**IN THE SUPREME COURT OF MISSOURI**

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| **ELLEN L. KEISKER, et al.,** | ) | |
| | ) | |
| **Appellant,** | ) | |
| | ) | |
| **and** | ) | |
| | ) | |
| **TRINITY UNIVERSAL INSURANCE COMPANY,** | ) | |
| | ) | **No. SC84290** |
| **Respondent,** | ) | |
| | ) | |
| **vs.** | ) | |
| | ) | |
| **BEATRICE FARMER, et al.,** | ) | |
| | ) | |
| **Respondents.** | ) | |

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**APPEAL FROM THE MISSOURI CIRCUIT COURT FOR THE TWENTY-SECOND JUDICIAL CIRCUIT, ST. LOUIS CITY**

**THE HONORABLE JIMMIE M. EDWARDS**
**CIRCUIT JUDGE**

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# RESPONDENT'S SUBSTITUTE BRIEF

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## JURISDICTIONAL STATEMENT

Super Sandwich Shop, Inc. (hereinafter sometimes referred to as "Shop") initiated this lawsuit on January 10, 1998. (L.F. at 101.) The lawsuit was brought in the names of Shop and others for damages sustained by them on December 11, 1997. (L.F. at 98, 282.) On that date, the building in which Shop operated a restaurant, as well as the contents and fixtures therein, were damaged when the building was struck by two separate automobiles operated by Beatrice Farmer and Harold Beck of the Sheriff's Department of the City of St. Louis. (L.F. at 98-99, 282-83.) Shop made a claim against Trinity Universal Insurance Company (hereinafter sometimes referred to as "Trinity"), from whom Shop had procured a Commercial Lines Policy of insurance, for the damages it sustained. (L.F. at 99-100.) Trinity ultimately paid $141,609.49 on that claim. (L.F. at 99-100.)

On September 1, 1999, Trinity moved to intervene as a Plaintiff in this action in order to protect its right to recover the amounts paid to Shop from the parties causing the loss. (L.F. at 297.) Trinity's Motion was denied. (L.F. at 296.) When this occurred, the city of St. Louis interplead its statutory $100,000.00 liability limits into the registry of the Court for a judicial determination as to Shop's and Trinity's rights to those funds. (S.L.F. at 7.) Shop filed a Petition for Declaratory Judgment, also requesting that the court determine Shop's and Trinity's interests in the interpleaded funds. (L.F. at 272.) Trinity was ultimately

allowed to intervene in this case pursuant to the court's Order dated June 30, 2000. (L.F. at 272.)

The dispute between Shop and Trinity was tried to the Honorable Jimmie M. Edwards on Stipulated Facts and Briefs submitted by the parties. (L.F. at 63, 69, 84, 90, 98, 119, 130, 147; R.S.L.F. at 4.) On August 31, 2000, Judge Edwards entered an Order and Judgment in favor of Trinity and against Shop, finding that Shop had assigned to Trinity its right to recover from the parties responsible for the loss and that Trinity was entitled to recover the entire $100,000.00 in interplead funds. (L.F. at 49; Appendix at A-4.) Shop's Motion to Amend Judgment or in the Alternative Motion for New Trial, filed on September 13, 2000, was denied. (L.F. at 26, 45.) This appeal followed. (L.F. at 25.)

This Court accepted transfer of this case from the Missouri Court of Appeals for the Eastern District. Accordingly, this Court has jurisdiction pursuant to Article V, Section 10, of the Constitution of the state of Missouri.

## STATEMENT OF FACTS

Super Sandwich Shop, Inc., is a Missouri corporation that operated a restaurant located at 2722 North Florissant, St. Louis, Missouri 63106. (L.F. at 49, 98.) On December 11, 1997, at approximately 4:18 p.m., the premises were damaged when two separate automobiles driven by Beatrice Farmer and Harold Beck were in an accident and collided with the building. (L.F. at 49, 98.) Mr. Beck was an employee of the city of St. Louis and the Sheriff's Department of the City of St. Louis at the time of the collision. (L.F. at 49, 98, 103.) As a result of the accident, the building and the contents and fixtures therein sustained severe damage. (L.F. at 98.) The damage was the result of the negligence and carelessness of Ms. Farmer, the city of St. Louis, the Sheriff's Department of the city of St. Louis, and Mr. Beck. (L.F. at 99, 281.)

At the time of the accident, there was in full force and effect a Commercial Lease (hereinafter sometimes referred to as the "Lease") between Ken and Ellen Keisker (hereinafter sometimes referred to as the "Keiskers") and Shop pertaining to the building located at 2722 North Florissant. (L.F. at 50, 99; R.S.L.F. at 10.) The Lease was for a term of five years commencing August 1, 1994, and ending July 31, 1999. (R.S.L.F. at 10.) The Lease provided that Shop would "be responsible for all repairs required . . ." and further provided that Shop "shall, at [its] own expense and at all times, maintain the premises in good and safe

condition . . . and shall surrender the same, at termination hereof, in as good condition as received, normal wear and tear excepted." (R.S.L.F. at 10.) The provisions of the Lease further provided that "[a] total destruction of the building in which the premises may be situated shall terminate the Lease." (R.S.L.F. at 10.)

The Lease also contained a provision that required Shop, as lessee, to maintain, "at its own expense . . . , plate glass and public liability insurance including bodily injury and property damage insuring Lessee and Lessor. . . ." (L.F. at 50; R.S.L.F. at 10.) The Lease further required that Shop "shall provide Lessor with a Certificate of Insurance showing Lessor as an additional insured. The Certificate shall provide for a ten-day written notice to Lessor in the event of cancellation or material change of coverage." (R.S.L.F. at 10.)

