

CASE NO. A10-2146

**State of Minnesota
In Supreme Court**

RAM MUTUAL INSURANCE COMPANY,

Appellant,

VS.

RUSTY ROHDE d/b/a STUDIO 71 SALON,

Respondent.

APPELLANT'S REPLY BRIEF

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Reply

Respondent (Rohde) raises new issues in his responsive brief that Appellant (RAM) will address here. First, and most importantly, Rohde claims that RAM advances “new issues and theories improperly raised for the first time on appeal.” (Resp.’s Brief, p. 6). Second—and of less importance—Rohde claims that his policy of insurance on the rental property is secondary to RAM’s. (Resp.’s Brief, p. 15 n.11). Third, Rohde, while not disagreeing with the holding of *General Mills v. Goldman*, 184 F.2d 359 (8th Cir. 1950)—which was based on Minnesota law—points out a typographical error RAM made in its citation of that case. RAM corrects that issue here. Fifth, Rohde argues that *Dix Mut. Ins. Co. v. LaFramboise*, 597 N.E.2d 622 (Ill. 1992)—a case that uses the case-by-case approach—is factually similar to the present matter and should control the outcome of this case. (Resp.’s Brief, p. 25). Finally, Rohde contends that whether a claim concerns a water loss as opposed to fire damage and complete destruction of the premises is immaterial to the issues under consideration. (Resp.’s Brief., pp. 16 & 18). This contention misses RAM’s argument and therefore calls for clarification. RAM addresses each in turn below.

I. RAM IS NOT RAISING NEW ARGUMENTS OR THEORIES

Rohde argues that RAM is advancing two new legal theories that were not presented to the trial court below: (1) the “case-by-case approach”; and (2) whether

commercial properties are exempt from *Bruggeman*. (Resp.’s Brief, p. 6–7). In support of this, Rohde claims that the trial court did not consider these issues in its Memorandum. (*Id.* at p. 7). Yet, at the same time—and in the very next sentence of his brief—Rohde acknowledges that “much of the district court’s Memorandum in this case is a word-for-word replica of the arguments made in Rohde’s Memorandum of Law in Support of his Motion for Summary Judgment.” (*Id.*). It follows, according to Rohde’s analysis, that since his brief fails to discuss the “case-by-case” method, there is “no indication that the trial court considered any alternatives to the ‘no-subrogation’ rule[,]” such as the case-by-case method. (*Id.* at p. 8) (alteration added). This position ignores the summation of RAM’s argument at both the trial-court level and Court of Appeals.

A. The Case-by-Case Approach is not a New Issue on Appeal

As stated in RAM’s principle brief, the case-by-case approach 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) (emphasis added). That is exactly what RAM argued at the trial-court level: it urged the court to look at the terms of the parties’ lease agreement to find that there is no implied waiver of subrogation because Rohde agreed to assume the risk of loss. (*See* App. 221–224 [App.’s Tr. Mem., p. 6–9]) (arguing that the express terms of the parties’ lease agreement determines that *Bruggemann* is inapplicable).

For example, one of RAM's arguments—if not main argument—at the trial-court level was that an *implied* waiver of subrogation, as found in *Bruggemann*, cannot exist where the *express* terms of the agreement indicate otherwise. (App. 221–224 [App.'s Tr. Mem., p. 6–9]) (“An *implied* waiver cannot exist where there is an *express* agreement.”) (emphasis in original). In support of this, RAM cited *Osborne v. Chapman*, 574 N.W.2d 64, 68 (Minn. 1998), which stated that “a landlord and tenant may expressly or *implicitly* agree to allocate the responsibility for maintaining insurance coverage or in some way agree to hold each other harmless for negligent acts.” (App. 222 [App.'s Tr. Mem., p. 7]) (emphasis added). RAM then attempted to show what types of lease provisions—as cited in *Osborne*—can shift the risk of loss to the tenant when liability is not otherwise expressly stated in the parties' lease agreement. (*Id.*). RAM then compared the *Osborne* lease provisions to the lease at hand, which required, among other things, that:

- Rohde obtain his own liability insurance;
- Rohde “maintain all . . . pipes . . . in, upon or serving the Premises in good tenantable repair and at its sole expense”;
- Rohde 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”; and,
- Rohde “will not make . . . alternations, additions or improvements or erect . . . plumbing fixtures . . . or make any changes to the Premises or otherwise without first obtaining the Landlord's written approval thereto.”

