

1992

GNS Partnership v. Fullmer : Unknown

Utah Court of Appeals

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Stuart Schultz; Strong & Hanni.

Keith W. Meade; Cohne, Rappaport & Segal.

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March 28, 1994

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FILED

Utah Court of Appeals

MAR 28 1994


Mary T. Noonan
Clerk of the Court

KET NO.

920763

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Mary Noonan, Clerk
Utah Court of Appeals
230 South 500 East, #400
Salt Lake City, Utah 84102

Re: GNS Partnership v. Fullmer
Case No. 920763-CA

Dear Ms. Noonan:

This letter is sent pursuant to Rule 28(j), Utah Rules of Appellate Procedure. In preparing for oral argument for the above-referenced case, which is set for oral argument on Monday, March 28, 1994, I discovered the following pertinent and significant authorities which I understand were not available in reporters when briefs were filed:

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

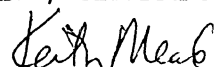
Community Credit Union v. Homelvig, 487 N.W.2d 602 (N.D. 1992); and

Dix Mutual Insurance v. La Framboise, 597 N.E.2d 622 (Ill. 1992).

These cases pertain to Point I beginning at page 9 in the Brief of Brad Fullmer. The cases are significant because they address one of the issues on appeal, whether a right of subrogation exists in favor of the landlord's insurer against a tenant.

Very truly yours,

COHNE, RAPPAPORT & SEGAL


Keith W. Meade

KWM/da

cc: Stuart Schultz
Strong & Hanni
600 Boston Building
Salt Lake City, Utah 84111

UNITED FIRE & CASUALTY
COMPANY, Appellant,

v.

Jerry BRUGGEMAN and Carla Brugge-
man, d/b/a Junction Gifts and Craft
Supply, Respondents,

and

EMPLOYERS MUTUAL CASUALTY
CO., Plaintiff,

v.

Jerry BRUGGEMAN and Carla Brugge-
man, d/b/a Junction Gifts and Craft
Supply, Respondents.

No. C3-93-333.

Court of Appeals of Minnesota.

Aug. 31, 1993.

Review Denied Oct. 19, 1993.

Landlord's fire insurer brought subroga-
tion action against negligent tenants. The

District Court, Sherburne County. Robert B. Danforth, J., entered judgment for tenants, and landlord appealed. The Court of Appeals, Forsberg, J., held that tenants were coinsureds, for subrogation purposes.

Affirmed.

1. Insurance ⚭606(2.1)

Negligent tenants were coinsureds under landlord's fire policy, and, thus, were not amenable to subrogation suit.

2. Insurance ⚭606(2.1)

Tenants are coinsureds with landlord, for subrogation purposes; tenants and landlord have insurable interest in leased premises, and since premium reflects increased risk of rental use and premium may be passed on to tenant in form of rent, this is most efficient way to allocate insurance costs.

Syllabus by the Court

Tenants are co-insureds under their landlord's fire insurance policy for purposes of subrogation actions.

Gordon H. Hansmeier, Michael C. Rajkowski, Donohue Rajkowski Ltd., St. Cloud, for appellant.

Lee F. Haskell, Thomas F. Ascher, Cosgrove, Flynn, Gaskins & O'Connor, Minneapolis, for respondents.

Considered and decided by FORSBERG, P.J. and HUSPENI and SCHULTZ,* JJ.

OPINION

FORSBERG, Judge.

[1] A landlord's insurer brought a subrogation action against negligent tenants who caused fire damages. The trial court determined the tenants were co-insureds under the policy and therefore not amenable to suit. We affirm.

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

FACTS

Respondents Jerry and Carla Bruggemans rented space from the Jedneak Brothers Properties in July 1990. There was no written lease or contract between the parties and no independent arrangement for provision of insurance coverage was discussed. On August 6, 1990, a fire destroyed the property. The Jedneak Brothers were paid \$81,275 by their insurer, appellant United Fire & Casualty Company (United).

United claimed the fire was negligently caused by the Bruggemans, and commenced this subrogation action. Trial was bifurcated, with a jury determining negligence and damages, and the court determining the legal issue of whether a subrogation action may be maintained. The jury found the Bruggemans were negligent and assigned damages in the amount of \$37,775. Despite these factual findings prerequisite to a subrogation action, the trial court denied recovery by finding the Bruggemans were co-insureds under the fire policy. United's motion for a new trial was denied, and judgment was entered. United appeals, claiming the trial court erred in finding the Bruggemans were co-insureds.

ISSUE

Did the trial court err in finding the tenants co-insureds under their landlord's fire insurance policy, and therefore not amenable to a subrogation action?

ANALYSIS

[2] United claims the trial court erred in determining the Bruggemans were co-insureds under its policy covering the Jedneak Brothers' property. This is a case of first impression in Minnesota, but the issue has been considered extensively by a number of other jurisdictions, where there is a clear split in the holdings. We believe the greater wisdom is in the majority position.

The first and leading case to state the majority position is *Sutton v. Jondahl*, 532 P.2d 478 (Okla.App.1975). As in this case,

jury found a tenant had negligently caused a fire. Likewise, as here, there was no expressed agreement between landlord and tenant covering provision of fire insurance. The *Sutton* court determined subrogation was not available to the landlord's insurer. *Id.* at 482.

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.

Id. This sharing of proprietary interests and the expenses associated with protecting them gives rise to the co-insured relationship.

We believe this is the most efficient way to allocate insurance costs. This is especially true when considering the reality of today's multi-unit rental market. If, as United contends, each tenant is responsible for all damages arising from its negligence in causing a fire and if each tenant was therefore responsible for its own fire insurance, the same property would be insured many times over. While this may provide insurance companies a welcome windfall, it would be contrary to economic logic and common sense.

