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 REPLY BRIEF

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STATEMENT OF FACTS

Respondent's Statement of Facts, while generally accurate, contains three (3) inaccuracies on Page 17. First, Respondent states "Trinity advised Shop of its intent to proceed against the parties responsible for the damage sustained by Shop" citing (LF 111-116). Appellant suggests that at no time did Trinity advise Appellant of its intent to proceed against "parties responsible for the damage." The record is clear that from the date of loss (12-11-97) until Appellant's counsel became aware of Trinity's petition, Cause No. 992-8523, Trinity was content to allow Appellant to pursue the litigation hoping to get reimbursed from funds generated by Appellant's actions. Respondent's reference to correspondence at LF 111-116 does not indicate that Trinity was taking any active steps towards recovery. Rather, Trinity's correspondence makes it clear that Trinity only advised others of its subrogation interest, LF 109, 110, 111-116.

Second, Trinity states "Shop took the position that Trinity was not entitled to recover any of the damages paid by Trinity because the policy did not grant Trinity a right of subrogation," citing LF 100-101 and 113-116. None of the citations to the legal file support this contention. On the contrary, on Page 114, Appellant's counsel recognizes Trinity's right to subrogation and provided various calculations of the extent of that interest.

Third, Trinity states "...Shop withdrew all offers with respect to the division of those proceeds and

once again asserted that it was entitled to the entire $100,000," citing LF 111 and 126. This statement is inaccurate in that the record is clear that Shop never indicated it was entitled to all of the proceeds. It is true that after negotiating with Trinity for several months unsuccessfully, Appellant did withdraw all prior settlement offers (LF 126).

APPELLANT'S RESPONSE TO RESPONDENT'S POINT RELIED ON NO. I

Holt v. Myers, 494 S.W.2d 430 (Mo. App. 1973)

State ex rel. Bartlett & Co., Grain v. Kelso, 499 S.W.2d 579 (Mo.App. 1973)

English v. Old American Insurance Company, 426 S.W.2d 33 at 36 (Mo. 1968)

Steele v. Goosen, 399 S.W.2d 703 (Mo. 1959)

Respondent's First Point Relied On asserts that the language of the insurance policy unambiguously assigned Shop's claims to Trinity. In Missouri, a subrogation right passes to an insurer upon payment, whereas, an assignment occurs only if it is clear that the insured has divested itself of all rights and those same rights are vested in the insurer, *Holt v. Myers*, 494 S.W.2d 430 (Mo. App. 1973), *State ex rel. Bartlett & Co., Grain v. Kelso*, 499 S.W.2d 579 (Mo.App. 1973), and *Farmer's Insurance Co., Inc. v. Effertz*, 795 S.W.2d 424 (Mo.App. W.D. 1990).

Trinity asserts in its Brief that the contract is not ambiguous. Trinity does correctly state that language will be deemed ambiguous if it is "fairly susceptible of two interpretations," citing *English v. Old American Insurance Company*, 426 S.W.2d 33 at 36 (Mo. 1968). However, Trinity does not address Appellant's argument that the fact that, as drafter of the Commercial Property Conditions (LF 165), it construed the Commercial Property Conditions as creating a right of subrogation from December 12, 1997 until November or December of 1999 and then changed its interpretation of the same provision,

concluding that the Commercial Property Conditions created a right of assignment (LF 165), clearly indicates that the policy is "fairly susceptible to two interpretations" and, therefore, is ambiguous. Appellant maintains that the policy must be ambiguous if the drafter places two different interpretations on the same provision. Trinity offers no explanation to counter to this argument.

On Page 26 of its Brief, Trinity argues that the language of the Commercial Property Conditions limiting Trinity's recovery "to the extent of our payment" is irrelevant. In interpreting contracts, Missouri courts are not to ignore contract language, *Tuttle v. Muenks,* 21 S.W.3d 6, 11 (Mo.App. WD 2000). Respondent urges that the limiting language "to the extent of the amount paid" is irrelevant citing *Steele v. Goosen,* 399 S.W.2d 703 (Mo. 1959) and *Hoorman v. White*, 349 S.W.2d 379 (Mo.App. E.D. 1961). However, Respondent misconstrues the facts and the law in *Goosen* and *Hoorman, id.* In both cases, the Missouri courts held only that, where there is a clear assignment of rights from the insured to the insurer, the language limiting recovery to the amount of payment will not be found to create a subrogation. The courts do not indicate that such language can be ignored. And where, as in the present case, the policy language contains no clear indicators of assignment, such as the use of the term "assignment," an exclusive right to sue for the entire loss or comparable language, there is no authority which states that the subrogation language limiting the insurer's recovery to the extent of its payment is irrelevant and can be ignored. To the contrary, *Holt v. Myers*, 494 S.W.2d 430 (Mo. App. 1973), *Steele v. Goosen,* 399 S.W.2d 703 (Mo. 1959), and *Hoorman v. White*, 349 S.W.2d 379 (Mo.App. E.D. 1961) all recognize that the language limiting the insurer's recovery to the extent of its payment is subrogation language.