(App. 223 [App.'s Tr. Mem., p. 8]). After RAM compared the *Osborne* lease provisions to those just stated, RAM argued that Rohde assumed the risk of loss. (*Id.*) (“In sum, Defendant agreed to provide his own liability insurance for the benefit of the landlord. In line with *Osborne*, *Bruggemann* is inapplicable to the facts here.”).

While RAM did not specifically use the term “case-by-case” method in its memorandum, the arguments advanced were certainly the underlying theory or analysis to the case-by-case approach. Indeed, as mentioned, that approach looks at “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) (emphasis added).

Moreover, while *Osborne*, 574 N.W.2d at 63, did not involve a subrogation action, the analysis contained therein is akin to the case-by-case method. Put another way, the Court looked to the terms of the parties’ lease agreement to see where the risk of loss should lie. Moreover, as pointed out in RAM’s principle brief, footnote 5 of the *Osborne* opinion alludes to the “case-by-case” approach. *Osborne*, 574 N.W.2d 64, n.5 (Minn. 1998). And, one court has cited *Osborne* for the proposition that it follows an approach different than *Sutton*, and hence *Bruggemann*. *Rausch v. Allstate Ins. Co.*, 882 A.2d 801, 813 (Md. 2005).

RAM advanced the same argument on appeal as it did at the trial-court level. (App. 306–310 [App.’s App. Brief, p. 11–15]). Accordingly, at no point has RAM abandoned this argument or position.

In sum, RAM preserved this issue for review here; that issue being whether terms within the parties’ lease agreement dictate where the risk of loss should lie—which is exactly the method and means to the case-by-case approach. A parties’ failure to call a theory by its name at the trial-court level—even though that theory was utilized—does not constitute a “new” theory when properly named on appeal.

Second, contrary to Rohde’s position, the trial court did consider this issue, but appeared to have missed the point RAM attempted to advance with the *Osborne* case. This may simply be because, as Rohde points out, the trial court cut-and-pasted from Rohde’s trial memorandum. Or, maybe the trial court did not feel comfortable ruling on policy issues that are better suited for appellate courts. Or, perhaps most plausible, the trial court did not accept RAM’s argument on this point.

In any event, the trial court in its memorandum stated: “In its opposition to Defendant’s summary judgment motion Plaintiff relies on the case of *Osborne*.” (Add. 9). The trial court then discussed *Osborne*, but failed to address RAM’s argument that certain lease provisions shifted the risk of loss to Rohde. (Add. 8–9). Instead, the trial court accepted wholesale Rohde’s argument that *Osborne* is distinguishable from

Bruggemann because “the landlord and tenant do not share an insurable interest in lost future rents.” (Add. 8). But, as RAM pointed out on appeal, it never argued that *Osborne* and *Bruggeman* are on the same footing. (App. 309 [App.’s App. Brief., p. 14]). Rather, RAM was attempting to point out how *Osborne* “is relevant for the purpose of establishing what type of lease provisions can shift the risk of loss to a tenant, especially if *Bruggmen* is inapplicable.” (*Id.*) (emphasis added). In sum, the trial court did address and consider *Osborne*; however, it accepted Rohde’s position and failed to discuss *Osborne* from the angle RAM argued. In the end, RAM has no control over whether the trial court will accept its argument. That should not, however, foreclose RAM from addressing that same argument on appeal.

Finally, whether the trial court considered an issue should be of no consequence as to whether a party is entitled to pursue that claim on appeal. Otherwise, a trial court could simply glean over an issue to insulate itself from appeal or simply miss the point among the numerous arguments advanced. Contrary to Rohde’s position, it would be inequitable for an appealable issue to hinge on whether the trial court expressly addressed the issue in its memorandum. This is especially true where Rohde himself admits that the trial court simply cut-and-pasted from his brief.

B. Whether Property is Commercial or Residential is a Factor to consider under the Case-by-Case Approach

Rohde also argues that the Court should not consider in its analysis the fact that the lease here concerns commercial property entered into by two sophisticated parties. (Resp.'s Brief, p. 6–7). Again, Rohde claims that RAM is raising this issue for the first time.