The minority position on the subject is well illustrated by the case of *Neubauer v. Hostetter*, 485 N.W.2d 87 (Ia.1992). The *Neubauer* court took a close look at the authority on this question and allowed the subrogation action because “it satisfies equitable concerns by placing the burden of the loss where it ought to be—on the negligent party.” *Id.* at 89 (quoting *Fire Ins. Exch. v. Geekie*, 179 Ill.App.3d 679, 128 Ill.Dec. 616, 617, 534 N.E.2d 1061, 1062 (1989)).

This minority position disregards the majority position's reasoning that a co-insured relationship is established because the tenant

indirectly pays the insurance premiums. When payment of rent is understood to include insurance premiums, as we believe it does, the minority position fails because insurance is purchased to hold the insured harmless from its negligence. The parties' status as co-insureds renders nugatory the issue of the relative negligence of the separate interest holders.

Also, we are not convinced by the minority position's concern that establishing the co-insured relationship for purposes of subrogation interferes with an insurer's ability to limit its risk.

The insurer has a right to choose whom it will insure and it did not choose to insure the lessees, and under [*Sutton*] the lessee could have sued the insurer for loss due to damage to the realty, e.g. loss of use if policy provides such coverage. Cases following *Sutton*, however, have at least impliedly restricted the co-insurance relationship to one limited solely to the purpose of prohibiting subrogation.

Id., 485 N.W.2d at 89 (quoting 6A J. Appleman, *Insurance Law and Practice* § 4055, at 94 n. 86.01 (1991 Supp.)).

The insurer knows the risk it is undertaking when insuring a rental property. It insures the building for the use for which it is intended. While it may not have control over who the individual tenants are, it can increase its premiums to reflect increased risks presented by changing tenant use. Likewise, it can require the landlord to undertake any number of safety and structural precautions. We believe the landlord is the party in the best position to assume such responsibilities, and we reject the minority position on this issue.

Finally, we find no problem with limiting the co-insured relationship to the subrogation context. Landlord and tenant have separate insurable risks for loss of use in the event of a fire. The landlord's risk is directly related to the insured structure, that is, loss of rents. The tenant's loss of use involves the activity carried on within the structure. The tenant's loss arises from the use, not the structure. The shared insurable interests between landlord and tenant are limited to the structure, which is the subject of the fire policy. Risks

such as loss of use are therefore properly *dealt with in separate insurance contracts.*

United also claims several evidentiary errors led to an insufficient award of damages. Since we affirm the trial court's dismissal of the subrogation action, we need not reach this issue.

DECISION

The Bruggemans were co-insureds under the Jedneak Brothers' fire insurance policy, and therefore are not subject to subrogation by United. The judgment of the trial court is affirmed.

Affirmed.



COMMUNITY CREDIT UNION OF NEW
ROCKFORD, NORTH DAKOTA, Plain-
tiff and Appellant,

v.

Lynn HOMELVIG and Cindy Homelvig,
husband and wife, Defendants and
Appellees.

Civ. No. 920001.

Supreme Court of North Dakota.

July 28, 1992.

Landlord's insurer, after paying landlord damages under fire policy for fire damage to leased house, brought subrogation action against tenants in landlord's name, alleging that tenants negligently caused fire. The District Court, Eddy County, Gordon O. Hoberg, J., entered summary judgment in favor of tenants, and appeal was taken. The Supreme Court, Erickstad, C.J., held that absent express agreement to the contrary, tenant is implied coinsured under landlord's fire insurance policy, and insurer may not seek subrogation against tenant.

Affirmed.

1. Judgment ⇌ 178

Purpose of summary judgment is to promote prompt and expeditious disposition of legal conflict on its merits, without trial, if no material dispute of fact exists or if only question of law is involved.

further similar acts of misconduct that cause injury or potential injury to a client, the public, the legal system, or the profession.

6. NDPRLDD 4.5 addresses reinstatement of a lawyer after a short suspension:

B. *Short Suspension.* A lawyer suspended for six months or less may resume practice at the end of the period of suspension by filing with the court and serving upon counsel an

2. Insurance ¶580(4), 606(1.1)

Absent express agreement to the contrary, tenant is implied coinsured under landlord's fire insurance policy, and insurer may not seek subrogation against tenant.

Michael J. Morley, of Morley & Morley, Ltd., Grand Forks, for plaintiff and appellant. Argued by Robert M. Light.

William P. Harrie (argued), of Nilles, Hansen & Davies, Ltd., Fargo, for defendants and appellees.

ERICKSTAD, Chief Justice.

The Community Credit Union of New Rockford appeals from a district court summary judgment dismissing its action against Lynn and Cindy Homelvig. We affirm.

The Homelvigs leased a house from the Credit Union on a month-to-month basis with an option to purchase. The agreement between the parties was oral; no written lease agreement was ever signed by the parties. The Credit Union insured the house with a policy issued by Cumis Insurance Society. The Homelvigs obtained renters insurance, including liability coverage, from North Star Mutual Insurance Company.

On August 22, 1990, a fire destroyed the kitchen and caused smoke damage to the remainder of the house. Cumis paid \$38,307 to the Credit Union for the damages.

Cumis then brought this subrogation action in the Credit Union's name, alleging that the Homelvigs negligently caused the fire. The Homelvigs moved for summary judgment, asserting that they were co-insureds under the Cumis policy and that subrogation was barred as a matter of law. The district court concluded that the Homelvigs were co-insureds under the Cumis policy and granted summary judgment. Cumis, through the Credit Union, appealed.

[1] The purpose of summary judgment is to promote the prompt and expeditious disposition of a legal conflict on its merits, without trial, if no material dispute of fact exists or if only a question of law is in-

volved. *E.g.*, *Stuhlmiller v. Nodak Mutual Insurance Co.*, 475 N.W.2d 136, 137 (N.D.1991); *United Electric Service & Supply, Inc. v. Powers*, 464 N.W.2d 818, 819 (N.D.1991). The dispositive issue in this case is a question of law: whether a tenant is an implied co-insured on a landlord's fire insurance policy as a matter of law, absent an express agreement to the contrary. If the tenant is a co-insured under the policy, subrogation is unavailable. *See Agra-By-Products, Inc. v. Agway, Inc.*, 347 N.W.2d 142, 145 (N.D.1984); 6A Appleman, *Insurance Law and Practice* § 4055 (1972); 16 Couch, *Insurance Law* § 61:137 (2d ed. 1983).

