IN THE

SUPREME COURT OF MISSOURI

No. SC84290

ELLEN KEISKER, et al.,

Appellant,

and

TRINITY UNIVERSAL INSURANCE CO.,

Respondent,

vs.

BEATRICE FARMER, et al.,

Respondent

Appeal from the Circuit Court of the City of St. Louis, Cause No. 982-00081
Honorable Jimmie Edwards, Division No. 5

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

This cause is an appeal from the Circuit Court's judgment on a Petition for Declaratory Judgment and Interpleader Petition and presents issues of interpretation of an insurance policy and Missouri law. Jurisdiction of this cause lies with the Supreme Court of Missouri under its general appellate jurisdiction by virtue of the Court having granted transfer pursuant to Article V, Section 10 of the Constitution of Missouri.

STATEMENT OF FACTS

On December 11, 1997, two (2) motor vehicles crashed into a restaurant at 2722 North Florissant in the city of St. Louis. One vehicle was a St. Louis Sheriff's Department van operated by Deputy Harold Beck. The other vehicle was operated by Beatrice Farmer.

As a result of the collision, suit was filed on behalf of three (3) Plaintiffs:

1. Ellen Keisker, owner of the building: Claim for damage to structure;
2. L. Lee Hinds: Claim for personal injuries;
3. Super Sandwich Shop, Inc., operator of the restaurant: Claim for loss of business.

Suit was filed in January 1998, initially naming Beatrice Farmer as a defendant (LF 292). Defendants Harold Beck and the City of St. Louis were joined in the action on June 9, 1998 (LF 287) and the Sheriff's Department of the City of St. Louis was added as a defendant on October 16, 1998 (LF 282). The claims of Plaintiff Ellen Keisker were settled. Additionally, Defendant Beatrice Farmer settled the claims against her and was dismissed on November 12, 1999 (LF 10).

Super Sandwich Shop, Inc., a tenant in the building (LF 99, ¶6 and 104), had purchased a policy of insurance from Trinity Universal Insurance Company (hereinafter "Trinity"), which paid $141,609.49 on the claim as follows:

Structural Damage to Building:	$ 94,665.96
Damage to Contents of Building:	$ 32,443.53
Business Interruption:	$15,000.00

on April 8, 1998 (LF 100, LF105-108).

Trinity internal documents reflect that, as of December 12, 1997, it had knowledge that the Sheriff's Department vehicle and another car caused the damage to its insured and that it intended to pursue its right of subrogation (LF 133). Trinity Universal was aware of the suit Super Sandwich Shop, Inc. had filed in January 1998 (LF 135, ¶10) and on April 6, 1999 wrote to the attorney for the City of St. Louis advising the City of Trinity's "subrogation lien" with respect to the "third party claim/suit" (LF 109). On April 28, 1999, Thomas Noonan, attorney representing Trinity Universal, wrote to Plaintiff's counsel advising of Trinity's "subrogation claim" (LF 110).

On September 1, 1999, Trinity filed a Motion to Intervene (LF 297) on the basis of its subrogation rights (LF 298-299, ¶6-7). The Court denied Trinity's Motion to Intervene on October 14, 1999 (LF 296). On October 15, 1999, Trinity's counsel submitted copies of the provisions of the insurance policy to Plaintiff's counsel, under which Trinity had "a valid right of subrogation" (LF 111). On November 16, 1999, Trinity filed a separate cause of action bearing Cause No. 992-8523 against the City of St. Louis and other defendants, alleging for

the first time that Super Sandwich Shop, Inc. had assigned its rights to bring a cause of action (instead of a subrogation right) to Trinity. The City of St. Louis filed a Motion to Consolidate Cause No. 992-8523 with Plaintiff Super Sandwich Shop's action, Cause No. 982-00081 (Supp. LF 11). The Court denied the Motion to Consolidate (Supp. LF 10). The City of St. Louis, the St. Louis Sheriff's Department and Harold Beck then filed an Interpleader Petition on January 26, 2000, admitting liability and offering to pay the statutory $100,000 maximum into the registry of the Court (LF 281, Supp. LF 7).

Plaintiff Super Sandwich Shop, Inc. and Trinity filed responses to the Interpleader Petition (LF 273; Supp. LF 1). The Court granted Trinity's oral Motion to Intervene on June 30, 2000 (LF 272). The Court decided the issues presented in the Interpleader Petition and the Petition for Declaratory Judgment action upon stipulations of facts with exhibits (LF 98-118), briefs (LF 63; LF 69; LF 90) and additional facts to which opposing parties would not stipulate (LF 84; LF 130).

The Court ruled in favor of Intervenor Trinity, finding that Trinity was entitled to the $100,000 interpleaded into the Court registry, on the basis that Trinity had received an assignment of Super Sandwich Shop, Inc.'s cause of action under the policy (LF 49). Following denial of Plaintiff's post-trial motion (LF 26; LF 45) Plaintiff brought this appeal (LF 25). Judge Edward's 08-31-00 Order severed Plaintiff Lee Hinds' personal injury action (the only other claim pending in this matter) from this action (LF 61) and designated his Order and Judgment as final for the purposes of appeal (Joint Supp. LF 1).

STANDARD OF REVIEW

It is well-settled law that insurance policies are contracts and thus rules of contract interpretation apply. Construction of contracts involve legal conclusions and in reviewing the language of an insurance policy, an appellate court review is de novo and it need not give deference to the trial court's interpretation, *National Union Fire Insurance v. City of St. Louis,* 947 S.W.2d 505 at 506 (Mo.App. 1997). "The usual rule of deference to trial court's Findings of Fact, which is based upon the superior opportunity of the trial court to assess the credibility of witnesses does not apply" where cases are "...submitted solely upon affidavits," *Landmark Bank v. First National Bank in Madison,* 738 S.W.2d 922 (Mo.App.E.D. 1987).

POINTS RELIED ON

I. THE TRIAL COURT ERRED IN FINDING THAT THE LANGUAGE OF THE INSURANCE POLICY UNAMBIGUOUSLY CREATED AN ASSIGNMENT OF SUPER SANDWICH SHOP, INC.'S CAUSE OF ACTION AND NOT A SUBROGATION RIGHT BECAUSE THE POLICY IS AT BEST AMBIGUOUS AS IT DOES NOT CONTAIN ASSIGNMENT LANGUAGE, BUT DOES CONTAIN LANGUAGE CONSISTENT WITH SUBROGATION RIGHTS IN THAT THE WORDS "ASSIGN," "ASSIGNMENT," "TRANSFER OF CAUSE OF ACTION," AND "RIGHT TO PROSECUTE" DO NOT APPEAR, BUT LANGUAGE CONSISTENT WITH SUBROGATION, SUCH AS RECOVERY "TO THE EXTENT OF OUR PAYMENT" AND RETENTION OF THE INSURED'S RIGHT TO WAIVE CAUSES OF ACTION AGAINST THIRD PARTIES AND ANY AMBIGUITY MUST BE CONSTRUED AGAINST THE INSURER.