The type of property at issue (*i.e.*, commercial vs. residential) is one of the factors courts can look at under the case-by-case approach. *See Seaco Ins. Co. v. Barbosa*, 761 N.E.2d 946, 950 (Mass. 2002). RAM, in its principle brief on this issue, cited *Barbosa*. (App.'s Brief, p. 24). In *Barbosa*, the court failed to apply *Sutton* to a commercial lease because a commercial lease presents “different circumstances and involve different considerations than their residential counterparts.” *Barbosa*, 761 N.E.2d at 950. Yet, the *Barbosa* Court went on to evaluate the terms of the parties’ lease agreement—which contained terms similar to the lease at issue here—to determine where the risk of loss should lie. *Id.* at 947, 951 (citing lease provisions that required the lessee to repair the premises, carry liability insurance, and return the premises in the same condition (“yield-up”)). In the end, the fact that the property in *Barbosa* was commercial property did not itself determine the outcome of the matter. Rather, the Court delved further to review the terms of the parties’ lease agreement to see who assumed the risk of loss. *Id.* at 952. Accordingly, whether property is commercial or residential is just one of the factors to

consider under the case-by-case approach. This is especially true where subrogation is rooted in equity.

RAM acknowledges that the *Barbosa* case was not addressed in its trial memorandum, nor was the issue of residential versus commercial property. Yet, as discussed at length above, RAM has preserved for appeal the theory underlying the case-by-case approach. Since the case-by-case approach evaluates many factors to the lease agreement, including whether the property is commercial or residential, this is simply an extension of the discussion under the case-by-case approach. Accordingly, this factor (*i.e.*, commercial property) is not foreclosed from consideration, especially where the standard of review is *de novo*. Under that standard it is permissible to look at all the underlying facts presented to the trial court. Here, a copy of the parties' lease, which is denoted "Commercial Lease Agreement," is part of the trial-court record. (App. 132).

C. Even if the Case-by-Case Approach were a New Issue on Appeal—which it is not—the “Well Established” Exception to the Rule Applies Here

Assuming Rohde was correct in that the “case-by-case” approach—and hence the commercial-property issue—was not addressed in the trial court, that does not necessarily preclude its review here. Minn. R. Civ. App. P. 103.04 provides that Courts of Appeal may review “any order involving the merits or affecting the judgment” or “*any other matter as the interest of justice may require.*” (emphasis added). While Courts of Appeal

will generally consider only those issues raised below, a “well established” exception exists. *Watson v. United Serv’s Auto. Ass’n*, 566 N.W.2d 683, 687 (Minn. 1997). This exception holds that:

[A]n appellate court may base its decision upon a theory not presented to or considered by the trial court *where the question raised for the first time on appeal is plainly decisive of the entire controversy on its merits, and where, as in [a case] involving undisputed facts, there is no possible advantage or disadvantage to either party in not having had a prior ruling by the trial court on the question.*

Id. (citing *Holen v. Minneapolis-St. Paul Metro. Airports Comm’n*, 84 N.W.2d 282, 286 (1957) (emphasis in original)). According to the *Watson* Court, the following factors determine whether the “new” issue should be considered on review: (1) “the issue is a novel legal issue of first impression”; (2) “the issue was raised prominently in briefing”; (3) “the issue was ‘implicit in’ or ‘closely akin to’ the arguments below”; and (4) “the issue is not dependent on any new or controverted facts.” *Id.* at 688 (citing *Cohen v. Cowles Media Co.*, 479 N.W.2d 387, 390 (Minn. 1992) and *Perl v. St. Paul Fire and Marine Ins. Co.*, 345 N.W.2d 209, 215 n. 6 (Minn. 1984)). Each is addressed in turn.

(1) *The issue is a novel legal issue of first impression*

Whether the Court should adopt the case-by-case approach, in lieu of *Bruggemann*, is an issue undecided by the Court. In *Osborne*, 574 N.W.2d at 65 n.5, the Court referred to the case-by-case approach and went on to state that [t]he *Osbornes* would have us adopt this standard but, as explained *infra*, we need not reach this issue.

Id. (alteration added). Accordingly, the issue has not been determined.