As required by the Lease, Shop procured a Commercial Lines Policy of insurance (hereinafter sometimes referred to as the "Policy") from Trinity bearing policy number CPA 8040553 01. (L.F. at 50, 99.) Mr. L. Lee Hinds, president of Super Sandwich Shop, Inc., submitted a Commercial Insurance Application dated September 24, 1996, with respect to that Policy for the premises located at 2722 North Florissant as well as another Super Sandwich Shop, Inc., location at 1801 Olive Street, St. Louis, Missouri 63103. (L.F. at 50; R.S.L.F. at 49.) The Application requested coverage for property, crime/miscellaneous crime, commercial general liability, and business interruption. (R.S.L.F. at 49.) Mr.

Hinds indicated that Shop owned both locations when asked if Shop's interest was either as an owner or tenant. (R.S.L.F. at 49.) Mr. Hinds also stated in the Application that Shop occupied 100% of each location. (R.S.L.F. at 49.)

Trinity ultimately issued the Policy to Shop and Hindsight Industries, Inc., covering both Super Sandwich Shop, Inc., locations. (L.F. at 50, 99.) The relevant Policy period for the purposes of this action was October 10, 1997, through October 10, 1998. (L.F. at 151.) The Policy was in full force and effect on December 11, 1997, the date of the loss. (L.F. at 151.) The Policy provided Commercial Property Coverage, Commercial Crime Coverage, and Comprehensive General Liability Coverage. (L.F. at 151).

The Commercial Property Coverage Part contained several subcategories of coverage purchased by Shop. (L.F. at 152-53.) With respect to the premises located at 2722 North Florissant, the building was insured up to a limit of $125,000.00. (L.F. at 153, 163.) Business Personal Property was also covered up to a limit of $50,000.00. (L.F. at 153, 163.) Finally, Business Income was covered up to a limit of $15,000.00. (L.F. at 153, 163.)

The Policy contained a Building and Personal Property Coverage Form that pertained to the Commercial Property Coverage Part. (L.F. at 160, 171.) In Section A – Coverage, the Form defined covered property as the building itself, including completed additions, fixtures, permanently installed machinery and

equipment, personal property owned by Shop that was used to maintain or service the building or structure or its premises, additions under construction, alterations, and repairs to the building or structure, and materials, equipment, supplies, and temporary structures on or within 100 feet of the premises used for making additions, alterations, or repairs to the building or structure. (L.F. at 171.)

The Policy also contained a section entitled Commercial Property Conditions, which by the terms of the Declarations was applicable to the Commercial Property Coverage Part. (L.F. at 160, 164.) Section I of the Commercial Property Conditions was entitled "TRANSER OF RIGHTS OF RECOVERY AGAINST OTHERS TO US." According to that Section,

> [i]f 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.

(L.F. at 51, 165; Appendix at A-3.) That Section also gave Shop the right to waive its rights against other parties. (L.F. at 165; Appendix at A-3.) However, this could only be done in limited situations, which were at any time prior to a loss or following a loss if the party against whom recovery is sought is insured by the Policy, is a business firm owned or controlled by Shop or that owns or controls

Shop, or is a tenant of Shop. (L.F. at 165; Appendix at A-3.) The Policy language was equally available to both Shop and Trinity. (L.F. at 60).

On December 12, 1997, Shop made a claim against the Policy issued by Trinity for damage to the building located at 2722 North Florissant, as well as the contents and fixtures therein. (L.F. at 50, 99.) The full cost of repair or replacement for the damage to the premises was determined to be $174,557.82. (L.F. at 105.) However, pursuant to the terms of the Policy, Trinity was only obligated to pay the actual cash value of the loss at the time of the loss. (L.F. at 105, 175-76.) Trinity ultimately paid $141,609.49, the actual cash value of the claim less Shop's $500.00 deductible. (L.F. at 50, 100.) This payment was made by three checks dated April 9, 1998, in the amount of $94,665.96 for building damage, $32,443.53 for damage to business personal property, and $15,000.00 for business interruption. (L.F. at 50, 100.) Mr. Hinds signed a Statement as to Full Cost of Repair or Replacement Under the Replacement Coverage Subject to the Terms and Conditions of this Policy (hereinafter sometimes referred to as "Statement as to Full Cost of Repair") on behalf of Shop, acknowledging receipt of the three checks. (L.F. at 51, 100.)

Shop initiated this lawsuit on January 10, 1998. (L.F. at 59, 60, 101.) Shop sued Ms. Farmer, Mr. Beck, the city of St. Louis, and the Sheriff's Department of the City of St. Louis seeking damages measured by the loss of income and profits

it sustained as a result of the accident. (L.F. at 50, 282-96.) At the time suit was brought, Trinity had made no statements regarding assignment or subrogation rights other than those set forth in the policy and had not asserted any subrogation rights or taken any actions inconsistent with the Policy language. (L.F. at 60.) Trinity advised Shop of its intent to proceed against the parties responsible for the damage sustained by Shop. (L.F. at 111-16.) Trinity also requested that Andy Williams, attorney for the city of St. Louis, protect its "subrogation lien" in the event of settlement. (L.F. at 51, 109.)

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. (L.F. at 100-01, 113-16.) Shop asserted that even if Trinity were subrogated to Shop's right of recovery, Trinity could not recover for damage to the building because Shop did not own the building. (L.F. at 100-01, 113, 115.) Shop conceded that if Trinity had subrogation rights through Shop, Trinity was entitled to recover the $47,443.53 that was paid pursuant to the business personal property and business income loss coverages provided by the policy. (L.F. at 100-01, 114, 115.) However, while negotiating with respect to the $100,000.00 offered by the City to resolve the claims against it, Shop withdrew all offers with respect to the division of those proceeds and once again asserted that it was entitled to the entire $100,000.00. (L.F. at 111, 126.) Based on Shop's position, and in order to protect

its right to recover the damages it paid, Trinity moved to intervene as a Plaintiff in this action on September 1, 1999. (L.F. at 297.) Trinity's Motion to Intervene as Plaintiff was denied by the Court on October 14, 1999. (L.F. at 296.)