In urging the court to find an assignment from the policy language, Respondent states that no express language is necessary to create an assignment. Appellant agrees. However, in order to accomplish

an assignment, it must be evident from the policy language that there was an intent to assign, *Holt v. Meyers*, supra and it must be clear from the policy language that the insured is completely divested 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). The Commercial Property Conditions does not contain either the word "assign" or "subrogation." Therefore, the Court must look to the actual policy language to determine whether a right of subrogation or an assignment right is transferred to the insurer. Since there is no express use of the word "assign" or "subrogation," Appellant contends the Court should consider the fact that there is an absence of the word "assign" as a relevant factor, coupled with the language in the first sentence limiting Trinity's recovery "to the extent of our payment" and the third sentence in which the language reserves the right for the insured to waive causes of action against other parties which are both indicators of subrogation. Since there must be a clear intent for a party to divest itself of all rights to the cause of action and it appears that there is no such intent in the relevant policy provision, Appellant contends that an assignment cannot be found.

Trinity then suggests that the word "transferred" is equivalent to an assignment. However, Trinity does not address the argument that the word "transferred" is equally applicable to the equitable right of subrogation being "passed" or "transferred" as to an assignment of rights being transferred. The phrase "transferred" is equally applicable to either subrogation or assignment rights because in each situation the right which originates with the insured and can only become a right of the insurer if it is transferred from the policy holder to the insurer.

Respondent suggests that Appellant's reliance on *Holt v. Myers*, 494 S.W.2d 430 (Mo. App. 1973) for the proposition that a subrogation right was created in the case at hand is misplaced. Respondent points out that the purported assignment clause in *Holt* used the word "subrogate" and, therefore, *Holt*

is inapplicable. However, Respondent misconstrues the purpose for which Appellant cited *Holt*, id. The Court in *Holt* recognized that the pertinent document omitted the word "assigned," which is the situation in the case at bar, *Holt v. Myers*, 494 S.W.2d 430 at 437 (Mo. App. 1973). Further, *Holt* recognized that the limitation of an insurer's recovery "to the extent of said payment" is language indicative of subrogation at page 437. Further, the Court, in *Holt*, also considered whether the relevant document contained a phrase "transferring causes of action" to the insurer. The Court considered all of these factors indicators of assignment or subrogation. *Holt* is relevant to the case at hand because no form of the word "assign" appears, there is no transfer of "causes of action" to the insurance company, and, therefore, there are no indicators of assignment. However, the phrase limiting the insurance company's recovery "to the extent of our payment" is included in the Commercial Property Conditions, which is an indicator of subrogation. Therefore, *Holt* is relevant as it outlines the correct approach a court should take in determining whether the policy language creates a subrogation right or a right of assignment, see *Alsup v. Green*, 517 S.W.2d 151 (Mo.App. 1974).

On Page 28, Respondent seems to argue that the fact that the policy allows waiver against closely related parties is evidence that the policy means that Trinity has causes of action against third parties. However, Appellant contends that the fact that the insured retained the right to waive causes of action against certain closely related parties is not only a clear indication that the insured is not divesting itself of all rights, which is necessary to constitute an assignment, *State ex rel. Bartlett & Co., Grain v. Kelso*, 499 S.W.2d 579 (Mo.App. 1973), but that this language is consistent with a transfer of subrogation rights. That is, it is consistent and likely that this language is included to allow Trinity to pursue its subrogation rights against third parties, but that the insured can waive rights of subrogation against closely related parties so that Trinity would not in effect be recouping its payment to the insured from a parent company or

subsidiary.