The great majority of courts which have addressed this issue have held that, absent an express agreement to the contrary, a tenant is an implied co-insured under the landlord's fire policy and subrogation is barred. *See, e.g.*, *Tate v. Trialco Scrap, Inc.*, 745 F.Supp. 458 (M.D.Tenn.1989); *Alaska Insurance Co. v. RCA Alaska Communications, Inc.*, 623 P.2d 1216 (Alaska 1981); *Liberty Mutual Fire Insurance Co. v. Auto Spring Supply Co.*, 59 Cal.App.3d 860, 131 Cal.Rptr. 211 (1976); *Safeco Insurance Cos. v. Weisgerber*, 115 Idaho 428, 767 P.2d 271 (1989); *New Hampshire Insurance Group v. Labombard*, 155 Mich.App. 369, 399 N.W.2d 527 (1986); *Safeco Insurance Co. v. Capri*, 101 Nev. 429, 705 P.2d 659 (1985); *Sutton v. Jondahl*, 532 P.2d 478 (Okla.Ct.App.1975); *Fashion Place Investment, Ltd. v. Salt Lake County*, 776 P.2d 941 (Utah Ct.App. 1989); *Cascade Trailer Court v. Beeson*, 50 Wash.App. 678, 749 P.2d 761 (1988).

As noted by one leading commentator:

"The modern trend of authority holds that the lessor's insurer cannot obtain subrogation against the lessee, in the absence of an express agreement or lease provision establishing the lessee's liability, because the lessee is considered a co-insured of the lessor for the purpose of preventing subrogation; the parties are co-insureds because of the reasonable expectations they derive from their privity under the lease, their insurable interests in the property, and the commercial realities under which lessors insure

leased premises and pass on the premium cost in rent and under which insurers make reimbursement for fires negligently caused by their insureds' negligence."

6A Appleman, *supra*, § 4055, 1991 Supp. at 79. Professor Keeton also advocates the majority rule:

"The possibility that a lessor's insurer may proceed against a lessee almost certainly is not within the expectations of most landlords and tenants unless they have been forewarned by expert counseling. When lease provisions are either silent or ambiguous in this regard—and especially when a lessor's insurance policy is also silent or ambiguous—courts should adopt a rule against allowing the lessor's insurer to proceed against the tenant."

Keeton & Widiss, Insurance Law § 4.4(b) at 340-341 (1988) (footnote omitted).

The seminal case setting forth the majority rule is *Sutton v. Jondahl*, *supra*, in which the tenant's son had caused a fire damaging the insured premises. Concluding that the landlord's insurer could not seek subrogation against the tenant, the court reasoned:

"Under the facts and circumstances in this record the subrogation should not be available to the insurance carrier because the law considers the tenant as a co-insured of the landlord absent an express agreement between them to the contrary, comparable to the permissive-user feature of automobile insurance. This principle is derived from a recognition of a relational reality, namely, that both landlord and tenant have an insurable interest in the rented premises—the former owns the fee and the latter has a possessory interest. Here the landlords (Suttons) purchased the fire insurance from Central Mutual Insurance Company to protect such interests in the property against loss from fire. This is not uncommon. And 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.

"The landlords of course could have held out for an agreement that the tenant would furnish fire insurance on the premises. But they did not. They elected to themselves purchase the coverage. To suggest the fire insurance does not extend to the insurable interest of an occupying tenant is to ignore the realities of urban apartment and single-family dwelling renting. Prospective tenants ordinarily rely upon the owner of the dwelling to provide fire protection for the realty (as distinguished from personal property) absent an express agreement otherwise .

"Basic equity and fundamental justice upon which the equitable doctrine of subrogation is established requires that when fire insurance is provided for a dwelling it protects the insurable interests of all joint owners including the possessory interests of a tenant absent an express agreement by the latter to the contrary. The company affording such coverage should not be allowed to shift a fire loss to an occupying tenant even if the latter negligently caused it For to conclude otherwise is to shift the insurable risk assumed by the insurance company from it to the tenant—a party occupying a substantially different position from that of a fire-causing third party not in privity with the insured landlord."

Sutton v. Jondahl, *supra*, 532 P.2d at 482.

Other courts have expanded the *Sutton* rationale, addressing various public policies which support the rule. For example, in *Safeco Insurance Co. v. Capri*, *supra*, 705 P.2d at 661, the Supreme Court of Nevada stated:

"It is not uncommon for the lessor to provide fire insurance on the leased property. As a matter of sound business practice, the premium to be paid had to be considered in establishing the rental rate. Also, such premiums would be chargeable against the rent as an overhead or operating expense. Accordingly, the tenant actually paid the premium as

DOMRES v. BACKES

N. D. 605

Cite as 487 N.W.2d 605 (N.D. 1992)

part of the monthly rental. *Sutton, supra*, 532 P.2d at 482. Courts therefore consider it to be an undue hardship to require a tenant to insure against his own negligence, when he is paying, through his rent, for the fire insurance which covers the premises....

"Moreover, insurance companies expect to pay their insureds for negligently caused fires and adjust their rates accordingly. In this context, an insurer should not be allowed to treat a tenant, who is in privity with the insured landlord, as a negligent third party when it could not collect against its own insured had the insured negligently caused the fire."

See also *New Hampshire Insurance Group v. Labombard, supra*, 399 N.W.2d at 531.

The court in *Tate v. Trialco Scrap, Inc., supra*, 745 F.Supp. at 473, also emphasized that it is the tenant who ultimately bears the cost of the landlord's insurance premiums:

"The realities of who ultimately pays for the insurance also support adoption of this rule. Despite the fact that the lessor may actually send the premium check to the insurance company, the lessee ultimately pays for insurance through his rent checks, because the lessor takes his own costs into account when setting rent. If the lessee is ultimately the source of the insurance payment, simple equity would suggest that he be able to benefit from that payment unless he has clearly bargained away that benefit."