II. THE TRIAL COURT ERRED IN HOLDING THAT THE INSURANCE

POLICY LANGUAGE CREATED AN ASSIGNMENT OF SUPER SANDWICH SHOP'S RIGHTS BECAUSE TO BE CONSTRUED AS AN ASSIGNMENT THE INSTRUMENT MUST COMPLETELY DIVEST THE INSURED OF ALL RIGHTS TO CLAIMS, BUT THAT UNDER THE POLICY LANGUAGE SUPER SANDWICH SHOP RETAINED THE RIGHT TO WAIVE CLAIMS AGAINST CERTAIN PARTIES.

III. THE TRIAL COURT ERRED IN FINDING THE INSURANCE POLICY UNAMBIGUOUSLY CREATED AN ASSIGNMENT OF SUPER SANDWICH SHOP, INC.'S CAUSE OF ACTION AND NOT A SUBROGATION RIGHT BECAUSE AN INSURANCE POLICY IS AMBIGUOUS IF OPEN TO DIFFERENT CONSTRUCTIONS AND THERE WAS CONCLUSIVE PROOF THAT TRINITY UNIVERSAL INSURANCE COMPANY AND ITS ATTORNEYS FIRST INTERPRETED THE LANGUAGE OF ITS POLICY AS CREATING A RIGHT OF SUBROGATION, THEN LATER INTERPRETED THE POLICY AS CREATING AN ASSIGNMENT IN THAT TRINITY'S PLEADINGS, THE STIPULATED FACTS, AND EXHIBITS ESTABLISH THAT FOR A PERIOD OF TWO YEARS, TRINITY CONCLUDED THAT THE POLICY LANGUAGE CONFERRED A RIGHT OF SUBROGATION BEFORE IT SUBSEQUENTLY INTERPRETED THE SAME PROVISION AS CREATING AN ASSIGNMENT.

IV. THE TRIAL COURT ERRED BY RULING THAT TRINITY WAS NOT ESTOPPED FROM ASSERTING THE THEORY OF ASSIGNMENT OF RIGHTS BECAUSE THE EVIDENCE ESTABLISHED THE ELEMENTS OF EQUITABLE ESTOPPEL IN THAT THE JOINT STIPULATION OF FACTS AND OTHER EVIDENCE PROVED (1) TRINITY'S ASSERTION OF SUBROGATION RIGHTS FOR NEARLY TWO YEARS WAS INCONSISTENT WITH ITS LATER THEORY OF ASSIGNMENT OF THE CAUSE OF ACTION; (2) SUPER SANDWICH SHOP, INC. RELIED ON THE ASSERTION OF SUBROGATION BY INITIATING AND MAINTAINING THIS LAWSUIT; (3) SUPER SANDWICH SHOP, INC. WAS DAMAGED.

POINT RELIED ON I

THE TRIAL COURT ERRED IN FINDING THAT THE LANGUAGE OF THE INSURANCE POLICY UNAMBIGUOUSLY CREATED AN ASSIGNMENT OF SUPER SANDWICH SHOP, INC.'S CAUSE OF ACTION AND NOT A SUBROGATION RIGHT BECAUSE THE POLICY IS AT BEST AMBIGUOUS AS IT DOES NOT CONTAIN ASSIGNMENT LANGUAGE, BUT DOES CONTAIN LANGUAGE CONSISTENT WITH SUBROGATION RIGHTS IN THAT THE WORDS "ASSIGN," "ASSIGNMENT," "TRANSFER OF CAUSE OF ACTION," AND "RIGHT TO PROSECUTE" DO NOT APPEAR, BUT LANGUAGE CONSISTENT WITH SUBROGATION, SUCH AS RECOVERY "TO THE EXTENT OF OUR PAYMENT" AND RETENTION OF THE INSURED'S RIGHT TO WAIVE CAUSES OF ACTION AGAINST THIRD PARTIES AND ANY AMBIGUITY MUST BE CONSTRUED AGAINST THE INSURER.

AUTHORITIES CITED

ARGUMENT

The key to interpretation of an insurance policy is to determine whether the language is ambiguous or unambiguous, *American Family Mutual Insurance Company v. Wemhoff*, 972 S.W.2d 402 (Mo.App.W.D. 1998). Unambiguous provisions will be enforced as written, but ambiguous provisions will be enforced against the insurer, *American Family Mutual Insurance Company v. Wemhoff*, supra. An ambiguity arises where a provision is uncertain or reasonably and fairly open to different interpretations, *American Family Mutual Insurance Company v. Wemhoff*, supra.

On December 11, 1997, Plaintiff Super Sandwich Shop, Inc., an operator of a restaurant, sustained a casualty loss and was insured by Trinity Universal Insurance Company (Trinity). On December 12, 1997, Super Sandwich Shop, made a claim under the policy for which Trinity paid $141,609.49 (net of Super Sandwich Shop, Inc.'s $500 deductible), (Stipulation of Facts; LF 98-100). The insurance policy pertaining to the Commercial Property Conditions states in part:

"I. 8. **Transfer of Rights of Recovery Against Other to Us**

If any person or organization to or for whom we make payment under this Coverage Part has rights to recover damages from another, those rights are transferred to us to the extent of our payment. That person or organization must do everything necessary to secure our rights and must do nothing after loss to impair them. But you may waive your rights against another part in writing:

1. Prior to a loss to your covered property or covered income.

2. After a loss to your covered property or income only if, at time of loss, that party is one of the following:

a. Someone insured by this insurance;

b. A business firm:

(1) owned or controlled by you; or

(2) that owns or controls you; or

(3) your tenant.

This will not restrict your insurance" (LF 165) (emphasis added).

The primary issue is whether this language creates a right of subrogation or an assignment. In Missouri, there is a distinct difference between an assignment of a claim and subrogation to a claim, *Holt v. Myers,* 494 S.W.2d 430 (Mo.App. 1973). In Missouri, after an insurer pays an insured's claim, legal title to a cause of action and the exclusive right to sue for the entire loss remains with the insured subject to the insurer's right of subrogation, *Hagar v. Wright Tire & Appliance, Inc.,* 33 S.W.3d 605 (Mo.App. W.D. 2000), citing *Farmer's Insurance Co., Inc. v. Effertz,* 795 S.W.2d 424 (Mo.App. W.D. 1990).

The only relevant exception is when the insured assigns the property damage claim against the tortfeasors to the insurer, *Farmer's Insurance Co., Inc. v. Effertz,* supra. To assign a claim, there must be a complete divestiture of all rights from the assignor and vesting of those rights in the assignee, *Holt v. Myers,* 494 S.W.2d 430 (Mo.App. 1973) and *Klein v. General Electric Co.,* 714 S.W.2d 896 (Mo.App. E.D. 1986). An instrument which is construed as an assignment, "must have completely divested relator of *any* legal title and right

in the claim or cause of action..." *State ex rel. Bartlett & Co. Grain v. Kelso,* 499 S.W.2d 579, 582 (Mo. App. K.C. Dist. 1973), (emphasis added). An assignment gives the insurer full legal title to the claim and permits the insurer to pursue the claim in its name against the tortfeasor, *Farmer's Insurance Co., Inc. v. Effertz*, supra. Missouri courts have noted factors indicating whether an assignment or a subrogation right is created by a policy or a release when a claim has been paid. In *Holt v. Myers*, id., the court noted that the words "assign" and "assignor" did not appear. Since an assignment requires a complete divestiture of plaintiff's claims, Missouri courts have associated the limiting language, "to the extent of payment" with subrogation, *Holt v. Myers, Id ,; Alsup v. Green*, 517 S.W.2d 151 (Mo.App. 1974). Also, phrases such as "causes of action" or "right to prosecute in the name of the insured" are associated with assignments, *Holt v. Myers*, supra.