(2) *The issue was raised prominently in the briefing*

The parties' respective briefs discuss at length the case-by-case approach and how it should, or in the case of Rohde should not, apply here. Thus, the parties have prominently addressed the issue.

(3) *The issue was implicit in or closely akin to the arguments below*

As discussed in depth above, at the trial-level RAM asserted that there can be no implied waiver of subrogation where the parties' lease agreement indicates otherwise. In support of this, RAM referred to *Osborne* to show how the parties' lease provisions shifted the risk of loss to the tenant. This is, in essence, the case-by-case approach. Accordingly, to the extent the case-by-case approach was not explicitly raised in RAM's trial memorandum, its arguments were certainly "closely akin to" the case-by-case method.

(4) *The issue is not dependent on any new or controverted facts*

This case comes to the Court upon the trial court's entry of summary judgment in favor of Rohde. There were essentially no factual disputes for purposes of the summary-judgment motion. The facts asserted were based in large part on the parties' lease agreement. And the trial court's outcome hinged on the identity of the parties and type of suit (*i.e.*, subrogation). For all ends and purposes the issue here is not dependent on any

new facts. The arguments advanced on appeal are based on factual allegations contained in the record below.

For all the reasons stated, and to the extent the Court determines that the case-by-case approach was not encompassed in the proceedings below, RAM respectfully requests that the Court consider it for review under the “well established” exception to the rule.

II. RAM’s Policy is not Necessarily Primary

While somewhat tangential to the parties’ arguments, Rohde claims that RAM’s policy of insurance is primary over Rohde’s commercial insurance policy. Presumably Rohde points this out to show that the insurance he obtained—which was a requirement of the parties’ lease—would not apply. The relevance of this issue is not to establish which parties’ insurance company is ultimately responsible for the loss, but rather to provide evidence as to the parties’ intent under the lease agreement—namely which party was required to insure the risk.

On this point, Rohde states: “RAM incorrectly argues that its policy also provides ‘excess’ coverage for damage to the premises at issue.” (App.’s Brief, p. 15 n.11). Rohde then states that “RAM’s insurance policy is primary according to the following language contained in its policy”:

a. Primary Insurance

This insurance is primary except when b. below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary.

(*Id.*). Rohde neglects to reference the remaining relevant policy language. That language states:

a. Primary Insurance

This insurance is primary except when b. below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary.

b. Excess insurance

This insurance is excess over:

...

(b) Any other primary insurance available to you covering liability for damages arising out of the premises or operations for which you have been added as an additional insured by attachment of an endorsement.

(App. 249).

Here, Rohde's commercial policy provides coverage for the building described on the declarations page. (App. 182). The declarations page identifies 201 Main St. S., Suite 2, Sauk Centre, Minnesota, as the insured premises. (App. 140). This is the same address identified on the parties' commercial lease agreement. (App. 132). The policy then provides coverage for "water damage" and further states that Rohde's insurance company will "pay the cost to tear out and replace any part of the building or structure to repair the damage." (App. 150). As for endorsements, Rohde obtained Tenants Liability Coverage. (App. 208). That endorsement states that "[w]ith respect to the premises

shown on the Schedule of this endorsement which are rented to you or temporarily occupied by you with the permission of the owner, Exclusion[] . . . k. . . . do[es] not apply to ‘property damage.’” (App. 208) (alterations & omission added). Exclusion “k” excludes coverage for property damage to the rental premises. (App. 170). By excepting exclusion k, Rohde’s policy brings back into coverage “property damage” to the rental premises that results from Rhode’s negligence. (App. 170). Accordingly, there is coverage for Rohde’s actions and the endorsement in effect would add JD Properties—the building owner—as an insured. Accordingly, both policies are “excess” and, as stated in RAM’s brief, a “closest-to-the-risk” analysis would result.

Such an analysis was not done at the trial level and perhaps is only relevant to a declaratory-judgment proceeding. What is relevant and important, however, is that Rhode obtained coverage for the loss, which goes to the issue of the parties’ intentions under the lease agreement—and, as stated before, this is relevant to the case-by-case approach.

III. *General Mills v. Goldman*, 184 F.2d 359, 360 (8th Cir. 1950)

Rohde correctly identifies an error in RAM’s citation to the *General Mills*’ case.