Respondent next attempts to equate the terms "assign" and "transfer," citing *Steele v. Goosen,* 399 S.W.2d 703 at 711 (Mo. 1959). Appellant has searched Page 711 of *Steele v. Goosen,* id, in vain for language which Respondent attributes to the Supreme Court — but no where is it indicated that the terms "assign" and "transfer" are synonymous or interchangeable. As stated above, the term "transfer" is equally applicable to the transfer of a right of subrogation as it is consistent with a transfer of assignment rights. Since either right originates with the insured, a subrogation right or an assignment right can become a right of the insurer only if the right is transferred.

Respondent does not explain the absence of language transferring a "cause of action," or "right to sue" which can create an assignment. Respondent suggests that the use of the word "right" in the Commercial Property Conditions is a right to recover "something" from another and, therefore, must be an assignment." However, this argument overlooks the fact that the transfer of a subrogation right is also a right to recover something from another. Therefore, Respondent's argument fails.

On Pages 32 and 33 of its Brief, Respondent discusses the use of the word "transfer" in the Commercial Property Conditions. Trinity states "there is no indication of any technical meaning of the term 'transfer' was intended..." and the word was merely used to indicate that Trinity was entitled to recoup payments it made to Shop from the responsible parties. First, the policy does not use the language "from the responsible parties," which might be an indicator of an assignment. However, Appellant agrees that no technical meaning of the word "transfer" was intended as it can apply equally to a transfer of a subrogation right as it can too transfer of an assignment right. Further, Appellant agrees the word was used merely to indicate that Trinity was entitled to recoup payments, which is consistent with a right of subrogation.

On Pages 33 and 34 of its Brief, in contending that the policy language is not ambiguous, Trinity suggests that conduct of the parties should not be examined. It is obvious that Trinity does not want its conduct examined because it clearly interpreted its own policy as transferring a right of subrogation to it. This was the position Trinity took in correspondence with third parties (LF 109-112, 137), as well as pleadings filed in this action (FL 297). In *Butler v. Mitchell-Hugeback, Inc.*, 895 S.W.2d 15 (Mo. 1995), this Court restated that the cardinal principle for contract interpretation is to ascertain the intention of the parties and give effect to that intent, at page 21. In order to determine the intent of the parties, it is often necessary to consider not only the contract between the parties, but the practical construction the parties themselves have placed on the contract by their acts and deeds id. As stated above, policy language is ambiguous when it is susceptible to two interpretations. Trinity's own conduct demonstrates that the policy it drafted is ambiguous and, therefore, urges the Court not to look at the interpretations Trinity placed on its policy. However, as stated by Respondent on Page 25 of its Brief, a court must deem language to be ambiguous where it is fairly susceptible to two interpretations, *English v. Old American Insurance Company*, 426 S.W.2d 33 at 36 (Mo. 1968) and, therefore, Trinity's conduct is pertinent.

Finally, Respondent cites the Florida case of *Cole v. Barlar Enters., Inc.*, 35 F.Supp.2d 891at 894 (M.D. Fla. 1999), a case in which a Federal District Court found that policy language constituted an assignment rather than a subrogation right. The language in the *Cole* case is similar to the language in the case at bar in that there is mention of rights to recover being transferred to the insurance company and there is no use of either the term "assign" or "subrogation." However, the third sentence of the provision of the policy in *Cole* states "at our request, the insured will bring 'suit' or transfer those rights to us and help us enforce them." This phrase is indicative of assignment language since the insured will transfer the rights to bring suit to the insurance company at the insurance company's request. Therefore, even though the term "assigned" is not used, an assignment could be created because rights to the cause of action are being

divested from the insured to the insurer , *State ex rel. Bartlett & Co., Grain v. Kelso*, 499 S.W.2d 579 (Mo.App. 1973).[1] However, this language is not present in the case at bar. In *Cole*, there is no limiting subrogation language stating that the insurance company's right of recovery will be limited to the extent of its payment as is the case in the Commercial Property Conditionss at issue. Further, the policy language in *Cole* does not reserve rights to waive causes of action, which language is present in the case at bar and it is obvious that there is no complete divestiture of rights. Therefore, *Cole* is irrelevant to the case at bar, except to the extent that the cited language on Page 36 of Respondent's Brief is nearly identical to the Commercial Liability Conditions of the policy at bar (LF 205). Since the language in the Commercial Liability Conditions (LF 205) and the language of the policy in *Cole* are similar, they could be construed as transferring assignment rights to the insurance carrier. However, since the same language is not used in the Commercial Property Conditions, under the maxim "expressio unius est exclusio alterious" (the expression of one thing is the exclusion of another), the fact that this assignment language appears in one portion of the policy and not in the Commercial Property Conditions makes it clear that the assignment was not intended under the Commercial Property Conditions, *General American Life Insurance Co. v. Barrett*, 847 S.W.2d 125 (Mo.App. W.D. 1993). Thus, Respondent's citation of *Cole* is supportive of Appellant's position that no assignment was created under the Commercial Property Conditions. Also, citations from other jurisdictions may not be persuasive in Missouri since our rule pertaining to subrogation