In the case at bar, the phrases used in the policy are indicators of subrogation rather than an assignment in that:

- neither "assign" nor "assignor" appear,
- there is no mention of "causes of action" being transferred to Trinity, nor is there any mention of Trinity being able to sue or prosecute in its name.
- however, the policy does contain the language limiting the transfer of the insured's right to recovery "to the extent of our payment."

Therefore, the language is more consistent with subrogation than assignment.

As stated above, an ambiguity is defined as a provision reasonably and fairly open to different interpretations, *American Family Mut. Ins. Co. v. Wemhoff*, 972 S.W.2d 402

(Mo.App. W.D. 1998). An ambiguous provision is to be construed against the drafter of the contract under the canon of "contra proferentum", *Mansion Hills Condominium Association v. American Family Mutual*, 62 S.W.3d 633. In *Krombach v. Mayflower Insurance Co., Ltd.*, 827 S.W.2d 208 at 211 (Mo. 1992), the Missouri Supreme Court cited approvingly Judge Learned Hand's statement that "the canon of contra proferentum is more rigorously applied in insurance than in other contracts...," *Gaunt v. John Hancock Mutual Life Insurance Co.*, 160 F.2d 599 at 602 (2d Cir. 1947). The doctrine of "contra proferentum" as applied to this case requires the policy to be construed as transferring to Trinity a right of subrogation only and not a right of assignment because the policy does not use assignment language such as "assign," "causes of action," or "right to sue." Rather, the policy uses subrogation language stating that Trinity will "...recover damages...to the extent of our payment," which was recognized as subrogation language in *Holt v. Myers*, 494 S.W.2d 430 (Mo. App. 1973) at page 437. (Further evidence of ambiguity are contained in Points Relied On II and III of this brief).

The recent case of *Purcell Tire and Rubber Company, Inc. v. Executive Beechcraft, Inc.*, 59 S.W.3d 505 (Mo 2001), indicated that ambiguity can depend upon context and that language which is ambiguous to an unsophisticated party may not be ambiguous to a sophisticated commercial entity. In the case at hand, there can be no doubt that Trinity Insurance Company, a conglomerate of insurance companies, is a sophisticated party, (see Letterhead of 04-06-99 Letter, LF 109). Trinity and its legal counsel interpreted the policy language as creating a right of subrogation (see Point Relied On III). Super Sandwich Shop,

a small diner in north St. Louis, is an unsophisticated party whose owner interpreted the policy as creating a right of subrogation, (LF 135-136). Using the criteria of sophisticated versus unsophisticated parties as discussed in *Purcell*, id., the policy would be interpreted as meaning a right of subrogation was created or at best there was an ambiguity, which as discussed above must be construed against Trinity.

The Appellate Court, in affirming the trial court, relied on two points, which Appellant contends misinterpret Missouri law and if left in place by this Court would constitute a deviation from case law established by this Court and other courts of appeal.

First, the Appellate Court relied on *Steele v. Goosen*, 399 S.W.2d 703 (Mo. 1959) and *Hoorman v. White*, 349 S.W.2d 379 (Mo.App. E.D. 1961) to reach the conclusion that the language "to the extent of payment" can be ignored in order to find an assignment.

Judge Hoff wrote "based on these cases, it is clear that the language limiting an insurer to the amount of its payment to an insured is not dispositive when deciding whether or not a document gives an insurer rights through subrogation or assignment." However, the Appellate Court misapplied the holdings in *Steele v. Goosen,* supra, and *Hoorman v. White,* supra, which state that where there is clear language of assignment, the limiting language "to the extent of payment" will not defeat that assignment.

In *Steele*, supra, the language construed was "...the insured hereby **assign[s]** and transfer[s] to [the insurer] each and all claims, rights and demands against any person...arising from...such loss or damage and [the insurer] is subrogated in the place of and to the claims and demands of the insured against such person...who may be liable or hereafter judge liable for

the burning, theft, destruction, or damage to said property to the extent of the amount hereby paid," (emphasis added). In *Hoorman*, supra, the language construed was "the insurer was subrogated to all claims and rights of action [insured] had against any third...of those same rights in the **assignee**," (emphasis added). Both cases used a form of the word "assigned." Thus, the holding of these cases is that, where a clear assignment occurs, the limiting language "to the extent of payment" (which sounds of subrogation) will not defeat the assignment.

But in the case at bar, the policy does not use any form of the word "assign" or any other indication of an assignment and, therefore, *Steele* and *Hoorman* are distinguishable.

It is true that the word "assign" is not necessary to accomplish an assignment, *Holt v. Myers*, 494 S.W.2d 430 (Mo. App. 1973) as long as it appears that there was an intent to assign. But the Court in *Holt v. Myers*, 494 S.W.2d 430 (Mo. App. 1973), which was decided after *Steele* and *Hoorman*, recognized that the absence of the word "assign" and the use of the phrase "to the extent of ...payment" were indicators that no assignment was intended.

Appellant contends there was no intent to assign the causes of action as the policy does not use the word "assign," no mention of "causes of action" or grant of a right for Trinity to sue or prosecute in the insured's name exists. The policy also does not contain language wherein the insured authorizes payment directly to Trinity. So there are no indications of assignment. But, in addition to the use of the subrogation language "to the extent of payment," under the policy herein, the insured retains right of waiver against certain third parties (see Point Relied On II) and, in another section of the policy, Trinity uses language which makes it clear that an assignment does occur (LF 205) (see Pages 21 and 22 of this Brief).

The Appellate Court based its finding of an assignment, in part, on the policy's use of the word "transfer," which the Appellate Court equated with assignment. Appellant suggests that an assignment cannot be gleaned from the use of the word "transfer." When a party obtains a subrogation right, it is because the right was given, conveyed or transferred. Therefore, the word "transfer" could apply equally to a right of subrogation. Notably, in *Holt v. Myers*, supra, the Court, in explaining subrogation, states "...an equitable right **passes** to the subrogee..." at page 437 (emphasis added). Black's Law Dictionary defines the word "pass" in the context of conveyance "to be transferred or conveyed from one owner to another..." (Black's Revised 4th Ed.). Since a subrogation right is "passed" or "transferred" from the subrogor to the subrogee, the word "transfer" is as consistent with subrogation as assignment. Thus, the Appellate Court's conclusion that the word "transfer" constitutes an assignment appears to be erroneous.

The Appellate Court cited *Devine v. Gateway Insurance Co.,* 60 S.W.3d 6 (Mo.App. E.D. 2001) for the proposition that unambiguous language is not made ambiguous simply because the parties disagree as to the meaning of a term. While this is a correct declaration of Missouri law, the facts in this case are that both parties agreed that the relevant policy language granted Trinity a right of subrogation. The parties' interpretation construing the language as granting subrogation rights continued from December 12, 1997 (the day after the loss) (LF 133) through 1998 and 1999 until November 16, 1999 when Trinity changed its theory and decided that the same language it had construed as granting subrogation rights should then be interpreted as granting assignment rights (see Point Relied On III). As stated above, the relevant policy language does not clearly assign Appellant's rights, but sounds in

subrogation, so that the language is at best ambiguous and since both parties construed the language as constituting a transfer of subrogation rights only, *Devine*, id., is not controlling.