Despite the notice provided by Shop of its intent to recover from the at-fault parties, the terms and conditions of the Commercial Property Conditions that transfers and assigns Shop's right of recovery to Trinity and prohibits Shop from impairing that right of recovery, and Shop's acknowledgement that Trinity was at least entitled to recover the amounts paid pursuant to the business personal property and business income loss coverages, Shop subsequently entered into a Release and Covenant Not to Sue with Ms. Farmer and Shelter Mutual Insurance Company dated November 8, 1999. (L.F. at 50, 101.) Shop received $6,000.00 from Ms. Farmer and Shelter Mutual Insurance Company in exchange for the Release and Covenant Not to Sue. (L.F. at 50, 101.) Shop did not pay any portion of the $6,000.00 to Trinity. (L.F. at 101.)

On January 26, 1999, Mr. Beck, the city of St. Louis, and the Sheriff's Department of the City of St. Louis responded to a separate action filed in the name of Trinity in which Trinity asserted that Shop had assigned its right to recover from the responsible parties by filing a Counterclaim for Interpleader. (S.L.F. at 7.) Mr. Beck, the city of St. Louis, and the Sheriff's Department of the City of St. Louis admitted liability for damages from the accident and offered to

pay their statutory liability limits of $100,000.00. (S.L.F. at 7-8.) In response to the Counterclaim for Interpleader, Shop sought a judicial declaration as to Shop's and Trinity's rights to the interplead funds. (L.F. at 272.) Trinity was ultimately allowed to intervene in this case pursuant to the court's Order dated June 30, 2000. (L.F. at 272.) The Counterclaim for Interpleader was granted to the extent the $100,000.00 deposited into the registry of the court was in satisfaction of Shop's claims arising from the accident. (L.F. at 61.)

Shop's request for a judicial declaration as to Shop's and Trinity's interests in the interplead funds was tried to the Honorable Jimmie M. Edwards on Stipulated Facts and Briefs submitted by the parties. (L.F. at 63, 69, 84, 90, 98, 119, 130, 147; R.S.L.F. at 4.) On August 31, 2000, Judge Edwards entered an Order and Judgment in favor of Trinity and against Shop, finding that Shop had assigned to Trinity its right to recover from the parties responsible for the loss and that Trinity was entitled to recover the entire $100,000.00 in interplead funds. (L.F. at 49; Appendix at A-4.) Shop's Motion to Amend Judgment or in the Alternative Motion for New Trial, filed on September 13, 2000, was denied. (L.F. at 26, 45.) This appeal followed. (L.F. at 25.)

## POINTS RELIED ON

**I. THE TRIAL COURT DID NOT ERR IN AWARDING TRINITY THE ENTIRE $100,000.00 DEPOSITED INTO THE REGISTRY OF THE COURT BY THE CITY OF ST. LOUIS BECAUSE THE POLICY OF INSURANCE ISSUED BY TRINITY TO SHOP UNAMBIGUOUSLY ASSIGNED SHOP'S CLAIMS FOR DAMAGES AGAINST HAROLD BECK, THE CITY OF ST. LOUIS, AND THE SHERIFF'S DEPARTMENT OF THE CITY OF ST. LOUIS TO TRINITY IN THAT THE POLICY STATED THAT SHOP'S RIGHTS WERE "TRANSFERRED" TO TRINITY TO THE EXTENT OF ITS PAYMENT.**

Darr v. Structural Sys., Inc., 747 S.W.2d 690 (Mo.App. 1988)

General Exch. Ins. Corp. v. Young, 357 Mo. 1099, 212 S.W.2d 396 (1948)

Hoorman v. White, 349 S.W.2d 379 (Mo.App. 1961)

Steele v. Goosen, 329 S.W.2d 703 (Mo. 1959)

**II. THE TRIAL COURT DID NOT ERR IN FINDING THAT THE POLICY OF INSURANCE ISSUED BY TRINITY TO SHOP SUPPORTED AN ASSIGNMENT OF SHOP'S CLAIMS EVEN THOUGH SHOP WAS PERMITTED TO WAIVE ITS RIGHTS AGAINST CERTAIN INDIVIDUALS OR ENTITIES BOTH BEFORE AND AFTER A LOSS BECAUSE THE POLICY PERMITS SHOP TO WAIVE ITS RIGHTS AGAINST CERTAIN INDIVIDUALS OR ENTITIES ONLY UNTIL THE TIME A LOSS IS PAID AND THEREFORE THERE WERE NO WAIVER RIGHTS AFTER THE CAUSE WAS ASSIGNED TO TRINITY.**

Jos. A. Bank Clothiers, Inc. v. Brodsky, 950 S.W.2d 297 (Mo.App. 1997)

Sherwood Med. Co. v. B.P.S. Guard Servs., Inc., 882 S.W.2d 160 (Mo.App. 1994)

## III. THE TRIAL COURT DID NOT ERR IN FINDING THAT TRINITY WAS NOT ESTOPPED FROM ASSERTING THAT SHOP'S RIGHTS WERE ASSIGNED TO TRINITY BY AT TIMES ASSERTING THAT TRINITY'S RIGHTS WERE IN SUBROGATION BECAUSE ASSIGNMENT AND SUBROGATION ARE CONSISTENT THEORIES OF RECOVERY, SHOP DID NOT RELY ON TRINITY'S ASSERTIONS IN BRINGING THIS ACTION, AND SHOP DID NOT SUSTAIN ANY DAMAGE AS A RESULT OF TRINITY'S ASSERTIONS.