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[1] Compare language in *Alsup v. Green*, 517 S.W.2d 151 (Mo.App. 1974) where language authorizing insurer to sue in name of insured held to be a transfer of subrogation rights and not an assignment (footnote 1 at Page 152); see also, *Ewing v. Pugh*, 420 S.W.2d. 14 (Mo.App. 1967) at Page 16.

may be unique, see *Farmer's Insurance Co., Inc. v. Effertz*, 795 S.W.2d 424 at 426 (Mo.App. W.D. 1990).

APPELLANT'S RESPONSE TO RESPONDENT'S POINT RELIED ON NO. II

State ex rel. Bartlett & Co., Grain v. Kelso, 499 S.W.2d 579 at 582 (Mo.App. 1973).

American Family Mut. Ins. Co. v. Wemhoff, 972 S.W.2d 402, (Mo.App. W.D. 1998)

General American Life Insurance Co. v. Barrett, 847 S.W.2d 125 (Mo.App. W.D. 1993).

Under Missouri law, to be construed as an assignment, an instrument 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 at 582 (Mo.App. 1973). The third sentence of the Commercial Property Conditions in the case at bar specifically states "but you may waive your right against another party in writing" (LF 165).

"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).

Therefore, it is clear from this policy that since the insured retained rights in the cause of action there was not a complete divestment of legal title and rights in the claim, which is necessary to constitute an assignment, *State ex rel. Bartlett & Co., Grain v. Kelso*, supra.

In Point Relied On No. II of its Substitute Brief, Respondent argues that an assignment was created even though Appellant retained rights in the cause of action. At Page 41 of its Brief, Respondent cites the majority opinion from the Appellate Court, indicating that the waiver rights existed only up to the time of payment and that upon payment Appellant's waiver rights were extinguished. Respondent fails to point to

any language in the policy stating that Appellant's rights in the cause of action were extinguished upon payment. Therefore, it cannot be assumed or presumed that the waiver rights were extinguished upon payment, but must be construed as continuing to exist. In addition, Appellant submits that the argument that Appellant's rights in the cause of action were extinguished upon payment is not logical. Obviously, if an insured is assigning rights to a cause of action to the insurer, this transfer of rights occurs only upon payment by the insurer. In the absence of payment, all rights remain in the insured. Since, if the insured retains all rights in the cause of action, including waiver rights, prior to payment, then it, of course, had the right to waive its rights prior to payment and if it had waiver rights prior to payment, then there would be no reason for this language in which the insured retained waiver rights against other parties. Appellant submits that the waiver language only makes sense if construed to survive payment, especially as it is intended to keep the insurance company from recouping its casualty payment from a co-insured or a subsidiary parent or tenant of the insured. Further, the language is more consistent with a right of subrogation.

Beginning at Page 41 of its Brief, Respondent mentions the transfer provision in the Commercial General Liability Conditions of the policy and contends the Commercial General Liability Conditions irrelevant to this case "because payment was not made under that coverage part" at page 42 of its Brief. However, "an ambiguous phrase is not considered in isolation, but by reading the policy as a whole with reference to associated words. As such, one must consider the language at issue in the context of the entire policy," *American Family Mut. Ins. Co. v. Wemhoff*, 972 S.W.2d 402, (Mo.App. W.D. 1998). Respondent sidesteps the maxim "expressio unius est exclusio alterious"—which means the mention of one thing implies the exclusion of the other, *General American Life Insurance Co. v. Barrett*, 847

S.W.2d 125 (Mo.App. W.D. 1993). As stated above, the Commercial General Liability Conditions language is similar to the language interpreted by the Florida District Court in *Cole v. Barlar Enters., Inc.*, 35 F.Supp.2d 891at 894 (M.D. Fla. 1999) cited by Respondent. In contrast to the Commercial Property Conditions, the transfer of rights clause in the Commercial 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." (Tr. 205) (emphasis added).