Other policy arguments in favor of the majority rule include preventing windfalls to insurers and preventing multiple policies and overlapping coverage. See, e.g., *Tate v. Trialco Scrap, Inc., supra*, 745 F.Supp. at 473; *Safeco Insurance Cos. v. Weisgerber, supra*, 767 P.2d at 274.

[2] The cases adopting the majority rule are well-reasoned and highly persuasive. We hold that, absent an express agreement to the contrary, a tenant is an implied co-insured under the landlord's in-

surance policy and the insurer may not seek subrogation against the tenant.

The district court did not err in holding that the Homelvigs were implied co-insureds under the Cumis policy. Accordingly, summary judgment was appropriate. The judgment is affirmed.

VANDE WALLE, LEVINE, MESCHKE
and JOHNSON, JJ., concur.



tenant could not be held liable for negligently caused fire damage to leased premises solely on basis that lease did not contain a provision expressly relieving tenant of such liability; (2) construing lease as a whole, parties intended that tenant was not to be liable for any fire damage to premises and that landlord would look solely to insurance as compensation for any fire damage to the premises; and (3) by payment of rent, tenant gained status of coinsured under policy, precluding subrogation action against tenant by insurer.

Appellate Court reversed; Circuit Court affirmed.

Freeman, J., concurred with opinion.

Heiple, J., dissented with opinion.

149 Ill.2d 314

173 Ill.Dec. 648

DIX MUTUAL INSURANCE COMPANY,
as Subrogee of Roy Mitchell Estate,
Appellee,

v.

Terrence LaFRAMBOISE, Appellant.

No. 72037.

Supreme Court of Illinois.

July 30, 1992.

Insurer filed subrogation action against tenant to recover amount it paid to landlord for fire loss allegedly caused by tenant's negligence. The Circuit Court, Vermilion County, John P. O'Rourke, J., dismissed complaint, and insurer appealed. The Appellate Court, 213 Ill.App.3d 292, 157 Ill.Dec.140, 571 N.E.2d 1159, reversed and remanded. Tenant petitioned for leave to appeal which was allowed. The Supreme Court, Bilandic, J., held that: (1)

1. Pretrial Procedure ⇐679

When legal sufficiency of a complaint is challenged by a motion to dismiss, all well-pleaded facts in the complaint are taken as true.

2. Appeal and Error ⇐863, 919

On review of dismissal for failure to state a cause of action, Supreme Court must determine whether well-pleaded allegations of the complaint, when interpreted in the light most favorable to plaintiff, are sufficient to set forth a cause of action upon which relief may be granted.

3. Subrogation ⇐1

"Subrogation" is a method whereby one who has involuntarily paid a debt or claim of another succeeds to the rights of the other with respect to the claim or debt so paid.

See publication Words and Phrases for other judicial constructions and definitions.

4. Subrogation ⇐1

Right of subrogation is an equitable right and remedy which rests on principle that substantial justice should be attained by placing ultimate responsibility for a loss upon the one against whom in good conscience it ought to fall.

5. Subrogation ¶1

Subrogation is allowed to prevent injustice and unjust enrichment but will not be allowed where it would be inequitable to do so.

6. Subrogation ¶1

There is no general rule to determine whether right of subrogation exists since right depends upon equities of each particular case.

7. Subrogation ¶32

One who asserts a right of subrogation must step into the shoes of, or be substituted for, the one whose claim or debt he has paid and can only enforce those rights which the latter could enforce.

8. Landlord and Tenant ¶55(1)

Although a tenant is generally liable for fire damage caused to leased premises by his negligence, if the parties intended to exculpate the tenant from negligently caused fire damage, their intent will be enforced.

9. Landlord and Tenant ¶37

Lease between landlord and tenant must be interpreted as a whole so as to give effect to intent of the parties.

10. Landlord and Tenant ¶55(1)

Tenant could not be held liable for negligently caused fire damage to leased premises solely on basis that lease did not contain a provision expressly relieving tenant of such liability.

11. Landlord and Tenant ¶55(1)

Construing lease as a whole, parties intended that tenant was not to be liable for any fire damage to premises and that landlord would look solely to insurance as compensation for any fire damage to premises; parties considered possibility of fire and expressly provided that landlord would not be responsible for fire damage to tenant's personal property, indicating that parties intended for each to be responsible for his own property; conclusion was supported by landlord's conduct in taking out fire policy to cover leased premises.

12. Insurance ¶606(1)

Insurer may not subrogate against its own insured or any person or entity that has a status of a coinsured under the policy.

13. Insurance ¶606(1.1)

Under provisions of lease as a whole, reasonable expectations of the parties, and principles of equity and good conscience, fire insurer under policy issued to landlord could not maintain subrogation action against tenant for fire loss due to tenant's negligence; by payment of rent, tenant contributed to payment of insurance premium, thereby gaining status of coinsured under policy; moreover, landlord intended that policy would cover any fire damage to premises no matter who caused it, and to conclude otherwise would have defeated reasonable expectations of the parties.

John A. Beyer and Steven D. Ziegler, Satter, Beyer & Spires, Pontiac, for appellant.

Monica E. Rackauskas, Mark E. Condon and Peter W. Schoonmaker, Condon & Cook, Chicago, for appellee.

Justice BILANDIC delivered the opinion of the court:

Dix Mutual Insurance Company (insurance company) paid its insured (landlord) \$40,579 for a fire loss on certain real property. The insurance company, by way of subrogation, seeks to recover the \$40,579 from Terrence LaFramboise (tenant) because he allegedly caused the fire loss due to his negligence. The trial court dismissed the insurance company's first-amended complaint for failure to state a cause of action. The trial court found that the parties did not intend for the tenant to be liable for fire damage to the real property and that the tenant was a co-insured under the insurance company's insurance policy. The appellate court reversed, reinstated the first-amended complaint and remanded the cause for further proceedings, 213 Ill.App.3d 292, 157 Ill.Dec. 140, 571 N.E.2d 1159. We allowed the tenant's petition for leave to appeal, 141 Ill.2d 538, 162

Ill.Dec. 485, 580 N.E.2d 111. (134 Ill.2d R. 315.) We reverse.