Brown v. State Farm Mut. Auto. Ins. Co., 776 S.W.2d 384 (Mo. banc 1989)

Hartford Accident & Indem. Co. v. J&S Sewer Constr. Co., 556 S.W.2d 206 (Mo.App. 1977)

Shahan v. Shahan, 988 S.W.2d 529 (Mo. banc 1999)

Whitney v. Aetna Casualty & Surety Co., 16 S.W.3d 729 (Mo.App. 2000)

## IV. THE TRIAL COURT DID NOT ERR IN AWARDING TRINITY THE ENTIRE $100,000.00 DEPOSITED INTO THE REGISTRY OF THE COURT BY THE CITY OF ST. LOUIS BECAUSE, EVEN IF TRINITY'S RIGHT TO RECOVER WAS BASED ONLY ON SUBROGATION, TRINITY WAS IMMEDIATELY ENTITLED TO RECOVER ITS PAYMENTS FROM THE PARTIES RESPONSIBLE FOR THE LOSS UNDER THE DOCTRINE OF SUBROGATION AND WAS FURTHER ENTITLED TO RECOVER EACH ELEMENT FOR WHICH IT PAID A CLAIM.

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

G.M. Battery & Boat Co. v. L.K.N. Corp., 747 S.W.2d 624 (Mo. banc 1988)

Mitchell v. K.C. Stadium Concessions, Inc., 865 S.W.2d 779 (Mo.App. 1993)

State ex rel. Home Serv. Oil Co. v. Hess, 485 S.W.2d 616 (Mo.App. banc 1972)

## ARGUMENT

**I. THE TRIAL COURT DID NOT ERR IN AWARDING TRINITY THE ENTIRE $100,000.00 DEPOSITED INTO THE REGISTRY OF THE COURT BY THE CITY OF ST. LOUIS BECAUSE THE POLICY OF INSURANCE ISSUED BY TRINITY TO SHOP UNAMBIGUOUSLY ASSIGNED SHOP'S CLAIMS FOR DAMAGES AGAINST HAROLD BECK, THE CITY OF ST. LOUIS, AND THE SHERIFF'S DEPARTMENT OF THE CITY OF ST. LOUIS TO TRINITY IN THAT THE POLICY STATED THAT SHOP'S RIGHTS WERE "TRANSFERRED" TO TRINITY TO THE EXTENT OF ITS PAYMENT.**

"The interpretation of the meaning of an insurance policy is a question of law." Goza v. Hartford Underwriters Ins. Co., 972 S.W.2d 371, 373 (Mo.App. 1998). Where the case is submitted on stipulated facts, the only question addressed by the appellate court is whether the trial court drew the proper legal conclusions from the facts stipulated. Goza, 972 S.W.2d at 373; Hadel v. Board of Educ. of Sch. Dist. of Springfield, 990 S.W.2d 107, 111 (Mo.App. 1999). The facts will be deemed to have been determined in accordance with the trial court's decision if there are disputes among those facts. Hadel, 990 S.W.2d at 111. The trial court's

"judgment will be affirmed if the result reached is correct on any tenable basis." Id.

The standard of review and rules for determining the existence of an ambiguity in an insurance policy are set forth in Learfield Communications, Inc. v. Hartford Accident & Indem. Co., 837 S.W.2d 299, 300 (Mo.App. 1992). The determination as to whether the language of a policy is ambiguous is a question of law for the trial court. Id. The appellate court will then review the policy itself to determine if the trial court erred in interpreting the policy as unambiguous. Id. The language will be deemed to be ambiguous if it is "fairly susceptible of two interpretations." Id. (quoting English v. Old Am. Ins. Co., 426 S.W.2d 33, 36 (Mo. 1968)). If there is no ambiguity, the plain meaning of the policy controls. Id.

"The firmly established rule in Missouri . . . is that when an insurer pays a property loss, then its right to maintain suit against the tort-feasor depends upon whether it receives from the insured an assignment of the whole claim as compared with merely rights of subrogation." State Farm Mut. Auto. Ins. Co. v. Jessee, 523 S.W.2d 832, 834 (Mo.App. 1975). See also Farmers Ins. Co. v. Effertz, 795 S.W.2d 424, 426 (Mo.App. 1990). If the right to recover is assigned to the insurer, then the insurer has the exclusive right to recover against the responsible parties. Jessee, 523 S.W.2d at 834. This is true even where the insurer pays less than the entire property loss. Steele v. Goosen, 329 S.W.2d 703, 710-11 (Mo. 1959);

General Exch. Ins. Corp. v. Young, 357 Mo. 1099, 1107, 212 S.W.2d 396, 400-01 (1948); Hoorman v. White, 349 S.W.2d 379, 380 (Mo.App. 1961). It is also irrelevant that the document granting the assignment limits the insurer's rights to the extent of the amount paid under its policy. Steele, 329 S.W.2d at 711-12; Hoorman, 349 S.W.2d at 379-80.

"The word 'assignment' has a comprehensive meaning, and in its most general sense is a transfer or making over to another of the whole of any property, real or personal, in possession or in action, or of an estate or right therein." Kroeker v. State Farm Mut. Auto. Ins. Co., 466 S.W.2d 105, 109 (Mo.App. 1971). There is no express language required to establish a valid assignment of a right. Darr v. Structural Sys., Inc., 747 S.W.2d 690, 693 (Mo.App. 1988); Greater Kansas City Baptist & Community Hosp. Ass'n v. Businessmen's Assurance Co., 585 S.W.2d 118, 119 (Mo.App. 1979). Instead, an assignment is created "when one party ***transfers*** to another 'all or part of one's property, interest, or rights.'" Hagar v. Wright Tire & Appliance, Inc., 33 S.W.3d 605, 610 (Mo.App. 2000); Ford Motor Credit Co. v. Allstate Ins. Co., 2 S.W.3d 810, 812 (Mo.App. 1999) (emphasis added). See also Kroeker, 466 S.W.2d at 109.

Section I of the Commercial Property Conditions contains language that operates as an assignment of Shop's right of recovery to Trinity. The provision expressly states that Shop's rights are "transferred" to Trinity. This is precisely the

type of language necessary to create a valid assignment. The language is unambiguous and carries the exact same meaning as if the term "assigned" were to have been used. Shop therefore assigned its right to recover for the damages paid by Trinity, and Trinity is the only party entitled to bring an action to recover those damages.