In both the clause cited in *Cole* and the Commercial Liability Conditions of this policy, the language is indicative of an assignment of rights. The third sentence of the Commercial Liability Conditions states that at the request of the insurance company, "the insured will 'bring suit' or transfer those rights to us..." This apparent assignment language is not included in the transfer of rights under the Commercial Property Conditions. Also, the first sentence of the Commercial Liability Conditions does not include the phrase that Trinity's recovery will be limited to the extent of its payment. Further, the Commercial Liability Conditions does not have the same third sentence included in the Commercial Property Conditions in which the insured retains rights in the cause of action. Where an assignment occurs in a similar provision in another part of the policy, under the maxim "expressio unius est exclusio alterious," it is presumed that since the same language was not employed under the Commercial Property Conditions an assignment was not intended under the Commercial Property Conditions. That no payment was made under the Commercial General Liability Conditions is of no import. It is the rule of construction which must govern.

Trinity next cites a "no subrogation" rule and suggests that because Missouri applies the no subrogation rule, the waiver rights in the third sentence of the Commercial Property Conditions would be meaningless if construed as a subrogation right. However, the fact that Missouri law or public policy might prohibit a recovery does not mean that a court would construe the provision to mean something not intended in order to permit the recovery the law or public policy prohibits. Further, while the no subrogation rule in Missouri has been applied to tenants and landlords having a contractual provision, parties are co-insured only if named in the policy. Trinity cites no authority for the proposition that a parent company or a subsidiary is a co-insured when not named in the policy. Therefore, Respondent's reliance on the no subrogation rule is misplaced.

APPELLANT'S RESPONSE TO RESPONDENT'S POINT RELIED ON NO. III

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

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

American Nursing Resources, Inc. v. Forest T. Jones and Co., Inc., 812 S.W.2d 790 (Mo.App 1991)

In its Point Relied On No. III, Respondent contends that it should not be estopped from asserting that the Commercial Property Conditions created an assignment right, even though for a period of two (2) years Trinity asserted the provision granted only subrogation rights. Trinity correctly states Appellant is contending that Trinity should be prohibited from asserting assignment rights because Appellant relied on Trinity's assertion of subrogation rights in maintaining and prosecuting its cause of action against defendants

for a period of two (2) years before Trinity changed its theory.[2] Trinity first asserts that estoppel is inapplicable to the case at bar because Appellant does not cite any case where an insurer was estopped from asserting a right of assignment after asserting subrogation rights. It is true that another case wherein an insurance carrier construed its own policy provision as granting a right of subrogation and allowing the insured to pursue litigation for a period of two (2) years before changing its interpretation of its policy to mean that the insured assigned rights can not be found. However, all elements for estoppel are present, which are: (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, *Tinch v. State Farm Insurance Company*, 16 S.W. 3d 747 (Mo.App. 2000). In suggesting that the first element of estoppel, an inconsistent act, is not present in the case at bar, Trinity asserts that subrogation and assignment are the same and used interchangeably. This argument ignores the Missouri case law as stated in *Farmer's Insurance Co., Inc. v. Effertz*, 795 S.W.2d 424 at 426 (Mo.App. W.D. 1990), *Holt v. Myers*, 494 S.W.2d 430 (Mo. App. 1973), *Hagar v. Wright Tire & Appliance, Inc.*, 33 S.W.3d 605 (Mo.App. 2000), and other Missouri cases which clearly state the difference between a right of subrogation and an assignment of rights. The firmly established rule in Missouri is that when an insurer pays a claim, it receives

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[2] In footnote 2, Page 47 of its Brief, Trinity points out that Appellant misstated that its Second Amended Petition was filed after Trinity filed its Motion to Intervene, when in fact the Second Amended Petition was filed before the Motion to Intervene.

a subrogation right, which is where an equitable right passes to the subrogee and the legal right to the claim is never removed from the insured. In an assignment, the insured is completely divested of any legal title or right in the cause of action and the insurer obtains full legal title to the claim and permits the insurer to pursue the claim in its name directly against the tortfeasor, *Farmer's Insurance Co., Inc. v. Effertz*, supra. The first element of estoppel is satisfied because Trinity first made statements and acts consistent with a right of subrogation, where Appellant would retain the right to the cause of action. The theory of assignment, which Trinity asserted after Appellant had prosecuted and maintained this action is inconsistent with subrogation. Further, the record is clear that Trinity never advised Appellant that it had received the right to bring the cause of action during the time Appellant was pursuing the litigation. Because Trinity acted as though it had a subrogation right for two (2) years and its later assertion that it had the right to maintain the cause of action against defendants is inconsistent and the first element of estoppel is established.