For the reasons stated above, Appellant submits that the policy language either constitutes a grant of subrogation rights only or is ambiguous and the application of the doctrine of contra proferentum requires the policy to be construed against Trinity Insurance Company. Further, Appellant suggests that the Appellate Court's legal analysis misconstrues *Steele, Hoorman, Holt*, supra, and other cases and fails to apply the doctrine of contra proferentum and to let the Appellate Court's interpretation stand would alter the Missouri law on the issues of construction of insurance policies, assignments and subrogation established over the past forty years.

POINT RELIED ON II

THE TRIAL COURT ERRED IN HOLDING THAT THE INSURANCE POLICY LANGUAGE CREATED AN ASSIGNMENT OF SUPER SANDWICH SHOP'S RIGHTS BECAUSE TO BE CONSTRUED AS AN ASSIGNMENT THE INSTRUMENT MUST COMPLETELY DIVEST THE INSURED OF ALL RIGHTS TO CLAIMS, BUT THAT UNDER THE POLICY LANGUAGE SUPER SANDWICH SHOP RETAINED THE RIGHT TO WAIVE CLAIMS AGAINST CERTAIN PARTIES.

AUTHORITIES CITED

ARGUMENT

In Missouri, an assignment is "a complete divestment of **all** rights from the assignor investing those same rights in the assignee," *Holt v. Myers*, 494 S.W.2d 430 at 437 (Mo. App. 1973) (emphasis added). Assignment of a claim is accomplished when it "appears from the circumstances and intention on the one side to assign...and on the other side to receive...," *Farmer's Insurance Co., Inc. v. Effertz*, 795 S.W.2d 424 at 425 (Mo.App. W.D. 1990). An instrument which is construed as an assignment "must have completed divested, relator of **any** legal title and **right in the claim or cause of action**...," *State ex rel. Bartlett & Co., Grain*

v. Kelso, 499 S.W.2d 579 at 582 (Mo.App. 1973) (emphasis added). The relevant provision of the Commercial Property Conditions states:

"I. **Transfer of Rights of Recovery Against Other to Us**

If any person or organization to or for whom we make payment under this Coverage Part has rights to recover damages from another, those rights are transferred to us to the extent of our payment. That person or organization must do everything necessary to secure our rights and must do nothing after loss to impair them. But you may waive your rights against another part in writing:

1. Prior to a loss to your covered property or covered income.

2. After a loss to your covered property or income only if, at time of loss, that party is one of the following:

a. Someone insured by this insurance;

b. A business firm:

(1) owned or controlled by you; or

(2) that owns or controls you; or

(3) your tenant.

This will not restrict your insurance" (LF 165) (emphasis added).

The third sentence stating "But you may waive your rights against another party in writing..." makes it clear that the insured had not been divested of all rights, *Holt v. Myers*, 494 S.W.2d 430 (Mo. App. 1973) or completely divested insured of any legal title in the claim or cause

of action, *State ex rel. Bartlett & Co., Grain v. Kelso,* 499 S.W.2d 579 at 582 (Mo.App. 1973). Because Super Sandwich Shop did not divest itself of all rights concerning causes of action it had from the loss, an assignment was not created and the trial court's judgment is in error.

A comparison of the above-referenced Commercial Property Conditions (Page 20 of this Brief & LF 165) with a similar clause of the policy under the Commercial General Liability Conditions (LF 205) is instructive. The Commercial General Liability Conditions reads as follows:

"8. Transfer of Rights of Recovery of Others to Us

If the insured has rights to recover all or part of any payment we have made under this coverage part, those rights are transferred to us. The insured must do nothing after loss to impair them. At our request, the insured will 'bring suit' or transfer those rights to us and help us enforce them" (LF 205) (emphasis added).

The added sentence in this section makes it clear that an assignment takes place if requested by Trinity. If the language in the first sentence of Paragraph 8 of the Commercial General Liability Conditions clearly created an assignment, then the last sentence, stating that the insured will bring suit or transfer those rights at Trinity's request would not be necessary. The first sentence of the Transfer of Rights clause in the Commercial Property Conditions (LF 165) and the first sentence of Paragraph 8 of the Commercial General Liability Conditions are similar except that the Property Conditions relevant to Super Sandwich Shop's loss has the

subrogation language "to the extent of our payment." The second sentences in the Property Conditions and the General Liability Conditions both state that the insured must not interfere with Trinity's rights.

The Rule of Construction "Expressio Unius Est Exclusio Alterius" is applicable to the interpretation of contracts, *General American Life Insurance Co. v. Barrett*, 847 S.W.2d 125 (Mo.App. W.D. 1993). This means that the expression of one thing is the exclusion of the other, *Barrett*, id. If the first sentence of the provision under the Commercial Property Conditions meant an assignment, then it would be unnecessary to add the language to the Commercial Liability Conditions requiring the insured to bring suit or transfer rights to bring suit at Trinity's request. The fact that the sentence requiring assignment of insured's rights is absent in the Commercial Property Conditions is proof that Trinity intended for a transfer of subrogation rights and not a complete assignment in situations involving property loss. The application of the doctrine of "Expressio Unius Est Exclusio Alterius" requires a finding that no assignment was intended under the Commercial Property Conditions in this case since the General Commercial Liability Conditions has language making it clear that an assignment of insured's rights could take place under other circumstances that is absent in the Property Conditions. Similarly, the fact that the third sentence of the Property Conditions retains rights to waive causes of action and the General Liability Conditions does not include this sentence makes it clear that the Property Conditions grants subrogation rights and the General Liability Conditions constitutes an assignment.

The Appellant submits that the majority's decision erred in finding the policy granted

an assignment of Super Sandwich Shop's causes of action, despite the language of the General Property Conditions specifying Super Sandwich Shop's retention of rights to waive causes of action (Judge Draper dissenting). The majority recognized that the third sentence kept rights with the insured, but found that those rights were extinguished upon Trinity's payment of the claim. Judge Hoff stated:

> "We conclude the policy waiver provision at issue here permits an insured to waive its right against certain specified individuals or entities after a property or income loss only up the point at which Trinity makes a payment under the policy. Construing that waiver provision as permitting an insured to waive rights against certain specified individuals or entities after the insurance company has paid under the policy for a covered property or income loss seems illogical."

Appellant contends majority's opinion finding the waiver of rights granted in the third sentence was extinguished without any language in the policy indicating the rights became extinguished is in conflict with Missouri case law requiring:

a. Courts not rewrite a contract for the parties, *Krombach v. Mayflower Insurance Co., Ltd.*, 785 S.W.2d 728 (Mo.App. E.D. 1990) and *Frost v. Mutual Liberty Insurance Co.*, 828 S.W.2d 915 at 918 (Mo.App. W.D. 1992).

b. Courts not to insert provisions by judicial construction, *Morris v. Granger*, 675 S.W.2d 15 (Mo.App. 1984). The Court, in concluding that the insured's waiver rights did not extend past the insurance carrier's payment without any language to this effect inadvertently is rewriting and inserting provisions in the contract

by judicial construction.

c. Further, Courts should not construe a provision in a contract so as to render it meaningless, *Shahan v. Shahan*, 988 S.W.2d 529 (Mo. 1999) and Appellant contends that construing the insured's waiver rights to exist only from the time of loss to the time of the carrier's payment renders the waiver rights essentially meaningless.