On this point, Rohde states:

RAM references the Eighth Circuit case of *General Mills v. Goldman* and states, ‘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.’ Appellant’s Brief, p. 28 (quoting *Goldman*, 184 F.2d at 572-573). But the language purported to be

quoted from *Goldman* cannot be found in that opinion; nor does the *Goldman* opinion include pages numbered 572 or 573.

(Resp.'s Brief, p. 26-27). The quoted language, "that in its absence the tenant would have been liable to the landlord's insurer under the doctrine of subrogation," comes from pages 572 and 573 of Milton Friedman's treatise, *FRIEDMAN ON LEASES* § 9.9 (4th ed. 1997), which is referenced in RAM's brief. RAM inadvertently identified *Goldman* as the source for this quote.

Friedman discusses the *Goldman* case as standing for the proposition that in the absence of the parties' lease provision of "loss by fire and ordinary wear excepted"—which shifted the risk of loss to the landlord—"the tenant would have been liable to the landlord's insurer under the doctrine of subrogation." See *Rausch v. Allstate Ins. Co.*, 882 A.2d 801, 809 (Md. 2005) (citing Friedman's treatise on this point). RAM referenced Friedman in its discussion of the *Goldman* case and correctly identified the page number for the quoted passage above, namely pages 572 and 573 of Friedman's treatise. But, as Rohde correctly points out, RAM cited the wrong authority, namely the *Goldman* case instead of Friedman.

This correction is further support, however, for RAM's reference to *Goldman* and the case-by-case approach. RAM referenced the *Goldman* opinion to show how language within a lease agreement can shift the risk of loss to one of the parties, as with the case-by-case approach. (App.'s Brief., p. 27-28). In *Goldman*, 184 F.2d at 360, the landlord's

insurer pursued a subrogation action against a tenant that negligently started a fire and destroyed the rental premises. *Id.* at 360-61. The parties' lease required the tenant to return the premises to the same condition "loss by fire and ordinary wear excepted." *Id.* at 360 n.1. The Court determined that this language relieved the tenant of liability where the loss was caused by fire. *Id.* at 366. In other words, this language shifted the risk of fire loss to the landlord. As referenced above, Friedman claims that in the absence of this provision "the tenant would have been liable to the landlord's insurer under the doctrine of subrogation." Friedman, at 572-73. *Goldman* was a federal case decided under Minnesota law.

Goldman seems to apply the theory of the case-by-case approach, namely a review of the parties' lease terms to determine where the risk of loss should lie. Most importantly, *Goldman* failed to adopt any bright line rule—unlike *Sutton* and *Bruggemann*—that absent a provision requiring the tenant to carry fire insurance there is an automatic waiver of subrogation. If anything, *Goldman* is precedence that under Minnesota law courts review the terms of the parties' lease agreement to determine who should ultimately be responsible for the risk. In the end, RAM attempted to square *Goldman* with *Bruggemann*, given the cases' differing approaches. The Court concluded that the cases' differing outcomes must lie in the fact that *Goldman* dealt with commercial property, whereas *Bruggemann* was residential property. (App.'s Brief, p.

28). This would make sense where equitable considerations are at the roots of subrogation.

IV. *Dix Mut. Ins. Co. v. LaFramboise*, 597 N.E.2d 622 (Ill. 1992)

Rohde claims that *Dix Mut. Ins. Co. v. LaFramboise*, 597 N.E.2d 622 (Ill. 1992)—a case that utilizes the case-by-case approach—is factually similar to the present matter and should control the outcome here. (Resp.’s Brief, p. 25). *LaFramboise* is, however, different. It concerned a fire loss and therefore the Court reviewed the parties’ lease agreement to determine which of them assumed the risk for fire damage. *Id.* at 625–26. As the *LaFramboise* Court noted, it must look at the lease “as a whole” to determine this issue. *Id.* at 625. In sum, the *LaFramboise* Court’s task was to review the terms in light of the risk-causing loss, that being fire damage.

Here, unlike in *LaFramboise*, we are dealing with a water-loss claim caused by Rohde’s alleged negligent installation of a water line. Therefore, the task here is to look at the terms of the lease to see whether Rohde assumed the risk for his alleged negligent installation of the water line and the resulting water damage.¹ As pointed out before, the parties’ lease provisions indicate that he did assume this risk.

