg. Co. v. Sahlberg*, 887 P.2d 1052 (Idaho 1994); *Towne Realty, Inc. v. Shaffer*, 773 N.E.2d 47 (Ill. 2002); *Sears, Roebuck & Co. v. Poling*, 81 N.W.2d 462 (Iowa 1957); *New Hampshire Ins. Co. v. Fox Midwest Theatres, Inc.*, 457 P.2d 133 (Kan. 1969); *Britton v. Wooten*, 817 S.W.2d 443 (Ky. 1991); *Seaco Ins. Co. v. Barbosa*, 761 N.E.2d 946, 950 (Mass. 2002) (commercial leases); *Fry v. Jordan Auto Co.*, 80 So.2d 53 (Miss. 1955); *Rock Springs Realty, Inc. v. Waid*, 392 S.W.2d 270 (Mo. 1965); *Phoenix Ins. Co. v. Stamell*, 21 A.D.3d 118 (N.Y. 2005); *U.S. Fire Ins. Co. v. Phil-Mar Corp.*, 139 N.E.2d 330 (Ohio 1956); *Cincinnati Ins., Co. v. Control Serv. Technology, Inc.*, 677 N.E.2d 388 (Ohio Ct. App. 1996); *Koch v. Spann*, 92 P.3d 146 (Or. Ct. App. 2004); *Hardware Mut. Ins. Co. of Minn. v. C.A. Snyder, Inc.*, 137 F.Supp. 812 (W.D.Pa.1956); *Wichita City Lines, Inc. v. Puckett*, 295 S.W.2d 894 (Tex. 1956); *Monterey Corp. v. Hart*, 224 S.E.2d 142 (Va. 1976); *Allstate Ins. Co. v. Fritz*, 2005 WL 1533103 (W.D. Va. 2005)). *Rausch* claims that these cases represent the *majority* view. *Rausch*, 882 A.2d at 814. (“The majority of courts, however, have avoided per se rules and taken a more flexible case-by-case approach, holding that a tenant's liability to the landlord's insurer for negligen[tly] causing a fire depends on the intent and reasonable expectations of the parties to the lease as ascertained from the lease as a whole.”) (citation omitted; alteration and emphasis added).

Important to note, some of these cases utilizing the case-by-case method ultimately reach the same result as that reached in *Sutton*, namely that the insurer cannot subrogate against the tenant. However, before doing so, these courts reviewed the relevant lease terms or other evidence to determine the parties' expectations. *Rausch*, 882 A.2d at 814 (stating that most of the cases "that have denied subrogation have done so because of the existence of specific provisions in the lease, such as a provision obligating the landlord to purchase fire insurance on the premises or a clause excepting fire damage from the tenant's responsibility to maintain or return the property in a good state and condition") (citing *Union Mut. Fire Ins. Co. v. Joerg*, 824 A.2d 586 (Vt. 2003)).

In contrast, the *Rausch* Court notes that only a small percentage of cases have actually adopted the *Sutton* approach, with *Bruggeman* being one of them. See *Rausch*, 882 A.2d at 812. *Rausch* cites 10 cases in this category. *Id.* (citing *DiLullo v. Joseph*, 792 A.2d 819 (Conn. 2002); *Lexington Ins. Co. v. Raboin*, 712 A.2d 1011 (Del. Super. 1998); *North River Ins. Co. v. Snyder*, 804 A.2d 399 (Me. 2002); *Peterson v. Silva*, 704 N.E.2d 1163 (Mass. 1999); *United Fire & Cas. Co. v. Bruggeman*, 505 N.W.2d 87 (Minn. Ct. App. 1993); *Tri-Par Investments, L.L.C. v. Sousa*, 680 N.W.2d 190 (Neb. 2004); *Safeco Ins. Co. v. Capri*, 705 P.2d 659 (Nev. 1985); *Community Credit Union of New Rockford, N.D. v. Homelvig*, 487 N.W.2d 602 (N.D. 1992); *GNS Partnership v. Fullmer*, 873 P.2d 1157 (Utah Ct. App. 1994); *Cascade Trailer Court v. Beeson*, 749

P.2d 761 (Wash. Ct. App. 1988)). Interestingly, not even the Oklahoma Supreme Court has “blessed” the Oklahoma Court Appeals’ decision of *Sutton Rausch*, 882 A.2d at 812 (citing *Travelers Ins. Co., v. Dickey*, 799 P.2d 625 (Okla. 1990)).