Also, the Court's complex analysis reaching the conclusion that the insured's waiver rights cease to exist after payment without explicit language misconstrues the principle announced by the Supreme Court in *Krombach v. Mayflower Insurance Co., Ltd.*, 827 S.W.2d 208 (Mo. 1992), that a policy will be viewed in the meaning that would ordinarily be understood by the layman who bought and paid for the policy.

The majority opinion is in conflict with Missouri law, which governs the interpretation of contracts / insurance policies and holds courts must interpret insurance policies in such a way that ordinary terms be understood by an average layperson, *Mansion Hills Condominium Ass'n v. American Family Mutual Insurance Co.*, supra. Also, "language used will be viewed in the meaning that would ordinarily be understood by the layman who bought and paid for the policy," *Krombach v. Mayflower Insurance Co., Ltd.*, 827 S.W.2d 208 at page 210 (Mo. 1992).

An ordinary layman could not understand that language stating rights to recover are transferred to Trinity "to the extent of our payment" could mean the insurance company could recover more than it paid to the insured, which is the effect of the construction given to the

policy by the majority's opinion.

Given that the policy does not state that causes of action are assigned to Trinity, nor does it use any language making it clear that the insured will not be able to sue responsible third parties, the average layman would interpret the language "to the extent of payment" to mean that the insurance carrier would be reimbursed but would not be entitled to the entire cause of action.

Nor would any layman understand that the language "but you may waive your right against another party in writing...after a loss.. if...that party is someone insured by the policy, a business owned or controlled by you, or a tenant...would apply only before the insurance company paid on the loss since there is no language so indicating.

The Appellate Court stated: "Permitting an insured to waive rights against certain specified individuals or entities after the insurance company has paid...seems illogical." However, the insured's retention of waiver rights is "illogical" only if one theorizes that an assignment took place. The insured's retention of waiver rights is completely consistent with subrogation. It is perfectly logical that the insured, which retained the right to bring causes of action, could choose not to sue a parent company, subsidiary, tenant, or someone else insured by the policy in which circumstance Trinity's recovery through subrogation would be limited. Because the policy expressly retains rights in the causes of action with the insured, all legal title and right to claim were not completely divested and a right of subrogation and not a right of assignment was created. To allow the Appellate Court's opinion to stand would be to allow the majority to rewrite the contract by judicial construction and essentially render the retention of rights clause void in contravention of established Missouri rules of contract

interpretation as enunciated in *Krombach v. Mayflower Insurance Co., Ltd.*, 827 S.W.2d 208 (Mo. 1992) and *Shahan v. Shahan*, 988 S.W.2d 529 (Mo. 1999) and would allow misapplication of the doctrine that policies will be given the meaning that would be ordinarily understood by the layman who bought and paid for the policy, *Mansion Hills Condominium Association v. American Family Mutual*, 62 S.W.3d 633 (Mo.App. E.D. 2001).

POINT RELIED ON III

THE TRIAL COURT ERRED IN FINDING THE INSURANCE POLICY UNAMBIGUOUSLY CREATED AN ASSIGNMENT OF SUPER SANDWICH SHOP, INC.'S CAUSE OF ACTION AND NOT A SUBROGATION RIGHT BECAUSE AN INSURANCE POLICY IS AMBIGUOUS IF OPEN TO DIFFERENT CONSTRUCTIONS AND THERE WAS CONCLUSIVE PROOF THAT TRINITY UNIVERSAL INSURANCE COMPANY AND ITS ATTORNEYS FIRST INTERPRETED THE LANGUAGE OF ITS POLICY AS CREATING A RIGHT OF SUBROGATION, THEN LATER INTERPRETED THE POLICY AS CREATING AN ASSIGNMENT IN THAT TRINITY'S PLEADINGS, THE STIPULATED FACTS, AND EXHIBITS ESTABLISH THAT FOR A PERIOD OF TWO YEARS, TRINITY CONCLUDED THAT THE POLICY LANGUAGE CONFERRED A RIGHT OF SUBROGATION BEFORE IT SUBSEQUENTLY INTERPRETED THE SAME PROVISION AS CREATING AN ASSIGNMENT.

AUTHORITIES CITED

ARGUMENT

It is the duty of the Court to interpret insurance policies, *Mazzocchio v. Pohlman*, 861 S.W.2d 208 (Mo.App. 1993) and to determine whether the language is ambiguous, *American Family Mut. Ins. Co. v. Wemhoff*, 972 S.W.2d 402 (Mo.App. W.D. 1998). Words are ambiguous if "reasonably open to different interpretations," *Gulf Insurance Co. v. Noble Broadcast*, 936 S.W.2d 810, 814 (Mo. 1997). In this case, the trial court found that the policy language was unambiguous in creating an assignment of rights rather than a right to subrogation, despite the fact that Trinity interpreted its own policy as creating a right of subrogation for two years before changing its position and claiming Super Sandwich Shop's rights were assigned. Appellant submits that the fact that Trinity could construe its policy first as creating subrogation rights and then construe it to mean that an assignment was created is conclusive proof that the policy is "reasonably open to different constructions" and therefore ambiguous under *Gulf Insurance*, supra and *Wemhoff*, supra. The facts to which both parties stipulated establish:

a. On April 6, 1999, Robert B. Dowd, II, Senior Recovery Specialist for Trinity, wrote a letter to Andy Williams, Assistant City Counselor for the City of St. Louis, regarding the monies paid by Trinity requesting the City protect Trinity's "**subrogation lien** in the event the third party claim / suit settles" (LF 109) (emphasis added).

b. Thomas Noonan, attorney for Trinity, advised Super Sandwich Shop, Inc.'s counsel of Trinity's "subrogation claim" in his April 28, 1999 letter (LF 110).

c. In September 1999, Trinity filed a Motion to Intervene as Plaintiff reciting the facts of the insurance claim and stated: "Trinity is therefore subrogated to the rights of Plaintiff Super Sandwich Shop, Inc. to the extent that it has...paid.." (LF 297-299, especially ¶6, 298).

d. On October 15, 1999, Trinity attorney Andrew D. Ryan wrote a letter to Super Sandwich Shop, Inc.'s counsel in which he states that: "Trinity has a valid right of subrogation through Section 1 of the Commercial Property Conditions" (LF 111).

Thereafter, Trinity asserted the same section of the Commercial Property Conditions (on which it based its right of subrogation) became language creating an assignment.

As stated, the language of an insurance policy is ambiguous when it is reasonably open to different interpretations, *Gulf Insurance Co. v. Noble Broadcast,* 936 S.W.2d 810, 814 (Mo. 1997); see also *Zemelman v. Equity Mutual Insurance Co.*, 935 S.W.2d 673 (Mo.App. W.D. 1996).