Shop contends that Section I of the Commercial Property Conditions merely grants a right of subrogation to Trinity. Shop relies on Holt v. Myers, 494 S.W.2d 430 (Mo.App. 1973), in arguing that Section I does not create an assignment because the term "assignment" is not used, because Section I purportedly fails to transfer Shop's "causes of action," and because Shop's rights are transferred "to the extent of . . . payment." However, Shop's reliance on Holt is misplaced.

In Holt, the purported assignment clause expressly stated that the insured "subrogates" the insurer to the insured's rights, claims, and interests. 494 S.W.2d at 436 n.3. In addition, the St. Louis District Court of Appeals found that since the insured agreed not to settle or release anyone found to be responsible for the loss without the written consent of the insured, the insurer recognized that the legal right of action remained with the insured and therefore the insurer was only subrogated to that right. Id. at 438.

The assignment clause in Trinity's Policy does not state that Trinity is subrogated to the rights of Shop, but instead states that Shop has "transferred" its

rights to Trinity. More importantly, Shop cannot waive its rights against another party at the time of loss unless that party is so closely related to Shop that the party is an insured under the Policy, either owns or is owned by Shop, or is a tenant. As Shop recognizes on page 25 of its Brief, it would not sue such a party, which would include a parent company, subsidiary, tenant, or someone else insured by the Policy. Therefore, any right of recovery would be against a party toward whom Shop had no waiver rights. This clearly indicates that after a loss, the parties intended that the right to recover was to become Trinity's because Shop would no longer control the disposition of that right against a party from whom recovery would ultimately be sought.

Shop is also incorrect in arguing that Trinity did not receive an assignment of Shop's rights because the term "assign" does not appear in the assignment clause. The Commercial Property Conditions portion of the Policy indicates that Shop "transferred" its rights to recover damages to Trinity. An assignment is defined as "a ***transfer*** or making over to another of the whole of any property, real or personal, in possession or in action, or of an estate or right therein." Kroeker, 466 S.W.2d at 109 (emphasis added). Even those cases cited by Shop indicate that an assignment is created when there is a ***transfer*** of one's property, interest, or rights. Hagar, 33 S.W.3d at 610 (Mo.App. 2000); Ford Motor Credit Co., 2 S.W.3d at 812.

Moreover, while no express language is required to create a valid assignment, the Missouri Supreme Court has indicated that the terms "assign" and "transfer" are synonymous and interchangeable. Steele, 329 S.W.2d at 711. In that case, an assignment was created where there was language in the relevant clause indicating that "the insured hereby assign[s] and transfer[s] . . ." its right to the insurer. Id. at 711. This was true where the clause indicated that the insurer was "subrogated" to the insured's claims and demands. Id. The fact that Shop "transferred" its rights to Trinity clearly and unambiguously indicates an assignment of those rights even without the express use of the term "assign."

Shop is also misplaced in its contention that Trinity has not received an assignment of Shop's right of recovery because the assignment clause does not specifically state that Shop has transferred its "causes of action" to Trinity. Valid assignments have been established without the express assignment of a "cause of action" in the assignment itself. Steele, 329 S.W.2d at 711; General Exch. Ins. Corp.,, 357 Mo. at 1102-03, 212 S.W.2d at 397-98.

Even assuming a party is required to transfer its "causes of action" to create a valid assignment, the language contained in Section I of the Commercial Property Conditions is sufficient to transfer those "causes of action." Simply stated, "[a] cause of action is a ***right*** which the law gives and which the law will enforce, a ***right to recover something*** from another." Universal Oil Products Co.

v. Standard Oil Co., 6 F. Supp. 37, 39 (W.D.Mo. 1934) (emphasis added), aff'd, German v. Universal Oil Products Co., 77 F.2d 70 (8th Cir. 1935). See also Stewart v. Shanahan, 277 F.2d 233, 236 (8th Cir. 1960); Miller v. Munzer, 251 S.W.2d 966, 970 (Mo.App. 1952). By the terms of Section I, Shop's "rights to recover damages from another . . ." are transferred to Trinity. By definition, Shop has assigned its "causes of action" to Trinity. Thus, to the extent there is a requirement that an assignment clause state that an insured transfers its "causes of action" to an insurer, this requirement has been met in Trinity's Policy.

Finally, Shop is misguided in its allegation that there is no assignment because Shop's right to recover is transferred to Trinity only "to the extent of [Trinity's] payment." In Steele, the insurer was "subrogated . . . to the extent of the amount paid hereby." 329 S.W.2d at 711. In Hoorman, the insurer was similarly "subrogated . . . to the amounts so paid . . ." following payment of a claim by the insurer. 349 S.W.2d at 379. In both cases, the courts held that an assignment was created. Steele, 329 S.W.2d at 711-12; Hoorman, 349 S.W.2d at 380.

Moreover, a valid assignment can exist even where the insurer pays less than the entire property loss. Steele, 329 S.W.2d at 710-11; General Exch. Ins. Corp., 357 Mo. at 1107, 212 S.W.2d at 400-01; Hoorman, 349 S.W.2d at 380. In both Steele and Hoorman, there was a valid assignment of the insured's claim despite

the fact that the term "subrogated" was used and despite the fact that the insurer was only subrogated to the extent of its payment. Accordingly, there is an unambiguous assignment of Shop's right of recovery in this case even though Shop's rights are transferred to the extent of Trinity's payment.

Shop claims that the language contained in the Policy is ambiguous as to whether Trinity's rights arise by assignment or subrogation. Shop argues that where there is an ambiguity in an insurance policy, the language must be construed against the party drafting the policy. Accordingly, Shop contends that the Policy must be construed against Trinity so that its rights are only those of subrogation.