Trinity then suggests that Appellant did not rely on Trinity's assertion of subrogation rights. However, as previously indicated from the correspondence in the legal file (LF 109-116) and the legal pleadings filed by Trinity (LF 297-299, SLF 11-12), it is evident that Trinity asserted it had a subrogation right. Under the Commercial Property Conditions of the policy, the second sentence requires the insured "must do everything to secure our rights," and since under the subrogation as asserted by Trinity only the insured can bring the cause of action, Super Sandwich Shop initiated and maintained a cause of action, in part, to secure Trinity's rights. There would be no benefit conferred to Super Sandwich Shop in pursing litigation if it had in fact assigned all rights to the cause of action to Trinity. It would not be able to recoup its deductible or its attorney's fees, among other items. Therefore, it is obvious from Super Sandwich Shop's actions that it operated on the faith of Trinity's actions and statements that it had a subrogation right

and, therefore, the second element of estoppel was established.

There is no question that having generated a $100,000 fund Appellant would be damaged if Trinity were allowed to change its theory to one of assignment. Trinity would be entitled to the entire $100,000 fund and the time, money and efforts expended by Appellant would be for naught - satisfies the third element requiring injury. On Pages 51 and 52 of its Brief, Respondent contends the cases of *Lake St. Louis Community Ass'n v. Ravenwood Properties, Ltd.*, 746 S.W.2d 642 (Mo.App. E.D. 1988) and *Miskimen v. Kansas City Star*, 684 S.W.2d 394 (Mo.App. 1984) are distinguishable because they do not involve an insurance contract. However, in both cases the Missouri Courts of Appeals estopped a party from changing its theory after an opposing party relied to its detriment. Even though *Miskimen* and *Lake St. Louis* do not involve an insurance contract, they stand for the proposition that a party may be estopped by its conduct from claiming rights or benefits arising from a contract, supra. Accordingly, they are relevant and pertinent to the case at bar.

At Page 53 of its Brief, Trinity suggests that Appellant cannot claim that it relied on Trinity's interpretation of the contract because the policy language was equally available to Shop for fourteen (14) months between the time Shop submitted its insurance application and the date of loss. Trinity presumably is arguing that Appellant should have interpreted the Commercial Property Conditions as creating a right of assignment in that fourteen month period. However, this assertion ignores the fact that Trinity, which drafted the policy in 1983 and revised it in 1987 (LF 165), had ten to fourteen years to interpret the same provision and came to the same conclusion that the Commercial Property Conditions created a subrogation right for Trinity.

At Page 58 of its Brief, Trinity challenges Appellant's suggestion that it was damaged because, even

in a subrogation situation, Appellant must turn over all monies recovered to Trinity as insurer. There is no question that in a subrogation situation, Shop would at least be entitled to recover its deductible, litigation costs and attorney's fees, *Jourdan v. Gilmore*, 638 S.W.2d 763 (Mo.App. 1982). In addition, the basis of subrogation is equity, *American Nursing Resources, Inc. v. Forest T. Jones and Co., Inc.*, 812 S.W.2d 790 (Mo.App 1991) and is intended to prevent an insured from recovering twice for one injury, *Hayde v Womach*, 707 SW2d 839, (Mo. App. 1986). As previously stated, Super Sandwich Shop had an insurable interest and therefore was able to secure an insurance policy and recover for structural damage to the building. However, the owner, Ellen Keisker, had the legal cause of action for damage to the structure, which she maintained to recovery. Super Sandwich Shop's action as indicated in its Second Amended Petition (LF 282) sought damages to its business, including lost profits. Since subrogation is intended to prevent an insured from recovering twice for the same injury, it would not operate to keep Super Sandwich Shop from recovering in tort for the same damages for which it had received insurance proceeds. But Super Sandwich Shop can only recover for damage to its business and if it recovers the $100,000 from the defendants for damages to its business, including lost profits, it is not recovering twice for the same injury (except to the extent that it received $15,000 under the business interruption provisions of the policy).