Missouri courts have held that when an ambiguity exists, to determine the meaning of contract language, courts may look to the practical construction the parties themselves have placed on the contract by their acts and deed, *Specialty Restaurant Corp. v. Gaebler*, 956 S.W.2d 391 (Mo.App. W.D. 1997). Further, Missouri courts have held that while the construction put on a contract by the parties in the course of their performance as evidenced by their actions is an aid to the court, such actions are not conclusive, “except where one party

construes the contract in a manner against their interest," *Tri-Lakes Newspapers, Inc. v. Logan*, 713 S.W.2d 891, 894 (Mo.App. S.D. 1986). Appellant contends that Trinity's actions clearly evidencing its belief that the policy gave Trinity a right of subrogation is not only an aid to the Court in construing the policy, but since Trinity's construction of the contract as creating a subrogation rights rather than assignment rights is against its interest, Trinity's construction of the contract as creating a subrogation right is conclusive under *Tri-Lakes*, supra.

Even if not conclusive, Trinity's action and deeds first interpreting policy as creating a right of subrogation and subsequently construing the same provision creating an assignment of rights, at least establishes the policy is open to two (2) different constructions and an ambiguity exists, which must be construed against the insurer, *Specialty Restaurant Corp. v. Gaebler*, supra; *American Family Mutual Insurance Company v. Wemhoff*, supra; see discussion of Contra Proferentum, Pages 14 through 18 of this brief.

As stated, because Trinity construed the contract in a manner against its interest, Trinity's interpretation of the contract as creating subrogation rights should be conclusive. In the alternative, Trinity's construction of the contract as creating a subrogation right and then construing the same contract to create a right of an assignment is conclusive proof that even a sophisticated party (see discussion involving *Purcell Tire & Rubber Company, Inc. v. Executive Beechcraft*, 59 S.W.3d 505 (Mo. 2001) could place different constructions on the policy and, therefore, it is ambiguous under *Gulf Insurance*, 936 S.W.2d 810, 814 (Mo. 1997).

The Appellate Court in the case at bar did not address Appellant's contention that Trinity's own interpretation of the policy indicates that Trinity acquired rights by subrogation rather than by assignment.

EXTENT OF SUBROGATION INTEREST

In the event this Court determines that Trinity acquired a right of subrogation or is barred from asserting the theory of assignment, Super Sandwich Shop, Inc. urges the Court to determine the nature and extent of Trinity's subrogation interest.

a. The doctrine of subrogation is one of equity and does not stand on form to give its aid, *American Nursing Resources, Inc. v. Forest T. Jones and Co., Inc.*, 812 S.W.2d 790 (Mo.App. 1991). Subrogation is intended to prevent an insured from recovering twice for one injury, *Hayde v. Womach*, 707 S.W.2d 839 (Mo.App. 1986).

Super Sandwich Shop, Inc.'s Petition seeks recovery for the value of its business based upon lost income / profits. As noted, Super Sandwich Shop, Inc. was a tenant in a building owned by Plaintiff, Ellen Keisker. As owner, Keisker had the legal right to recover for damages to the building.

Super Sandwich Shop, Inc. as tenant had a insurable interest in the building and had procured the Trinity Universal Insurance Policy under which Trinity paid $94,665.96 for damage to the structure and $32,443.53 for the contents, which were primarily fixtures in the building belonging to Ellen Keisker. Super Sandwich Shop, Inc. could recover damages based on lost income/profits, but it cannot recover for damages to the structure (since Keisker owned that cause of action). Since any monies obtained by settlement or judgment will not be for damage to the structure, there is no double recovery to Super Sandwich Shop, Inc. and,

therefore, Trinity's subrogation interest arising from funds paid for structural and content damages does not attach to the interpleaded funds. Trinity received a premium for the policy it voluntarily issued. Where there is no unjust enrichment, subrogation does not lie, *Chicago Title Insurance Co. v. Farmer's Insurance Co.*, 734 S.W.2d 887 (Mo.App. 1987). Because Super Sandwich Shop, Inc.'s claim for the value of the business based on lost profits is not a recovery for the structural and property damage, there is no double recovery or unjust enrichment at the expense of Trinity. Therefore, under Missouri law, Appellant contends that Trinity's subrogation interest is limited to the $15,000 it paid for loss of business income.

b. The City of St. Louis paid $100,000 into the registry of the court in its interpleader action on the basis of Super Sandwich Shop, Inc.'s claim pursuant to the statutory limit established in RSMo §537.600 and §537.610. Because of the statutory maximum, Super Sandwich Shop, Inc. is unable to receive full compensation from the interpleaded funds. As noted above, subrogation is an equitable principle based upon unjust enrichment. Super Sandwich Shop, Inc. asserts that since its recovery is being limited under equitable principles any recovery received by Trinity should be reduced, prorata, by the same percentage Plaintiff's recovery is reduced by the statutory maximum.

c. Super Sandwich Shop, Inc. next suggests that Trinity's subrogation interest should be reduced by expenses of litigation, including attorney's fees. Missouri courts have held that where one goes into court and takes the risks of litigation and successfully created a fund in which others are entitled to share, those others will not be allowed to lie back and share the results of the successful labors without contributing their proportionate part of counsel fees, *Jourdan v. Gilmore,* 638 S.W.2d 763 (Mo.App. 1982). The Western District

Court in *Gilmore* cited the Supreme Court case of *Leggett v. Missouri State Life Insurance* Co., 342 S.W.2d 863 (Mo. Banc 1960) in stating that court's of equity have the power to charge funds realized from or preserved by litigation with costs and expenses of litigation. The trial court's judgment held that Trinity is entitled to all of the $100,000 interpleaded by the City of St. Louis as a result of Super Sandwich Shop, Inc.'s suit, which had been pending nearly three (3) years. Counsel for Super Sandwich Shop, Inc. had received an offer from the City of St. Louis to pay $100,000 listing Super Sandwich Shop, Inc. and Trinity Universal Insurance as payees in April 1999, which is referred to in Andrew D. Ryan's 10-15-99 letter to which the parties stipulated (LF 111). To allow Trinity to recover the entire $100,000 without contributing to Plaintiff's courts costs and attorney"s fees is unjust. The issue of attorney's fees and subrogation interests arises most commonly in the Worker' Compensation arena where RSMo §287.150, as interpreted by the Missouri Supreme Court in *Ruediger v. Kallmeyer Bros. Service*, 501 S.W.2d 56 (Mo. 1973), provides a mechanism for deducting the costs of litigation from an insurance company's subrogation interests.

POINT RELIED ON IV

THE TRIAL COURT ERRED BY RULING THAT TRINITY WAS NOT ESTOPPED FROM ASSERTING THE THEORY OF ASSIGNMENT OF RIGHTS BECAUSE THE EVIDENCE ESTABLISHED THE ELEMENTS OF EQUITABLE ESTOPPEL IN THAT THE JOINT STIPULATION OF FACTS AND OTHER EVIDENCE PROVED (1) TRINITY'S ASSERTION OF SUBROGATION RIGHTS FOR NEARLY TWO YEARS WAS INCONSISTENT WITH ITS LATER THEORY OF ASSIGNMENT OF THE CAUSE OF ACTION; (2) SUPER SANDWICH SHOP, INC. RELIED ON THE ASSERTION OF SUBROGATION BY INITIATING AND MAINTAINING THIS LAWSUIT; (3) SUPER SANDWICH SHOP, INC. WAS DAMAGED.