However, the Policy is not ambiguous and clearly reflects that Shop assigned its rights to Trinity. "When interpreting the language of an insurance policy, [the Missouri Supreme Court] gives a term its ordinary meaning, unless it plainly appeared that a technical meaning was intended." Farmland Indus., Inc. v. Republic Ins. Co., 941 S.W.2d 505, 508 (Mo. banc 1997). A word's ordinary meaning is the meaning that would be given to it by a layperson and not necessarily the meaning that would be given by the persons that drafted the policy. Farmland Indus., 941 S.W.2d at 508; Adams v. Covenant Sec. Ins. Co., 465 S.W.2d 32, 34 (Mo.App. 1971). Where there is no ambiguity in the language of an insurance policy, extrinsic evidence should not be used to show the intentions of the parties. Spellman v. Sentry Ins., 66 S.W.3d 74, 76-77 (Mo.App. 2001);

Daniels Express & Transfer Co. v. GMI Corp., 897 S.W.2d 90, 92 (Mo.App. 1995).

The Missouri Supreme Court consults English language dictionaries to determine a word's ordinary meaning. Farmland Indus., 941 S.W.2d at 508. Webster's Ninth New Collegiate Dictionary defines "transfer" as a "conveyance of right, title, or other interest in real or personal property from one person to another." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 1253 (1st ed. 1983). "Assign" is similarly defined as "to transfer (property) to another. . . ." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 109 (1st ed. 1983).

Black's Law Dictionary defines the term "transfer" in part as "[t]he ***assignment*** or conveyance of property, including an instrument or document, that vests in the transferee such rights as the transferor had therein." BLACK'S LAW DICTIONARY 1497 (6th ed. 1990). On the other hand, the term "subrogate" means "to put in the place of another," whereas "subrogation" is "the assumption by a third party (as a second creditor or an insurance company) of another's legal right to collect a debt or damages." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 1175 (1st ed. 1983).

By the terms of the Commercial Property Conditions, Shop's rights to recover damages from another were "transferred" to Trinity upon payment of a claim. There is no indication that any technical meaning of the term "transferred"

was intended by Trinity. The word was merely used to indicate that Trinity was entitled to recoup payments it made to Shop from the responsible parties. Accordingly, the Court should look to the ordinary meaning of the term "transferred" to determine whether its use in the policy created an ambiguity.

The ordinary meaning of the word "transfer" is simply the "assignment" of property that vests in the transferee such rights as the transferor had in that property. The fact that others might have used the word "subrogation" when referring to Trinity's right of recovery is irrelevant as the ordinary meaning of "transferred" controls. Moreover, the fact that Trinity at any time referred to its rights in terms of subrogation is irrelevant because the language of the policy is unambiguous. Since there is no ambiguity in the use of the term "transferred," the term cannot be construed against Trinity as creating only a right of subrogation.

Shop argues that as an unsophisticated party, it relied upon the policy interpretation supplied by Trinity and that therefore only a right of subrogation was created. Shop also claims that the parties agreed that the Policy created a right of subrogation from December 12, 1997, through November 16, 1999, when Shop contends that "Trinity changed its theory that the same language it had construed as granting subrogation rights should then be interpreted as granting assignment rights." Again, when the language of an insurance policy is unambiguous, the

conduct of the parties should not be examined in construing the provisions of the policy.

Furthermore, Shop's contention that it was an unsophisticated party up against "a conglomerate of insurance companies" ignores what truly happened in this case. As the trial court correctly found, the Policy language was equally available to both Shop and Trinity. (L.F. at 60.) Shop retained an attorney and filed suit in this case on January 10, 1998. The trial court also concluded that at that time, Trinity had yet to make any statements regarding assignment or subrogation rights other than those set forth in the Policy and had not asserted any subrogation rights or taken any actions inconsistent with the Policy language. (L.F. at 59-60.)

To the extent there is a dispute as to when suit was filed and these statements were made, the facts will be deemed to have been determined in accordance with the trial court's decision. Shop cannot now claim that it was misguided by Trinity's use of the term "subrogation" in describing its recovery rights when legal counsel had every opportunity to determine the meaning of the Policy before Trinity made any statements regarding its rights or the rights of Shop under the Policy.

Furthermore, Shop is misplaced in its statement that the parties agreed that the relevant Policy language granted Trinity a right of subrogation. Even assuming

Trinity believed that it had subrogation rights, Shop was of the opinion that Trinity did not even have these rights until long after suit was filed. As late as July 2, 1999, Shop's attorney asserted that Trinity's subrogation claim was "unsubstantiated." (L.F. at 115.) Later, Shop's attorney withdrew all offers with respect to the division of the City's $100,000.00 limits in reasserting Shop's position that Trinity was not entitled to any part of the proceeds. (L.F. at 111, 126.) Shop certainly cannot claim to have been mislead into thinking that Trinity's rights were only in subrogation when its conduct clearly shows otherwise. Nevertheless, the parties' conduct in construing the Policy is of no consequence since the "transfer" language unambiguously assigned Shop's rights to Trinity.

Finally, Shop submits that the use of the term "transfer" is as consistent with "assignment" as with "subrogation," thereby creating an ambiguity in the Policy's meaning. In making this argument, Shop extrapolates the description of subrogation in Holt, using the definition of the term "pass" found within that description to assert that because "transfer" is used to define "pass," "transfer" can be used to define both "assignment" and "subrogation."

Such convoluted reasoning ignores the plain English language definitions found in Webster's Ninth New Collegiate Dictionary that would be relied upon by the Missouri Supreme Court. Webster's expressly uses the term "transfer" in the definition of "assignment." "Transfer" is nowhere to be found in the definitions of

either "subrogate" or "subrogation." In keeping with its "unsophisticated party" argument, it seems unreasonable to imagine that Shop would be required to reference various words in a dictionary to determine the meaning of "assignment" or "subrogation" when the English language definitions are clear and concise.

Other jurisdictions have similarly found that the use of the word "transferred" did not create an ambiguity that made an assignment ineffective. In Cole v. Barlar Enters., Inc., 35 F. Supp. 2d 891, 894 (M.D. Fla. 1999), the United States District Court for the Middle District of Florida was presented with the question as to whether an insurance policy effectively assigned funds from a judgment in favor of the insureds to their insurance company. The assignment provision provided that

> [i]f 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.