The unique facts of this case compel us to include the entire lease, which, in words and figures, is as follows:

"LEASE AGREEMENT

This Lease is made between Terry LaFramboise, tenant and acting landlord, J.S. Ludwig.

The house is leased beginning September 15, 1986 through September 15, 1987 for \$325.00 per month. This amount is payable on the 15 [sic] of the month.

TERMS:

(A) \$325.00 deposit has been made and will be considered the last month's rent of the year.

(B) The Tenant is to furnish their [sic] own utilities.

(C) The Tenant is to mow and keep the yard and area around the house neat at all times and the farm buildings.

(D) The Tenant will not xxxxxxxxxxxx [sic] in walls, paint, or make any additions to the home that are permanent without approval of the Landlord.

(E) The Tenant will assume their [sic] own risk for their [sic] personal property and Landlord, J.S. Ludwig, will not be responsible for fire, wind, or water damage.

DESCRIPTION:

The house is located on the Mitchell Farm in Vermilion County, Pilot township.

TENANT:	LANDLORD:
s/ Terry LaFramboise	s/ J.S. Ludwig
Date: 9-16-86	Date: 9-15-86"

During the term of the lease, the landlord maintained fire insurance coverage on the real property from the insurance company.

During the one-year term, the tenant, with the landlord's approval, attempted to strip the paint from the exterior of the property with a power stripper, which removes paint by heat application. During this process, the house was damaged by fire. The landlord filed a claim with the insurance company and was paid \$40,579 for the loss. The insurance company then brought this subrogation action against the

tenant to recover the amount it paid to the landlord for the fire loss. In its complaint, the insurance company alleged that the tenant was negligent in his use of the power stripper. The issue before this court is whether the insurance company's first-amended complaint states a cause of action in subrogation.

[1,2] When the legal sufficiency of a complaint is challenged by a motion to dismiss, all well-pleaded facts in the complaint are to be taken as true. (*Burdinie v. Village of Glendale Heights* (1990), 139 Ill.2d 501, 505, 152 Ill.Dec. 121, 565 N.E.2d 654.) On review, we must determine whether the well-pleaded allegations of the complaint, when interpreted in the light most favorable to the plaintiff, are sufficient to set forth a cause of action upon which relief may be granted. *Burdinie*, 139 Ill.2d 501, 152 Ill.Dec. 121, 565 N.E.2d 654.

[3-6] The doctrine of subrogation is a creature of chancery. It is a method whereby one who has involuntarily paid a debt or claim of another succeeds to the rights of the other with respect to the claim or debt so paid. (34 Ill.L. & Prac. *Subrogation* § 2 (1958).) The right of subrogation is an equitable right and remedy which rests on the principle that substantial justice should be attained by placing ultimate responsibility for the loss upon the one against whom in good conscience it ought to fall. (34 Ill.L. & Prac. *Subrogation* § 2 (1958).) Subrogation is allowed to prevent injustice and unjust enrichment but will not be allowed where it would be inequitable to do so. (34 Ill.L. & Prac. *Subrogation* § 6 (1958).) There is no general rule which can be laid down to determine whether a right of subrogation exists since this right depends upon the equities of each particular case. See 34 Ill.L. & Prac. *Subrogation* § 6 (1958).

[7] One who asserts a right of subrogation must step into the shoes of, or be substituted for, the one whose claim or debt he has paid and can only enforce those rights which the latter could enforce. (*Continental Casualty Co. v. Polk Broth-*

ers, Inc. (1983), 120 Ill.App.3d 395, 397, 75 Ill.Dec. 712, 457 N.E.2d 1271.) Consequently, in the case at bar, the 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.

[8, 9] With these principles in mind, we turn to the case at bar. Although a tenant is generally liable for fire damage caused to the leased premises by his negligence, if the parties intended to exculpate the tenant from negligently caused fire damage, their intent will be enforced. (*One Hundred South Wacker Drive, Inc. v. Szabo Food Service, Inc.* (1975), 60 Ill.2d 312, 326 N.E.2d 400; *Stein v. Yarnall-Todd Chevrolet, Inc.* (1968), 41 Ill.2d 32, 241 N.E.2d 439; *Cerny-Pickas & Co. v. C.R. Jahn Co.* (1955), 7 Ill.2d 393, 131 N.E.2d 100.) The lease between the landlord and the tenant must be interpreted as a whole so as to give effect to the intent of the parties. *Stein*, 41 Ill.2d at 35, 241 N.E.2d 439.

[10] In the instant case, the insurance company contends that the tenant is liable for negligently caused fire damage because the lease does not contain a provision expressly relieving the tenant of this liability. This argument, however, is without merit. In *Cerny-Pickas*, 7 Ill.2d at 396, 131 N.E.2d 100, this court stated:

"[B]ecause the contingency was not covered by express language, it does not follow that the instrument may not, when all of its provisions are considered, show that the parties themselves intended that the lessee should not be liable. That determination is to be made upon a consideration of the instrument as a whole." (Emphasis added.)

Accordingly, to ascertain the intent of the parties, we must consider the lease "as a whole."

[11] Although the appellate court properly determined that *Cerny-Pickas* controls the instant case, it nevertheless failed to actually construe the lease "as a whole."