At page 60 of its Brief, Trinity states that it did not idly sit by, but tried to intervene in this action. However, the record is clear that on May 5, 1998, Trinity representative Jerry Hickman, indicated that Trinity was going to begin its subrogation process (LF 137). Appellant had already initiated legal action and did not receive any notice or indication from Trinity that the cause of action had been assigned or that Appellant was barred from pursuing it. Rather, Respondent was content to sit back and allow Appellant

to pursue the litigation, sending a letter in April 1999 advising Defendant City of St. Louis of its "subrogation lien in the event the third party claim / suit settled," (LF 109). The Motion to Intervene, as pointed out by Trinity, was not filed until September 1999, nearly one and three-quarter years after the date of loss. It is obvious that Trinity did sit idly by while Appellant's efforts generated the $100,000 fund and then Trinity changed its theory to claim 100% of the recovery. At Page 60 of its Brief, Trinity admits that Appellant's withdrawal of all settlement offers prompted it to file its Motion to Intervene. This is proof that Trinity was content to allow Super Sandwich Shop to litigate and recover a fund in which it would share under a subrogation theory rather than asserting that Appellant had transferred all rights to bring the cause of action to Trinity through assignment.

APPELLANT'S RESPONSE TO RESPONDENT'S POINT RELIED ON NO. IV

Jourdan v. Gilmore, 638 S.W.2d 763 (Mo.App. 1982)

Hayde v Womach, 707 SW2d 839, (Mo. App. 1986)

In Point Relied On No. IV, Respondent contends that even if its right to recover is based in subrogation, it is entitled to 100% of the interpleaded funds. As stated above in Section III of this Brief, subrogation is based upon unjust enrichment and, where an insured recovers a fund, it is at least entitled to its deductible and litigation costs, including attorney's fees, *Jourdan v. Gilmore*, 638 S.W.2d 763 (Mo.App. 1982); *Hayde v Womach*, 707 SW2d 839, (Mo. App. 1986). Further, as asserted, there is no double recovery or unjust enrichment if Appellant recovers for structural damages under the insurance policy for which it paid premiums and recovers in tort for damage to its business since there is not a double recovery for a single injury. Since $94,665.96 of the damages paid by Trinity were for structural damage

to the building, for which only the owner can recover in tort, Trinity's subrogation interest for the damages paid to the structure does not reach the fund recovered by Appellant on its action for lost profits. Therefore, Trinity is not entitled to the entire $100,000 interpleaded into the court.

Trinity's argument that Super Sandwich Shop had an insurable interest is misplaced. Unquestionably, Shop had an insurable interest and was entitled to buy a policy covering the building, contents, and business interruption loss. However, while Trinity's citations of Missouri law defining insurable interest are correct in stating that a tenant can have an insurable interest in the leased structure, Trinity does not cite any authority for the proposition that a tenant having an insurable interest somehow acquires the right to bring a tort action for damage to the structure. As noted above, that action lies with the owner of the building. When considering unjust enrichment, it should be kept in mind that Trinity is an insurance company which is in the business of reimbursing its insureds for losses. It receives premiums for bearing the risk of loss. One of the risks Trinity assumes is that it will not be able to collect 100% of the losses it pays out.

Finally, in response to Appellant's suggestion that Trinity should receive only a pro-rata share of its payment for losses since Appellant's recovery was limited by statute, Trinity calculates that Super Sandwich Shop recovered 81% of its damages. This statement is incorrect. Shop at best recovered 81% of the monies due under the policy for structural damage, contents, and business interruption insurance. However, Super Sandwich Shop's cause of action is for lost business, which vastly exceeds the amount of insurance claim (LF 282). The statutory liability maximum, Mo.Rev.Stat.§537.610, limits Appellant's recovery and, under the theory of unjust enrichment, Trinity should not recover a greater percentage of its losses than Appellant recovers.

CONCLUSION

For the reasons stated herein, Appellant submits that Trinity's rights under the Commercial Property Conditions of the policy are limited to subrogation rights or, in the alternative, Trinity should be estopped from asserting it acquired rights of assignment. In either event, Appellant requests this Court find that Trinity is limited to recovery in subrogation and to determine the extent of those subrogation rights.

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 23rd day of May, 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 23nd day of May, 2002.

My Commission Expires:

NOTARY PUBLIC