In the end, it remains doubtful that *Sutton* represents the majority view. At a bare minimum, the rationales supporting *Sutton*, and hence *Bruggeman*, have weathered.

II. BRUGGEMAN IS INAPPLICABLE AND THE CASE-BY-CASE APPROACH SHOULD APPLY; OR, AT A BARE MINIMUM, THE EXPRESS TERMS OF THE PARTIES’ LEASE AGREEMENT SHOULD CONTROL

In this water-damage case, the trial court and Court of Appeals relied on *Bruggeman*, 505 N.W.2d at 89, and its progeny in dismissing RAM’s subrogation action. *Bruggeman* stands for the proposition that absent an agreement to procure fire insurance, a tenant is a co-insured on the landlord’s insurance policy. *Id.* at 89–90.

Bruggeman and its predecessor, *Sutton*, both dealt with residential leases. This case presents a commercial lease entered into by two sophisticated business entities. This difference is sufficient to find *Bruggeman* inapplicable. *See Seaco Ins. Co. v. Barbosa*, 761 N.E.2d 946, 950 (Mass. 2002) (refusing to apply *Sutton* to the commercial-lease setting).

Barbosa presented a commercial lease containing similar provisions as those found here. *Id.* at 947–48. The lease included a requirement that the tenant obtain liability insurance for the benefit of the landlord and return the premises in the same

condition with normal wear and tear excluded. *Id.* There, the Court discussed the rationales behind the anti-*Sutton* courts and ultimately refused to apply *Sutton* to a commercial lease. The Court stated:

The courts that apply *Sutton* to commercial leases ignore differences between residential and commercial tenancies. [citation omitted]. Commercial tenancies present different circumstances and involve different considerations than their residential counterparts. Commercial tenants tend to be more sophisticated about the terms of their leases and, unlike residential tenants, commercial tenants generally purchase liability insurance.

Id. at 950 (alteration added). Likewise, Minnesota courts in evaluating contractual inequities consider the sophistication of the parties and have applied a similar standard, namely that businesses are sophisticated parties. *See e.g., Alpha Systems Integration, Inc. v. Silicon Graphics, Inc.*, 646 N.W.2d 904, 910 (Minn. Ct. App. 2002) (evaluating an adhesion contract and stating that “corporations are presumptively sophisticated parties”). As observed in *Barbosa, Rohde* the commercial tenant did purchase liability insurance, as required by the parties’ lease. Accordingly, *Bruggeman* is not on all fours with this case.

Moreover, Minnesota cases construing *Bruggeman* have all dealt with a fire-related loss. *Nuessmeier Elec., Inc. v. Weiss Mfg. Co.*, 632 N.W.2d 248 (Minn. Ct. App. 2001) (fire by heater); *Osborne v. Chapman*, 574 N.W.2d 64 (Minn. 1998) (fire); *Blohm v. Johnson*, 523 N.W.2d 14 (Minn. Ct. App. 1994) (fire); *TIG Ins. Co. v. Anderson*, 663 N.W.2d 1 (Minn. Ct. App. 2003) (fire); *State Auto Ins. Co. v. Knuttila*, 645 N.W.2d 475

(Minn. Ct. App. 2002) (fire); *St. Paul Companies v. Van Beek*, 609 N.W.2d 256 (Minn. Ct. App. 2000) (fire by employee); *Bigos v. Kluender*, 611 N.W.2d 816 (Minn. Ct. App. 2000) (fire by grill). Here, however, the trial court applied *Bruggeman* to a non-fire related claim.