AUTHORITIES CITED

Lake St. Louis Community Ass'n v. Ravenwood Properties, Ltd., 746 S.W.2d 642 (Mo.App. E.D. 1988).

Miskimen v. Kansas City Star, 684 S.W.2d 394 (Mo.App. 1984)

Prouse v. Schmidt, 156 S.W.2d 919 (Mo. 1941)

Tinch v. State Farm Insurance Company, 16 S.W. 3d 747 (Mo.App. 2000)

ARGUMENT

Equitable Estoppel arises from the unfairness of allowing a party to belatedly assert

known rights on which the other party has in good faith relied and thereby becomes disadvantaged, *Tinch v. State Farm Insurance Company*, 16 S.W.3d 747 (Mo.App. 2000). The court in *Tinch*, stated the three (3) elements of estoppel as follows: (1) an admission, statement, or act by the person to be estopped that is inconsistent with the claim that is later asserted and sued upon; (2) an action taken by a second party on the faith of the admission, statement, or act, and ; (3) an injury to the second party which would result if the first party if permitted to contradict or repudiate its admission, statement, or act. Estoppel is not a favorite of the law, *Tinch*, supra, and Missouri courts have restricted the use of estoppel to those cases where a party asserting it proves each element by clear and satisfying evidence. A party may be estopped by its conduct from claiming rights or benefits arising out of contract, *Miskimen v. Kansas City Star*, 684 S.W.2d 394 (Mo.App. 1984).

As indicated above, Trinity, by pleadings and correspondence, contended that it had a "subrogation lien" (LF 109), "Subrogation claims" (LF110), "subrogation rights" (LF 111, LF 299). In addition, Trinity's property loss notice (LF 133) dated 12-12-97 (the day after the loss) indicates Trinity's intent to assert subrogation rights against the Sheriff's Department and the driver of the other vehicle. The affidavit of Larry Lee Hinds, owner of Super Sandwich Shop, Inc. establishes that Trinity Claim Representative Jerry Hickman (LF 100, ¶10) was advised by Mr. Hinds that suit would be filed and later that suit was filed (LF 135). Trinity Claims Representative Jerry Hickman's 05-05-98 letter states that Trinity was beginning the subrogation process towards the parties responsible for the damage (LF 137).

Super Sandwich Shop, Inc. filed suit first against Defendant Farmer in January 1998.

After settling the claim with Trinity on 04-08-98 (LF 100, ¶11) and receiving Mr. Hickman's letter referring to subrogation, Super Sandwich Shop, Inc. expanded the lawsuit on 06-09-98 by joining Deputy Harold Beck and the City of St. Louis (LF 287). Following the filing of Trinity's Motion to Intervene on the basis of its subrogation right (LF 297) and denial of the motion (LF 296), Super Sandwich Shop, Inc. added the Sheriff's Department of the City of St. Louis as defendant (LF 282). Discovery and negotiations between counsel for Super Sandwich Shop, Inc. and the City of St. Louis produced an offer from the City of St. Louis to pay $100,000 (reference Trinity Counsel's 10-15-88 letter LF 111). The record reflects that at no time did Trinity advise Super Sandwich Shop, Inc. or its counsel that Super Sandwich Shop, Inc. had assigned it cause of action to Trinity. As indicated above, in Missouri, a subrogation right in a claimant's recovery and an assignment of a claimant's right to sue are different, inconsistent legal theories. Where there has been an assignment, the claimant has no interest and cannot maintain the action, *Kroeker v. State Farm Mut. Auto. Ins. Co.*, 466 S.W.2d 105 (Mo.App. 1971). The trial court properly found that Trinity's assertions of subrogation were inconsistent with the theory of assignment (LF 60).

The trial court found that Super Sandwich Shop, Inc. had not proved that it relied on Trinity's assertion of subrogation because the policy language was available to Super Sandwich Shop, Inc. and the court found no basis on which Super Sandwich Shop, Inc. could have relied to its detriment. As argued above in Points Relied On I and III, the policy provision does not use the words "assign" or "assignor," does not suggest that Trinity is obtaining a cause of action or a right to sue, or use any other assignment language. The policy does indicate that Trinity's

rights are limited "to the extent of our payment," which is an indicator of subrogation and that Super Sandwich Shop retained rights to waive certain causes of action (LF 165). To the extent the court's ruling on the issue of estoppel is based upon its conclusion that the policy unambiguously conferred a right of assignment, it is flawed because, as stated, the policy did not create a right of assignment. The record, including the court file and minutes, as well as the Stipulation of Facts and exhibits, demonstrate that Super Sandwich Shop, Inc. relied on Trinity's position by continuing to litigate this case. Obviously, had Super Sandwich Shop, Inc. any indication that it had assigned the cause of action to Trinity, it would not have continued to pursue the suit in which it had nothing to gain. Further, the affidavit of Larry Lee Hinds and common sense indicate that hours of commitment by client and attorney alike were necessary in the pursuit of this legal claim (LF 137, ¶13-14), which no one would pursue without the possibility of recovery. The Western District Court of Appeals, in *Miskimen v. Kansas City Star*, 684 S.W.2d 394 (Mo.App. 1984), observed "no one in his right mind would purchase anything for such a large sum believing that his right to keep and work and continue to profit from the property could be terminated upon four (4) days' notice". Similarly, no one in his right mind would pursue costly and time-consuming litigation if all benefits therefrom would inure to their insurer.

In the case of *Lake St. Louis Community Ass'n. v. Ravenwood Properties, Ltd.*, 746 S.W.2d 642 (Mo.App. E.D. 1988), the Court of Appeals applied the doctrine of equitable estoppel. There a Community Association had assessed fees to homeowners and subjected them to the Architectural Board of Review on the basis of the Community Association's

position that the homeowners were bound by the Lake St. Louis Indenture of Covenants and Restrictions. The trial court and Court of Appeals held that the Community Association's interpretation that the homeowners were subject to the indenture estopped the Association from later asserting the inconsistent position that the homeowners were not subject to the Indenture of Covenants and Restrictions. Super Sandwich Shop, Inc. suggests that the Community Association's interpretation of the Indentures to include the homeowners is analogous to Trinity's interpretation of its policy concluding that it had a right of subrogation. Likewise, Trinity should be estopped from asserting that Super Sandwich Shop, Inc. assigned the cause of action , just as the Community Association was estopped from contending that the homeowners were not members of the Association.

Missouri courts have also applied the doctrine of estoppel to a newspaper which had assured newspaper carriers, who had acquired routes, that they had a proprietary interest in the routes and barred the newspaper from later contending that the carriers contract right was terminable at will, *Miskimen v. Kansas City Star*, 684 S.W.2d 394 (Mo.App. 1984).

The trial court in the case at bar stated: "Further, there is no evidence that Trinity **intended**, by asserting its subrogation rights, to cause Shop to maintain the action to its detriment.." (LF 60-61) (emphases added). However, intent is not a necessary element of estoppel. Not only is intent not included in the trial court's listing of the elements of estoppel (LF 59), it is not included in the case *In re: Estate of Glover*, 996 S.W.2d 559 at 563 (Mo.App. E.D. 1999) or the Missouri Supreme Court case of *Prouse v. Schmidt*, 156 S.W.2d 919 (Mo. 1941). The Court in *Prouse*, listed the elements of equitable estoppel, which

included, inter alia, the following:

> "the conduct must be done with the intention or at least the expectation that it will be acted upon by the other party or under such circumstances that it is both natural and probable that it will be so acted upon" (page 921).