¹ RAM made a similar argument at the trial-court level by attempting to distinguish *Blohm v. Johnson*, 523 N.W.2d 14 (Minn. Ct. App. 1994). (App. 224 [App.’s Tr. Mem., p. 9]) (“Here, unlike in *Blohm*, the risk-causing loss, *i.e.*, Defendant’s negligence, was specifically delegated to the Defendant.”).

It is also important to note, as the *LaFramboise* Court pointed out, the parties' lease agreement there did not contain a "yield back" clause. *Id.* at 625. Here, the parties' lease requires Rohde to maintain and return the premises in the same condition as it was at the inception of his lease. (App. 57, ¶ 47). While the absence of this clause was not outcome-determinative in the *LaFramboise* case, it may be a relevant factor under the case-by-case approach. *Id.* at 625.

V. A Water Damage Claim, as Opposed to a Fire-Related Loss that Destroys the Premises, is an Equitable Factor to Consider

Finally, Rohde claims that the fact that the rental property here was not completely destroyed, or that it concerns water damage as opposed to a fire loss, is immaterial and inconsequential. (Resp.'s Brief, pp. 16 &18). Rohde contends that these issues are irrelevant and their consideration would run afoul of the rationale and holding in *Bruggemann* and its progeny. (*Id.*). RAM agrees that these issues were not part of the *Bruggeman* holding. To be clear, however, *Bruggemann* and the issue of subrogation are steeped in equity. *See Medica, Inc. v. Atlantic Mut. Ins. Co.*, 566 N.W.2d 74, 77 (Minn. 1997) (stating that equitable subrogation is based on principles of equity). As even the *Sutton* Court noted, equity "is a fluid concept *depending upon the particular facts and circumstances of a given case* for its applicability." *Sutton v. Jondahl*, 532 P. 2d 478, 482 (Okla. Ct. App. 1975) (emphasis added). To that end, *Bruggemann* should not be a

rubber stamp that applies to each and every landlord-tenant subrogation matter. Rather, the facts of the underlying matter should be considered.

Here, the fact that the property was far from complete destruction should be a matter of consideration when weighing equitable factors. Likewise, fire damage is usually associated with complete destruction of the premises, or at least heavy damage, as the cases highlight. (See App.'s Brief, p. 25–26 (identifying the Minnesota cases addressing fire-related losses)). Here, we are dealing with a water-damage claim.

Understandably, one concern from the *Bruggemann* perspective is strapping unwary renters with a huge judgment because the lease did not require them to obtain fire insurance. Those equitable concerns, as stated in *Bruggemann*, are not present here.

In the end, the case-by-case approach looks at “other admissible evidence,” in addition to the parties’ lease terms. *Rausch*, 882 A.2d at 806. The type and amount of damage would certainly be evidence of further consideration under the principles of equity.

Conclusion

The new issues raised in Rohde’s appeal do not affect the positions RAM advanced in its principle brief. At the trial court level, RAM addressed the underlying theory to the case-by-case approach. Accordingly, this issue has been preserved for

review. To the extent it was not, the "well established" exception to this rule, as noted in *Watson*, 566 N.W.2d at 687, applies, thereby allowing the Court to review the issue.

Second, Rohde did obtain applicable insurance to cover the loss at issue, which is evidence of the parties' intent under the lease agreement. This is one of the factors to consider under the case-by-case approach.

Finally, *General Mills*, 184 F.2d at 360, stands for the proposition that absent a lease provision requiring the landlord to bear responsibility for a certain risk-causing loss, courts look to the terms of the lease agreement to determine where that risk should ultimately lie. Here, RAM's insured was not obligated to assume the risk of water damage caused by Rohde's negligence. Rather, the parties' lease agreement indicates that this responsibility would fall on Rohde. Accordingly, under the case-by-case approach, Rohde is the responsible party.

Respectfully submitted.

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Certificate of Compliance

This brief complies with the word/line limitations of Minn. R. Civ. App. P. 132.01, subd. 3(b). The brief was prepared using Microsoft Word version 2010, which reports that the brief contains 454 lines and 4,686 words.

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