Instead, the appellate court concluded that the absence of a "yield-back" provision revealed the parties' intent to place responsibility for negligently caused fire damage on the tenant. The appellate court determined that the tenant could only be relieved of this responsibility by an express provision in the lease. This, however, is not the law in Illinois. In Illinois, courts must look to the lease "as a whole" and the spirit of the agreement between the parties rather than search for an express provision in the lease. (See *One Hundred South Wacker Drive, Inc. v. Szabo Food Service, Inc.* (1975), 60 Ill.2d 312, 314, 326 N.E.2d 400; *Cerny-Pickas*, 7 Ill.2d at 396, 131 N.E.2d 100.) In the instant case, even the most cursory examination of the lease "as a whole" leads us to the obvious conclusion that neither the landlord nor the tenant was a sophisticated real estate mogul. It is hardly surprising to us that this particular lease does not contain a "yield-back" clause, as it is quite likely that the parties involved did not even know what a "yield-back" clause is.

The lease "as a whole" indicated that the tenant wanted shelter for one year for which he promised to pay a modest rent, furnish his own utilities, perform certain services on the farm, and assume the risk for his own personal property. The landlord agreed. Although one may be critical of the grammar, punctuation or even the style of the lease, it is difficult to find fault with the spirit of the document. In drafting this document, the landlord expressly placed minor duties on the tenant. "As a whole," the lease does not reflect any intent that, during the course of the one-year term, the tenant would be responsible for any fire damage to the realty and be required to pay an additional \$40,579 to the landlord. Such a proposition would probably be beyond the wildest dreams of the parties.

The only paragraph which purportedly addresses the risks borne by either party is paragraph (E) which reads:

"(E) The Tenant will assume their [sic] own risk for their [sic] personal property and Landlord, J.S. Ludwig, will

not be responsible for fire, wind or water damage."

The insurance company contends that the last clause in this paragraph reveals the parties' intent to place responsibility for fire damage to the real property on the tenant. This argument persuaded the appellate court. However, the appellate court improperly read the last clause in isolation from the beginning part of the sentence. When read as one complete sentence, it is obvious to us that the parties intended to expressly place responsibility for his own personal property on the tenant and to exempt the landlord from liability for damage to the *tenant's personal property*. See, e.g., *Tondre v. Pontiac School District No. 105* (1975), 33 Ill.App.3d 838, 843, 342 N.E.2d 290 (qualifying phrase is confined to the last antecedent).

We find it significant that the parties, who obviously considered the possibility of fire, expressly provided for the tenant's personal property but failed to do so with respect to the leased premises. This fact indicates to us that the parties intended for each to be responsible for his own property. This conclusion is supported by the landlord's conduct in taking out a fire insurance policy to cover the leased premises. As this court has noted before:

" 'Fire insurers expect to pay fire losses for negligent fires and their rates are calculated upon that basis; indeed, we may well assume that a great majority of fires are caused by someone's negligence in a greater or lesser degree.' [Citations.]" *Stein*, 41 Ill.2d at 38, 241 N.E.2d 439.

Under the insurance company's argument:

"it would be necessary for both parties to the lease to carry fire insurance if they are to be protected. The lessee would have to insure against fires due to his negligence, and the lessor against fires due to other causes. * * * The parties contemplated that the risk of loss by fire should be insured against and we see no reason to suppose that they did not contemplate the customary insurance policy which covers both accidental and

negligent fires." (*Cerny-Pickas*, 7 Ill.2d at 398, 131 N.E.2d 100.)

Therefore, we conclude that the parties intended that the tenant was not to be liable for any fire damage to the premises and that the landlord would look solely to the insurance as compensation for any fire damage to the premises.

In *Cerny-Pickas*, this court also noted:

" 'The ancient law has been acquiesced in, and consciously or unconsciously, the cost of insurance to the landlord, or the value of the risk enters into the amount of rent.' * * * 'They necessarily consciously figured on the rentals to be paid by the tenant as the source of the fire insurance premiums and intended that the cost of insurance was to come from the tenants. In practical effect the tenant paid the cost of the fire insurance.' " *Cerny-Pickas*, 7 Ill.2d at 398, 131 N.E.2d 100.

[12, 13] It is well settled that an insurer may not subrogate against its own insured or any person or entity who has the status of a co-insured under the insurance policy. (*Reich v. Tharp* (1987), 167 Ill.App.3d 496, 501, 118 Ill.Dec. 248, 521 N.E.2d 530; 16 Couch on Insurance § 61:137, at 197 (rev. 1983).) Under the particular facts of this case, the tenant, by payment of rent, has contributed to the payment of the insurance premium, thereby gaining the status of co-insured under the insurance policy. Both the landlord and tenant intended that the policy would cover any fire damage to the premises no matter who caused it, and to conclude otherwise would defeat the reasonable expectations of the parties.

We therefore conclude that, under the provisions of the lease as a whole, the reasonable expectations of the parties, and the principles of equity and good conscience, the insurance company cannot maintain a subrogation action against the tenant under the facts of this case.

For the foregoing reasons, we reverse the appellate court and affirm the trial court's dismissal of the insurance company's first-amended complaint.

Appellate court reversed; circuit court affirmed.

Justice FREEMAN, concurring:

I concur with that portion of the majority opinion which holds that the parties intended that the tenant be exonerated from liability for any fire damage to the premises and that the landlord might look solely to the insurance as compensation for any fire damage to the premises. I write only to express my disagreement with the majority holding that under these facts the tenant attained "the status of a co-insured under the insurance policy" by the payment of rent. 149 Ill.2d at 323, 173 Ill.Dec. at 652, 597 N.E.2d at 626.

Firstly, the result obtained by the majority opinion, *i.e.*, that the insurance company's subrogation action is not maintainable, does not require that we reach the issue of whether the tenant was a co-insured under the landlord's policy. In *Cerny-Pickas & Co. v. C.R. Jahn Co.* (1955), 7 Ill.2d 393, 131 N.E.2d 100, this court held that a landlord's insurer's subrogation action was not maintainable against a tenant, without additionally concluding that the tenant was a co-insured under the landlord's insurance policy. *Cerny-Pickas* determined that such an action was not maintainable based simply on an examination of the parties' lease, which indicated that the tenant was to be exonerated from liability for fire loss, and certain "better reasoned decisions," which supported that result. (*Cerny-Pickas*, 7 Ill.2d at 398, 131 N.E.2d 100.) These "better reasoned decisions" did not express the view that tenants gain the status of co-insureds by the payment of rent, but simply noted that tenants, thereby, bear the cost of insurance with their landlords. (See *Cerny-Pickas*, 7 Ill.2d at 398, 131 N.E.2d 100.) In the instant case, as in *Cerny-Pickas*, the majority need only have looked to the parties' intent, as expressed by their lease, as well as basic subrogation principles, to conclude that the subrogation action was not maintainable.