Id. The Court held that the phrase "those rights *are* transferred to us" was not ambiguous and created a valid assignment because there was an intent to transfer ownership. Id.

In this case, Section I of the Commercial Property Conditions is almost identical to the provision discussed in Cole. Shop's rights were transferred to Trinity and Shop was prohibited from impairing those rights. Moreover, the provision in Cole created an assignment even where partial payment was made, which is similar to this case in which Shop's rights were assigned to Trinity to the extent of Trinity's payment. There is no ambiguity as to the meaning of the term "transferred" in the Policy.

Furthermore, the relevant provision in Cole allowed the insured to bring suit if requested by the insurer, which arguably indicates that the insurer could choose between subrogation and assignment in exercising its right. Still, the Court found no ambiguity in the provisions of the policy. There is no such option in Trinity's Policy; the right to recover from the responsible party is conclusively and unambiguously transferred and assigned to Trinity.

Shop has "transferred" and therefore assigned to Trinity its "rights to recover damages from another. . . ." There is no ambiguity in the use of the term "transferred," even where Trinity's right to recover damages from another is characterized as a right of subrogation. By definition, Shop has assigned its "causes of action" to Trinity as the phrase "cause of action" is synonymous with a "right to recover." The fact that the phrase "cause of action" is not explicitly contained in the assignment clause does not render the clause inoperable as an

assignment. Once a loss occurs, Shop cannot waive its rights against another party against whom recovery would be sought, an indication that the prosecution of a cause of action belongs to Trinity. The "TRANSFER OF RIGHTS OF RECOVERY AGAINST OTHERS TO US" operates as a valid assignment of Shop's rights to Trinity, and the trial court properly concluded that Trinity was entitled to the entire $100,000.00 deposited into the registry of the court.

## II. THE TRIAL COURT DID NOT ERR IN FINDING THAT THE POLICY OF INSURANCE ISSUED BY TRINITY TO SHOP SUPPORTED AN ASSIGNMENT OF SHOP'S CLAIMS EVEN THOUGH SHOP WAS PERMITTED TO WAIVE ITS RIGHTS AGAINST CERTAIN INDIVIDUALS OR ENTITIES BOTH BEFORE AND AFTER A LOSS BECAUSE THE POLICY PERMITS SHOP TO WAIVE ITS RIGHTS AGAINST CERTAIN INDIVIDUALS OR ENTITIES ONLY UNTIL THE TIME A LOSS IS PAID AND THEREFORE THERE WERE NO WAIVER RIGHTS AFTER THE CAUSE WAS ASSIGNED TO TRINITY.

Shop contends that the waiver rights provided by the "TRANSFER OF RIGHTS OF RECOVERY AGAINST OTHERS TO US" portion of the Policy fails to completely divest Shop of all rights to recover damages from another after a loss. Specifically, the relevant Policy language indicates that Shop

> may waive [its] rights against another party in writing:
>
> 1. Prior to a loss to [Shop's] Covered Property or Covered Income.
> 2. After a loss to [Shop's] Covered Property or Covered 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

c. Your tenant.

This will not restrict your insurance.

Shop argues that since the Policy indicates a retention of some waiver rights after a loss, the "transfer" language contained in the Policy is consistent with subrogation and not assignment.

At the outset, it does not appear that Shop argues that any waiver rights it has before a loss have any impact on whether the Policy language creates an assignment of its right to recover damages after a loss. To the extent that Shop does make this argument, it should be noted that prior to a loss and payment thereon, no payment will in fact have been made by Trinity under the Policy and therefore the "transfer" provision is inapplicable. Instead, the provision is triggered only when Trinity makes payment pursuant to the Commercial Property Conditions. Whether Shop retains any waiver rights prior to a loss does not affect the assignment of Shop's rights after payment. Furthermore, Shop did not exercise any pre-loss waiver rights prior to December 11, 1997. With respect to this case specifically, those rights are therefore irrelevant.

Shop does takes issue with respect to whether the waiver rights set forth in the Policy after a loss negate the assignment language contained in the Policy. Extensive research of case law from Missouri and other jurisdictions fails to disclose any cases construing a provision in a policy with waiver rights such as those contained in the Policy issued to Shop by Trinity as creating assignment rights or subrogation rights.

However, as the majority opinion from the Eastern District Court of Appeals correctly noted, Shop's waiver rights only exist up until the time that payment is made for a loss. As soon as payment is made, the "transfer" language in the policy applies and operates as an unambiguous assignment of Shop's rights. At that very instant, Shop's waiver rights are extinguished. Shop is misguided in arguing that its post-loss waiver rights are rendered meaningless by construing the Policy as creating an assignment because Shop maintains those rights prior to the time payment is made and any rights under the policy are assigned. Since the language in the Policy clearly and unambiguously operates to assign Shop's rights to Trinity upon payment of a loss, Shop is unable to waive any rights after that payment because no rights are retained.

Shop also argues that the existence of a similar "transfer" provision contained in the Commercial General Liability Conditions of the Policy that requires Shop to bring suit or transfer its right "to recover all or part of any

payment made under [the Commercial General Liability Conditions] . . .” indicates that the “transfer” language in the Commercial Property Conditions was not intended to divest completely Shop’s rights under the Policy. Trinity would note that the “transfer” provision contained in the Commercial General Liability Conditions does not contain the words “assign” or “assignment,” yet Shop states at page 21 of its Brief that the sentence allowing Trinity to request Shop to “transfer” its rights “makes it clear that an assignment takes place. . . .” Shop therefore concedes that the use of the term “transfer” in the Commercial Property Conditions operates as an assignment of its rights despite the absence of the terms “assign” or “assignment” and that the use of those terms is not necessary to create an assignment.