Furthermore, cases following *Bruggeman*, including *Bruggeman* itself, all dealt with complete destruction and loss of use of the rental premises. *See e.g., Bruggeman*, 505 N.W.2d at 88 (“a fire destroyed the property”); *Osborne*, 574 N.W.2d at 65 (“heavily damaged by fire”). This makes sense because *Bruggeman*’s roots are based on the fiction that “the landlord and the tenant [are] co-insureds [as] each ha[s] an insurable interest in the property—the landlord a fee interest and the tenant a possessory interest.” *Bruggeman*, 505 N.W.2d at 89 (citing *Sutton v. Johnahl*, 532 P.2d 478 (Okla. Ct. App. 1975)) (alterations added). Thus, when fire destroys the property, the tenant loses its possessory interest.

The subrogation action at issue here, however, concerns water damage—damage that did not destroy the property. In fact, it caused approximately \$18,500 in damage; this compared to the \$259,600 insurance coverage on the building. (App. 60, 72 & 231). In turn, the damage did not result in Rohde losing his possessory interest. (App. 110, ¶ 17; 111, ¶ 21). Approximately three days after the loss occurred, the property was

cleaned and dried. (App. 73). For these reasons, *Bruggeman* and its progeny are inapplicable.

Third, *Bruggeman* concerns a situation where there was no provision regarding fire insurance, nor any indication as to which party was to procure such insurance. *See Bruggeman*, 505 N.W.2d at 88 (“There was no written lease or contract between the parties, and no independent arrangement for provision of insurance coverage was discussed.”). Indeed, in *Blohm v. Johnson*, 523 N.W.2d 14, 16 (Minn. Ct. App. 1994), the Court stated that “*Bruggeman* applies to any landlord/tenant situation *where there is no express agreement covering the provision of fire insurance* for the building.” (emphasis added). Here, the parties’ lease agreement required the landlord to insure against the peril of fire:

Tenant’s Repairs and Alterations

35. 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.

(App. 56, ¶ 35) (emphasis added).

A similar provision (and similar situation) was at issue in *General Mills v. Goldman*, 184 F.2d 359, 360 (8th Cir. 1950), *cert. denied*, 340 U.S. 947 (1951)—a case governed by Minnesota law. *Goldman* concerned a commercial lease between Goldman

the landlord and General Mills the tenant. *Id.* During the lease period a General Mills' employee negligently caused a fire, damaging the premises. *Id.* Goldman's insurer paid for the loss and brought a subrogation claim against General Mills. *Id.* The outcome of the case hinged on a specific lease provision that stated that the tenant would return the premises in the same condition "loss by fire and ordinary wear excepted." *Id.* n.1. The Court ultimately determined that this provision required the landlord to provide insurance for the peril of fire. *Id.* at 361. In turn, this exonerated the tenant for loss caused by fire. *Id.* at 361. Interestingly, with respect to this lease provision the Court stated "that in its absence the tenant would have been liable to the landlord's insurer under the doctrine of subrogation." *Id.* at 572-73.

Goldman remains good law today. As one commentator suggests, *Goldman* represents the emergence of subrogation claims by insurers against tenants. Friedman, Friedman on Leases § 9.9 (4th ed.1997). In the end, it is hard to square *Goldman* with *Bruggeman* given the *Goldman* Court's statement that in the absence of the "fire excepted" provision the landlord's insurer would have been able to proceed in subrogation against the negligent tenant. *Bruggeman* appears to be in conflict with *Goldman* unless one accepts the proposition that commercial leases present a different situation.