Secondly, but more importantly, the majority's holding on this point sweeps too broadly, serving to eviscerate the common law principle that a tenant is responsible for damage to leased premises resulting from his own negligence. (See 49 Am.

Jur.2d *Landlord & Tenant* §§ 934, 935 (1970); Annot., 10 A.L.R.2d 1012, 1016 *et seq.* (1950); *Cerny-Pickas*, 7 Ill.2d 393, 131 N.E.2d 100; *Fire Insurance Exchange v. Geekie* (1989), 179 Ill.App.3d 679, 128 Ill.Dec. 616, 534 N.E.2d 1061.) Indeed, the majority's holding, while stated to be limited to "the particular facts of this case" (149 Ill.2d at 323, 173 Ill.Dec. at 652, 597 N.E.2d at 626), serves to elevate the status of every tenant to that of a co-insured under his or her landlord's insurance policy, unless expressly indicated otherwise. By logical extension, the tenant might then also be considered a co-insured of the landlord with respect to personal property or negligence liability on the premises.

It is recognized that a tenant may attain the status of a co-insured where the insured landlord covenants to carry insurance for the benefit of the tenant. (See 16 Couch on Insurance § 61:137 (rev. 1983).) Accordingly, our appellate court has approached the issue by looking at the express or implied terms of a lease, as well as surrounding extrinsic evidence, to discern the parties' agreement concerning the allocation of insurance burdens. (Compare *Continental Casualty Co. v. Polk Brothers, Inc.* (1983), 120 Ill.App.3d 395, 75 Ill.Dec. 712, 457 N.E.2d 1271 (terms of lease and extrinsic evidence revealed that parties intended that landlord, rather than tenant, obtain real property insurance, resulting in nonviability of subrogation action); and *Reich v. Tharp* (1987), 167 Ill.App.3d 496, 118 Ill.Dec. 248, 521 N.E.2d 530 (express terms of sale agreement provided that both parties were to be named insureds on insurance policy, with the result that party omitted from policy deemed a co-insured); with *Fire Insurance Exchange*, 179 Ill.App.3d 679, 128 Ill.Dec. 616, 534 N.E.2d 1061 (no term in lease concerning obligation to insure premises; hence, tenant not a co-insured).) This approach is not to say, however, that in all instances where a landlord has insurance and a tenant pays rent, the tenant becomes a co-insured. The better reasoned view, rather, requires that we base our decision not on the mere existence of insurance, but on the parties' agreement as to the allocation of that burden.

Notably, *Anderson v. Peters* (1986), 142 Ill.App.3d 182, 96 Ill.Dec. 489, 491 N.E.2d 768, a decision holding that a tenant is considered a co-insured, despite the absence of any indication of the parties' intent, was expressly overruled by *Fire Insurance Exchange*, 179 Ill.App.3d 679, 128 Ill.Dec. 616, 534 N.E.2d 1061. The majority opinion returns us, *sub silentio*, to *Anderson*.

Justice HEIPLE, dissenting:

This case involves an insurance company which paid the insured landlord for fire loss to rental property. The insurance company, by way of subrogation, now seeks to recover from the tenant for his negligence in causing the fire. The trial court, in dismissing the insurance company's complaint, determined that the landlord and tenant did not intend for the tenant to be liable for fire damage, ruling that the tenant was a co-insured with the landlord. The appellate court reversed and reinstated the complaint. The majority of this court reverses the appellate court and affirms the trial court.

This case presents the question of whether a tenant is absolved from liability for his negligence in burning down the landlord's premises. The majority holds that the tenant is absolved. The effect of this unfortunate decision is to make all tenants at any time and at any place co-insureds with their landlords. The only exception would be if the parties had a clear agreement to the contrary.

I have two objections to the majority opinion. The first objection is that the opinion makes factual findings which are, simply put, not correct. My second objection is that the new rule of law which it announces is bad public policy.

The majority opinion purports to find that the lease instrument, when read as a whole, contemplates that the tenant is a co-insured on the landlord's fire policy. A reading of the lease discloses that this is not the case. Whether read in its individual particulars or as a whole, the lease is utterly silent in this regard. As the lease is set out in full in the majority opinion, it

is not necessary to repeat it here. An examination of the lease, however, discloses that nothing in it gives any indication that the parties intended to absolve the tenant for his own negligent conduct or that the tenant was regarded as a co-insured with the landlord. The only exculpatory language of any kind is in favor of the landlord which provides in paragraph (E) that the tenant assumes the risk for his own personal property and that the landlord is not responsible for fire, wind or water damage.

In arriving at its finding, the majority points out that "neither the landlord nor the tenant was a sophisticated real estate mogul." (149 Ill.2d at 321, 173 Ill.Dec. at 651, 597 N.E.2d at 625.) One may reasonably ask, If the parties had been sophisticated real estate moguls, would the result in this case be different? Would it matter if one were a greater mogul and the other a lesser mogul? Is this a useful concept?

The majority concludes, "Under the particular facts of this case, the tenant, by payment of rent, had contributed to the payment of the insurance premium, thereby gaining the status of co-insured under the insurance policy." Sad to say, there are no facts in this case, either particular or general, that would cause one to conclude that the tenant contributed to the payment of the insurance premium or expected to be treated as a co-insured. That assumption is as gratuitous as saying that the payment of rent included maid service and clean linens.