Trinity knew that Super Sandwich Shop, Inc. was going to file suit prior to January 10, 1998 and was advised shortly after suit was filed (Affidavit of Larry Hinds, LF 134-136, especially ¶10). Yet, as stated, Trinity never advised Plaintiff, Super Sandwich Shop, Inc. that it did not have legal title to the action. Further, it is undisputed that Trinity, having knowledge of this lawsuit, continued to assert its subrogation rights knowing that Super Sandwich Shop, Inc. was pursuing the action against the City of St. Louis, the Sheriff's Department of the City of St. Louis and Deputy Harold Beck. Super Sandwich Shop, Inc. submits that the record is clear and there can be no doubt that while it was pursuing the lawsuit and Trinity asserted only a subrogation interest, Trinity had to have had the expectation that Super Sandwich Shop, Inc. would continue to litigate because it had legal title to the action. Therefore, the reliance element, as stated in *Prouse*, supra and other cases, is satisfied.

The final element for estoppel is loss or damages. Super Sandwich Shop, Inc. contends that the record, common sense and Mr. Hinds' affidavit indicate that Super Sandwich Shop, Inc. was damaged by pursuing this action if Trinity had the cause of action assigned to it. In addition to the time invested by client and attorney, Super Sandwich Shop, Inc. incurred court costs, including special process server fees, filing fees and deposition costs. Even without evidence, Missouri has recognized that courts are experts on attorney's fees, *In re: Estate of*

Walker, 16 S.W.3rd 672 (Mo.App. 2000); *Dominion Homeowners Assoc., Inc. v. Martin,* 953 S.W.2d 178 (Mo.App. 1997). On the basis of the record and the law of the state of Missouri as stated above, Super Sandwich Shop, Inc. submits that Trinity should have been estopped from asserting the theory of assignment of rights even if the language of the policy created an assignment of rights rather than a right of subrogation.

The Appellate Court, in considering the issue of Estoppel found that if Super Sandwich Shop had proved all elements, that "justice to the rights of others" does not demand application of the doctrine. However, the Appellate Court based its findings on the erroneous statement that "...as the parties stipulated, Trinity first advised Shop of its subrogation right approximately one year later" [after Trinity paid the claim on 04-08-98]. This statement is false. Shop did not stipulate that Trinity first advised it of its subrogation rights in April 1999 (see Stipulation, LF 98-101). On the contrary, in Paragraph 10 of the Stipulation of Facts (LF 100), Trinity admits its employee, Jerry Hickman, was representative for this claim. Mr. Hickman's letter dated 05-05-98 refers to beginning the "subrogation process" (LF 135).

The Appellate Court then, based upon the erroneous statement, concludes that Shop was not adversely affected by Trinity's late assertion of assignment rights. Besides being based on the erroneous assumption that Trinity didn't suggest it had rights of subrogation until April 1999, the Appellate Court overlooks the fact that Trinity was aware of Super Sandwich Shop's suit and efforts to recover for nearly two (2) years and <u>never</u> indicated in any manner that it and not Shop owned the cause of action. Rather, Trinity was content to let Appellant invest all of its time, effort, and expense litigating the claim while it sat back and waited for Appellant's

efforts to bear fruit. The trial court's minutes reflect that the case was on the trial docket thirteen times between April 1998 and November 1, 1999 (Trinity first asserted assignment rights in November 1999) during which time, Super Sandwich Shop as Plaintiff had prepared the case for trial (LF 11-24). Additionally, the October 15, 1999 letter of Trinity's counsel makes reference to the settlement proposal that Super Sandwich Shop's counsel obtained from the City of St. Louis and other defendants to pay $100,000 directly to Super Sandwich Shop and Trinity, which offer Trinity rejected. The Appellate Court, when stating "justice to the rights of others" does not demand the application of the doctrine of estoppel did not offer any further explanation. Appellant suggests that its rights demand that estoppel be applied because Trinity took the position from the day after the loss that it would pursue its subrogation rights (LF 133) and for the next two (2) years Trinity did assert subrogation rights, never once indicating it owned the cause of action. But Trinity allowed Super Sandwich Shop to litigate and procure a $100,000 fund (statutory maximum) before deciding that it should switch its theory to one of assignment. Therefore, if left in tact, the Eastern District's opinion on the issue of estoppel would conflict with the established precedence by the Eastern District, *Tinch v. State Farm Insurance Company*, 16 S.W. 3d 747 (Mo.App. 2000); *Lake St. Louis Community Ass'n v. Ravenwood Properties, Ltd.*, 746 S.W.2d 642 (Mo.App. E.D. 1988); *Miskimen v. Kansas City Star*, 684 S.W.2d 394 (Mo.App. 1984); *Prouse v. Schmidt*, 156 S.W.2d 919 (Mo. 1941).

CONCLUSION

As stated above, the section of the Commercial Property Conditions governing this loss

can be interpreted as granting Trinity a right of subrogation since there is no clear assignment language, the rights are to the extent of payment and the insured retained waiver rights which are inconsistent with assignment. A comparison of a transfer of rights clause in General Commercial Liability Conditions section of the policy providing for an assignment of rights makes it clear that no assignment was intended under the Commercial Property Conditions. Therefore, this Court can find that the Commercial Property Conditions section of the policy unambiguously creates a right of subrogation.

However, even if the Court is not convinced the Commercial Property Conditions clearly create a right of subrogation, the factors indicating subrogation and Trinity's interpretation of the policy as creating a right of subrogation make it clear that the language is reasonably open to different interpretations. And, if the language is open to different interpretations, it is ambiguous and must be construed against Trinity which drafted the policy.

Alternatively, if this court finds the policy establishes an assignment, Trinity should be estopped from switching its legal position from subrogation to assignment.

Therefore, Super Sandwich Shop, Inc. requests this honorable Court find that Trinity's right is one of subrogation and declare that Trinity's subrogation right is (1) limited to the $15,000 payment for business income; (2) reduced prorata on the basis that Super Sandwich Shop, Inc. recovery is limited by RSMo §537.610; (3) reduced by costs of litigation.

Respectfully submitted,

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IN THE
SUPREME COURT OF MISSOURI

ELLEN KEISKER, et al.,	)	
	)	
Appellant,	)	
	)	
v.	)	Appeal No. SC84290
	)	
TRINITY UNIVERSAL INSURANCE CO.	)	
	)	
Respondent,	)	
and	)	
	)	
BEATRICE FARMER, et al,	)	
	)	
Respondent.	)	

AFFIDAVIT OF SERVICE

I, MICHAEL F. MERRITT, being duly sworn upon my oath, do hereby state that on the 22nd day of April, 2002, two (2) copies of the foregoing Appellant's Substitute Brief were hand-delivered to the Law Offices of Thomas Noonan, Attorneys for Intervenor/Respondent, at 701 Market, Suite 425, St. Louis, MO 63101.

MICHAEL F. MERRITT

STATE OF MISSOURI)
) SS.
COUNTY OF ST. LOUIS)

Subscribed and sworn to before me this 22nd day of April, 2002.

My Commission Expires:

NOTARY PUBLIC