Here, it is undisputed that the landlord did obtain fire coverage. (App. 228). And, it is undisputed that the damage at issue was not fire related. Nor was the damage caused by “wind, rain, or other similar disaster,” as defined by the term fire insurance. *See* BLACK’S LAW DICTIONARY, p. 817 (8th ed. 2004) (defining fire insurance as “[a]n agreement to indemnify against property damage caused by fire, wind, rain, or other similar disaster.”) (alteration added). More importantly, the parties’ lease provision above did not require the landlord to provide insurance coverage for water damage.

Here, we are dealing with water damage caused by Rohde’s negligent installation of a water line—a risk that the landlord was not required to cover. Since an express agreement exists as to fire insurance coverage, and since the loss at issue is unrelated to the perils associated with fire insurance, *Bruggeman* is inapplicable.

In that instance, there is no implied waiver of subrogation. Instead, the terms of the parties’ lease should control.

The lease here indicates that responsibility for water damage would fall on the tenant in the event he negligently caused such damage to the premises. In this regard, the relevant provisions of the lease state:

Additional Right Reentry

19. If the Landlord reenters the Premises or terminates the Lease, then:
 - h. the Tenant will pay to the Landlord on demand:
 - ii. reasonable expenses as the Landlord incurs or has incurred in

connection with . . . expenses of keeping the Premises in good order, repairing the same.

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. . . . [T]he Tenant will keep, repair, replace and maintain all glass, wiring, *pipes* and mechanical apparatus in, upon or serving the Premises in good and tenantable repair at its sole expense.
37. The Tenant will not make or have others make alterations, additions or improvements or erect or have others erect . . . *plumbing fixtures* . . . or *make any changes* to the Premises or otherwise *without first obtaining the Landlord's written approval thereto*.

Care and Use of Premises

47. At the expiration of the lease term, the Tenant will quit and surrender the Premises in as good a state and condition as they were at the commencement of this Lease, reasonable wear and damages by the elements excepted.

(App. 55, ¶ 19(h)(ii); App. 56, ¶¶ 35 & 37; App. 57, ¶ 47, respectively) (emphasis added).

In *Bruggeman*, the legal fiction of an implied waiver of subrogation existed because the landlord and tenant had no express agreement regarding insurance or what type. *Id.* at 89. Here, an *implied* waiver cannot exist where there is an *express* agreement allocating responsibility to the tenant—that being water damage caused by Respondent's negligence.

Similar lease provisions were at issue in *Koch v. Spann*, 92 P.3d 146, 149 (Or. Ct. App. 2004)—a case following the case-by-case method. There, the court determined that

an insurer's subrogation claim was not barred by *Sutton* where the lease provided that the tenant was responsible for damage caused by his negligence and the tenant was responsible for insuring his personal property. *Id.* The Court made this ruling despite the fact that the lease was silent with respect to fire insurance. The same situation should apply here, given the non-application of *Bruggeman*, as argued above.

Similarly, in *Osborne v. Chapman*, 574 N.W.2d 64, 68 (Minn. 1998), this Court recognized that “a landlord and tenant may expressly or *implicitly* agree to allocate the responsibility for maintaining insurance coverage.” (emphasis added) (citing *Dolphine Mfg., Inc. v. Tehaar*, 404 N.W.2d 295, 297 (Minn. Ct. App. 1987)). There, the Court determined that provisions in the parties' lease may have shifted the risk of loss to the tenant. Those provisions:

- obligated Osborne to repair the premises if “any part thereof[] shall be partially damaged by fire not due to [Chapman's] negligence”;
- required Chapman to surrender the premises at the end of the lease term “in as good state and condition as they were at the commencement of this lease, damages by the elements excepted”;
- obligated Chapman to keep the premises “in good repair” and to “make all required repairs to the plumbing, range, heating, apparatus, and electric and gas fixtures whenever damage thereto shall have resulted from [his] misuse, waste, or neglect”; and
- required Osborne to undertake all “[m]ajor maintenance and repair not due to [Chapman's] misuse, waste, or neglect.”