It is also worth noting that fire insurance is, generically speaking, casualty insurance. Since the landlord owns the building, he is the person at risk if the building burns down from whatever cause, be it lightning, faulty wiring, a bad furnace, or the negligent conduct of any person. Conceptually, liability insurance is different than casualty insurance. Liability insurance covers a person for his own negligent conduct. Regarding liability, the lease in this case clearly exculpated the landlord for liability for damage caused to the tenant's personal property. No similar language

exculpated the tenant for negligently damaging the landlord's premises.

The fire insurance contract contemplated that the insurance company, by way of subrogation, could recover the loss paid from any responsible party other than the insured. In other words, the insurance company in that regard would occupy the same position as the insured himself. There is nothing in law to require an insured to look either first or only to his insurance carrier for recovery of loss caused by another's negligence. The landlord, in this case, could have sued the tenant directly. There is also nothing in law to require a landlord to carry fire insurance at all. How can it be said that a tenant is deemed to be a co-insured in a lease when the lease does not even mention or contemplate insurance? Suppose that the landlord in this case had not taken out an insurance policy. Would the majority say he was debarred from suing his tenant for negligently burning down the premises? That is to say, would the loss be shifted away from the negligent tenant and onto the guiltless landlord?

Other jurisdictions have also addressed the issue of when a tenant will be relieved from liability for negligently causing a fire in leased premises. The decisions from various jurisdictions can be divided into three categories: (1) absent an express agreement to the contrary the tenant is treated as a co-insured of the landlord and is not liable for negligently causing a fire; (2) absent an express agreement to the contrary the tenant is liable for negligently causing a fire; and (3) an express agreement is not required and the determination of whether to hold the tenant liable for negligently causing a fire must be ascertained from the lease as a whole.

The lead case which determined that a tenant should be treated as a co-insured, absent an express agreement to the contrary, is *Sutton v. Jondahl* (Okla.App.1975), 532 P.2d 478. The reasons expressed for reaching this conclusion were that: (1) an insurance policy protects all property interest and both the tenant and landlord have insurable interests in the

premises; (2) in reality the tenant pays for part of the insurance premium through the payment of rent; (3) the reasonable expectations of tenants is for the landlord to provide fire insurance which will cover them; and (4) equity calls for placing the risk of fire loss upon the insurer which has collected premiums for the risk, rather than upon the tenant, which is a party in privity with the landlord. *Sutton*, 532 P.2d at 482.

Several jurisdictions have followed *Sutton*. *Alaska Insurance Co. v. RCA Alaska Communications, Inc.* (Alaska 1981), 623 P.2d 1216; *Safeco Insurance Co. v. Weisgerber* (1989), 115 Idaho 428, 767 P.2d 271; *Reeder v. Reeder* (1984), 217 Neb. 120, 348 N.W.2d 832; *Safeco Insurance Co. v. Capri* (1985), 101 Nev. 429, 705 P.2d 659; *Monterey Corp. v. Hart* (1976), 216 Va. 843, 224 S.E.2d 142; *Liberty Mutual Fire Insurance Co. v. Auto Spring Supply Co.* (1976), 59 Cal.App.3d 860, 131 Cal.Rptr. 211; *New Hampshire Insurance Group v. Labombard* (1986), 155 Mich.App. 369, 399 N.W.2d 527; *Fashion Place Investment, Ltd. v. Salt Lake County/Salt Lake County Mental Health* (Utah App.1989), 776 P.2d 941; *Cascade Trailer Court v. Beeson* (1988), 50 Wash.App. 678, 749 P.2d 761.

The Supreme Court of Kentucky in *Britton v. Wooten* (Ky.1991), 817 S.W.2d 443, recently addressed whether a tenant will be held liable for negligently causing a fire. In *Britton*, the court held that in order for a tenant to be exonerated from liability for negligently causing a fire, the lease must contain a clear and unequivocal expression stating such intent. In reaching this conclusion the *Britton* court noted that public policy disapproves of exculpatory agreements in derogation of tort liability and such an agreement should be found only if it is explicit. Similar conclusions were also reached in *Sears, Roebuck & Co. v. Poling* (1957), 248 Iowa 582, 81 N.W.2d 462; *Winkler v. Appalachian Amusement Co.* (1953), 238 N.C. 589, 79 S.E.2d 185; *Zoppi v. Traurig* (1990), 251 N.J.Super. 283, 598 A.2d 19; and *Galante v. Hathaway Bakeries, Inc.* (1958), 6 A.D.2d 142, 176 N.Y.S.2d 87. But cf. *Fireman's Insurance Co. v.*

Wheeler (1991), 165 A.D.2d 141, 566 N.Y.S.2d 692.

Falling between these two views are the jurisdictions which do not require an express agreement to be in the lease. These jurisdictions determine whether or not a tenant is liable for his own negligence in causing a fire based upon the intent of the parties as evidenced from a reading of the lease as a whole. If the intent of the parties is unable to be ascertained, the common law rule placing liability upon the tenant for his negligent conduct is enforced. This court, prior to today's decision, clearly fell within this classification. (*Cerny-Pickas & Co. v. C.R. Jahn Co.* (1955), 7 Ill.2d 393, 131 N.E.2d 100.) Other jurisdictions which have endorsed this view include *Neubauer v. Hostetter* (Iowa 1992), 485 N.W.2d 87; *Acquisto v. Hahn Enterprises, Inc.* (1980), 95 N.M. 193, 619 P.2d 1237; *Page v. Scott* (1978), 263 Ark. 684, 567 S.W.2d 101; and *Rock Springs Realty, Inc. v. Waid* (Mo.1965), 392 S.W.2d 270.

In general, I believe that the public is better served if negligent actors are held responsible for the damage or injury they cause. While I would agree that parties to a lease may agree to exculpate a tenant for negligent conduct which damages the premises and that a lease may be drawn so as to regard the tenant as a co-insured, I cannot agree that the lease in this case contemplated any such thing. Further, I cannot agree that the mere payment of rent in the absence of other language should operate to exculpate a tenant who negligently causes damage to the premises.

For the reasons given, I respectfully dissent.