See *Osborne v. Chapman*, 574 N.W.2d 64, 68 n.7, 65, n.2 (Minn. 1998) (alterations in original) (“[T]he lease [] provisions [] arguably shift the risk of loss to Chapman for losses caused by his negligence—at least for damage to the property.”) (alterations added).

Here, the parties’ lease agreement is on the same footing. The following provisions are similar to those present in the Osborne-Chapman lease:

- The Tenant covenants with the Landlord to occupy the Premises in a tenant-like manner and not to permit waste. . . . [T]he Tenant will keep, repair, replace and maintain all glass, wiring, pipes and mechanical apparatus in, upon or serving the Premises in good and tenantable repair at its sole expense.
- The Tenant will pay to the Landlord on demand . . . reasonable expenses as the Landlord incurs or has incurred in connection with . . . expenses of keeping the Premises in good order, repairing the same.
- The Tenant will not make or have others make alterations, additions or improvements or erect or have others erect . . . plumbing fixtures . . . or make any changes to the Premises or otherwise without first obtaining the Landlord’s written approval thereto.
- At the expiration of the lease term, the Tenant will quit and surrender the Premises in as good a state and condition as they were at the commencement of this Lease, reasonable wear and damages by the elements excepted.

(App. 55, ¶ 19; App. 56, ¶¶ 35 & 37; App. 57, ¶ 47, respectively).

At the trial level and Court of Appeals, Rohde argued that *Osborne* has no application to a subrogation claim since the issue there involved a direct suit by the

landlord against the tenant. (Add. 9–10). While true, *Osborne* was not a subrogation suit, *Osborne* is relevant for the purpose of establishing what type of lease provisions can shift the risk of loss to a tenant, especially if *Bruggeman* is inapplicable.

In sum, the parties' lease indicates that Rohde would be responsible for repairing the premises in the event he negligently caused water damage. Like the lease in *Koch*, 92 P.3d at 149, the lease here advises Rohde to obtain his own tenant's insurance. Specifically, the lease states: "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." (App. 55, ¶ 25). The parties' lease further required Rhode to obtain liability insurance for the benefit of the landlord. (App. 55, ¶ 25). Specifically, the lease stated:

Insurance

26. The Tenant is responsible for insuring the Premises for liability insurance for the benefit of the Tenant and the Landlord.

(App. 55, ¶¶ 25 & 26).

Rohde did obtain a business owner's policy providing coverage for his own negligent acts, which caused damage to the rental premises. (App. 41). Given the fact Rohde obtained insurance, he certainly did not rely on the landlord's insurer to provide coverage for his negligence. *See Osborne*, 574 N.W.2d at 67 n.6 ("We express no opinion as to whether tenants reasonably rely upon landlords to insure the leased structure against

damage by fire, as suggested in *Sutton* and *Bruggeman*.”). As one authority has noted, “A requirement that parties purchase insurance is a significant indication that [parties] intended to shift the risk of loss.” 16 COUCH ON INSURANCE § 224:88 (Lee R. Russ, 3d ed. 2005) (alteration added). Again, the insurance clause in the parties’ lease, as in *Koch*, indicates that Rohde would be responsible for his negligence.

A similar provision was at issue in *Am. Fam. Mut. Ins. Co. v. Auto-Owners Ins. Co.*, 757 N.W.2d 584, 594 (S.D. 2008)—a case adopting the case-by-case approach. There, the parties’ lease required the tenant to obtain “liability insurance.” *Id.* The Court ultimately determined that the insurer could proceed in subrogation against the tenant, in part, because of this provision. *Id.* The Court noted that the fact the tenants obtained insurance coverage indicates that they anticipated they could be responsible for the loss. *Id.* The same applies here. Rohde obtained liability insurance, covering damage to the premises as a result of his negligent. Clearly he anticipated that he could be held responsible.¹ Given all this, in the absence of an express agreement here

¹ On this point, Rohde has argued that his policy applies only in the event there is no other applicable insurance in place. (App. 122). Likewise, RAM’s policy applies only in the event there is no other applicable insurance. (App. 249) (“This insurance is excess over [a]ny other insurance.”). Accordingly, a closest-to-the-risk analysis would result to determine primary coverage. See *Integrity Mut. Ins. Co. v. State Auto. & Cas. Underwriters Ins. Co.*, 239 N.W.2d 445, 446 (Minn. 1976) (discussing the doctrine of closest to the risk). This, of course, is something neither the trial court or Court of Appeals discussed since it held that RAM’s claim is barred by *Bruggeman* in the first instance.

requiring the landlord to provide insurance coverage for the peril of water damage, these contractual provisions shifted the risk to Rohde, the tenant.

Finally, it is worthwhile to discuss *Blohm v. Johnson*, 523 N.W.2d 14 (Minn. Ct. App. 1994)—a case relied upon by Rohde and the trial court. (Add. 8–9). In *Blohm*, a tenant negligently caused fire damage to a rental unit. *Id.* at 15. The court dismissed the insurer’s subrogation claim, finding that *Bruggeman* applied because the lease did not specifically state that the landlord was responsible for carrying fire insurance. *Id.* at 16. The lease did, however, provide that the tenant was responsible for obtaining insurance for his business. *Id.*

Here, unlike in *Blohm*, the risk-causing loss, *i.e.*, water damage caused by Rohde’s negligence, was specifically delegated to Rohde by the lease provisions addressed above. Furthermore, Rohde agreed to provide liability coverage for the benefit of the landlord, and he did in fact obtain a policy that provided coverage for damage due to his own negligence. (App. 55, ¶ 26; App. 41). Indeed, if the loss at issue in *Blohm* was caused by the tenant’s business activities—a risk specifically delegated to the tenant in the lease agreement—then the insurance company’s subrogation claim arguably would have been viable. Here, the lease provision requiring Rohde to obtain “liability insurance” should, in addition to the other lease provisions, make RAM’s claim viable.

On this point, the trial court determined that the term “liability insurance” was

ambiguous at best. (Add. 11). Yet, to the extent the term “liability insurance” is ambiguous, Rohde’s subsequent actions in obtaining that form of insurance, which specifically apply to the loss here, cures any claimed ambiguity. *See Flakne v. Minnesota Farmers’ Mut. Ins. Co.*, 117 N.W. 785, 787 (Minn. 1908) (“In causing the by-laws to conform to the policy, it resolved an ambiguity in the contract and made definite an uncertain provision.”). Moreover, summary judgment is not proper if the court determines that a contract is ambiguous. *Donnay v. Boulware*, 144 N.W.2d 711, 716 (Minn. 1966). This is especially true where disputed material facts are to be resolved in favor of the non-moving party on summary judgment. *Id.* “Under such circumstances, the trial court should allow the parties a full opportunity to present evidence of facts and circumstances and conditions surrounding its execution and conduct of the parties relevant thereto.” *Abdallah, Inc. v. Martin*, 65 N.W.2d 641, 643 (Minn. 1997).

In conclusion, *Bruggeman* presented a situation where there was no lease between the parties. *Bruggeman*, 505 N.W.2d at 88. While there was an absence of insurance coverage, likewise there was no allocation of responsibility for damages. Here, the lease required the landlord to obtain fire insurance, which he did; and, it required, among other provisions, for Rohde to obtain liability insurance, which he did. The loss at issue, however, does not fall within the context of a fire-related loss; rather, it falls within Rohde’s liability for negligence and his obligations under the lease. *Bruggeman* is

therefore inapplicable and accordingly the other provisions of the parties' lease apply. Under those provisions, Rohde expressly agreed to pay for his damages to the property.

III. OTHER POLICY AND EQUITY CONSIDERATIONS

A. The Responsible Party should not Escape His Wrong

Minnesota has adhered to the position that a tortfeasor cannot escape its wrong because an innocent party had the foresight to purchase insurance. Indeed, in *Donohue v. Acme Heating Sheet Metal & Roofing Co.*, 8 N.W.2d 618, 619 (Minn. 1943), the Court stated that "insurance coverage of the plaintiff has no effect on the liability of a defendant for a tort."

The Court in *Osborne*, 574 N.W.2d at 67, stated that the situation there could not be reconciled with *Donohue* unless the Court determined that the landlord obtained the insurance coverage (lost rents) for the benefit of the tenant. Likewise, *Donohue* cannot be squared here unless the lease indicates that the landlord carried insurance for the benefit of the tenant for his negligent water damage. As discussed, the lease provisions suggest the exact opposite. Where there is no provision in the lease requiring the landlord to carry such insurance, it defies *Donohue* to fill gaps in the lease so the tenant is exonerated of liability (*i.e.*, escapes his wrong).

B. Adherence to Contract Principles

In Minnesota, “a contract must be interpreted in a way that gives all of its provisions meaning.” *Current Tech. Concepts, Inc. v. Irie Enters., Inc.*, 530 N.W.2d 539, 543 (Minn.1995). One of the main rules of construction is that “the parties intended the language used by them to have some effect.” *Indep. Sch. Dist. No. 877 v. Loberg Plumbing & Heating*, 123 N.W.2d 793, 799-800 (Minn. 1963). To that end, courts are to avoid any interpretation that would “render a provision meaningless.” *Id.*

Here, the Court of Appeals’ decision renders a number of provisions in the lease meaningless and of no effect. Paragraph 35 of the lease is a fitting example of this. It required the tenant to “keep, repair, replace and maintain all . . . pipes and mechanical apparatus in, upon or serving the premises in good and tenantable repair at *its sole expense*.” (App. 56, ¶ 35). As alleged, Rohde negligently installed a water line without the landlord’s permission, which in turn caused the water damage. Upholding the Court of Appeals’ decision will, in effect, render paragraph 35 of the lease meaningless in addition to the other provisions that required the tenant to keep the premises in good condition.

In contrast, giving these provisions meaning would be line with the principles of contract construction set forth above. Moreover, it avoids issues that may run afoul of the parties’ freedom of contract.

C. *Stare Decisis*

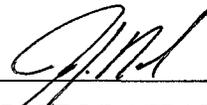
In the end, RAM is not asking this Court to overturn *Bruggeman*. Rather, it is asking the Court to find that *Bruggeman* is inapplicable under the present situation, especially where a commercial lease is at issue. This is in line with *General Mills v. Goldman*, 184 F.2d 359, 360 (8th Cir. 1950)—a case decided under Minnesota law—and avoids conflicts that might otherwise be present with *Bruggeman*. In that event, the parties' lease provisions should dictate the outcome, much like *Osborne*.

Conclusion

RAM respectfully asks that the Court reverse the judgment of the trial court with directions to reinstate RAM's Complaint and reconsider RAM's motion for partial summary judgment with respect to its contract claim.

Dated: December 4, 2011.

WILLENBRING, DAHL,
WOCKEN & ZIMMERMANN, PLLC



JOHN J. NEAL (#0387473)
KIRBY DAHL (#20710)
318 Main Street; P.O. Box 417
Cold Spring, MN 56320-0417
Telephone: 320.685.3678
ATTORNEYS FOR APPELLANT

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WILLENBRING, DAHL,
WOCKEN & ZIMMERMANN, PLLC



JOHN J. NEAL (#0387473)
KIRBY DAHL (#20710)
318 Main Street; P.O. Box 417
Cold Spring, MN 56320-0417
Telephone: 320.685.3678
ATTORNEYS FOR APPELLANT