Moreover, the “transfer” language contained in the Commercial General Liability Conditions is irrelevant to this case because payment was not made under that Coverage Part. Shop argues that it would be unnecessary to include the assignment language in the Commercial General Liability Conditions if the Commercial Property Conditions accomplished the assignment. However, in looking carefully at the declarations pages attached to the Policy, different forms apply to the Commercial Property Coverage and Commercial General Liability

Coverage under the Policy.[1] When payment is made under the Commercial Property Coverage, the terms of the Commercial General Liability Coverage do not affect rights after that payment, and vice versa. Therefore, Shop's attempt to compare and contrast the language contained in the Commercial General Liability Conditions and Commercial Property Conditions to argue that the latter is excluded from creating an assignment is misguided.

The limited number of parties to whom Shop's waiver rights apply after a loss also bolsters the argument that the "transfer" provision in the Commercial Property Conditions creates an assignment and not subrogation. Shop correctly notes on page 25 of its Brief that Trinity would have limited subrogation rights against these parties, which would include a "parent company, subsidiary, tenant, or someone else insured by the policy. . . ." This is because these parties would all be considered coinsureds under the Policy. Missouri applies the "no subrogation" rule in holding that an insured may not subrogate against a coinsured under a

[1] The only form the two Coverage Parts have in common is form IL 02 74 8/90, which governs cancellation and nonrenewal under the Policy. Since this form has nothing to do with payment of a loss, the "transfer" provisions of the Commercial Property Conditions and Commercial General Liability Conditions are not activated with respect to any of the provisions contained in form IL 02 74 8/90 and any discrepancy between the two is irrelevant.

policy whose negligent act causes a loss absent design or fraud on the part of the coinsured. Jos. A. Bank Clothiers, Inc. v. Brodsky, 950 S.W.2d 297, 302 (Mo.App. 1997); Sherwood Med. Co. v. B.P.S. Guard Servs., Inc., 882 S.W.2d 160, 162 (Mo.App. 1994).

In this case, if Trinity's rights were only in subrogation, it would not be able to recover against Shop's parent company, subsidiary, tenant, or other coinsured under the Policy. Therefore, the Policy language entitling Shop to waive its rights against these parties after a loss would be meaningless, regardless of whether these rights were exercised. On the other hand, if Shop assigned its rights to Trinity, these waiver rights would be effective against the coinsureds under the Policy, at least until the time payment was made and an assignment completed, because Trinity would be able to proceed against these coinsureds to the extent one or more of them was responsible for a loss. What Trinity has ultimately done in the Policy issued to Shop is to apply the "no subrogation" rule to a situation where its insured's rights are assigned to it. The only way to give any meaning to this provision is to construe the "transfer" language in the Policy as creating assignment rights.

The fact that Shop maintains waiver rights pursuant to the "transfer" language of the Policy does not defeat the clear and unambiguous assignment created in favor of Trinity. Any such rights prior to payment of a loss do not affect

the fact that Shop's rights are assigned because the "transfer" provision of the policy is only triggered once payment is made. While limited waiver rights are retained after a loss, once payment is made, the assignment is finally effectuated and those rights expire. Moreover, in order to give any meaning to those waiver rights, the Policy must be construed as creating an assignment of Shop's rights because Trinity could not otherwise subrogate against the parties toward whom those waiver rights apply. Therefore, a valid assignment has been created and Trinity is entitled to the entire $100,000.00 deposited in the court registry by the city of St. Louis.

## III. THE TRIAL COURT DID NOT ERR IN FINDING THAT TRINITY WAS NOT ESTOPPED FROM ASSERTING THAT SHOP'S RIGHTS WERE ASSIGNED TO TRINITY BY AT TIMES ASSERTING THAT TRINITY'S RIGHTS WERE IN SUBROGATION BECAUSE ASSIGNMENT AND SUBROGATION ARE CONSISTENT THEORIES OF RECOVERY, SHOP DID NOT RELY ON TRINITY'S ASSERTIONS IN BRINGING THIS ACTION, AND SHOP DID NOT SUSTAIN ANY DAMAGE AS A RESULT OF TRINITY'S ASSERTIONS.

Shop contends that Trinity is prohibited from asserting that Shop assigned its right of recovery to Trinity because Trinity at times asserted that its rights were those of subrogation. Shop appears to analogize its argument with the general rule that an insurance company may not assert a specific defense to an insured's claim, then later assert an inconsistent defense to that claim. Shop also argues that the policy is ambiguous and must be construed against the interests of Trinity because Trinity first construed the Policy as creating subrogation rights and later asserted that Shop's rights were assigned to Trinity. Shop further maintains that it relied on Trinity's assertion and that it would not have joined Mr. Beck, the city of St. Louis,

and the Sheriff's Department of the City of St. Louis in its lawsuit had it believed that Trinity's rights arose by assignment.[2]

As Trinity has set forth in Point I of its Brief, the Policy clearly and unambiguously transferred and assigned Shop's right of recovery to Trinity. Where an insurance policy's language is unambiguous, the factfinder is prohibited from considering extrinsic evidence to determine the intentions of the parties with respect to that language. Spellman, 66 S.W.3d at 76-77; Daniels Express & Transfer Co., 897 S.W.2d at 92. Therefore, Trinity's characterization of its rights under the Policy is immaterial to the determination of whether the "transfer" language of the Policy operated as an assignment of Shop's rights or only granted Trinity the right of subrogation.

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[2] At page 36 of its Brief, Shop states that "[f]ollowing the filing of Trinity's Motion to Intervene on the basis of its subrogation right (LF 297) and denial of the motion (LF 296), [Shop] added the Sheriff's Department of the City of St. Louis as a defendant (LF 282)." This misstates the facts of this case. Shop's Second Amended Petition, in which the Sheriff's Department of the City of St. Louis was added as a Defendant, was filed October 16, 1998. Trinity's Motion to Intervene was not filed until September 1, 1999, and was denied on October 14, 1999, almost a year after the Second Amended Petition was filed.

Assuming that the conduct of Trinity in characterizing its rights under the Policy is relevant, the doctrine of estoppel is still inapplicable to this case. Under Missouri law,

> estoppel requires "(1) an admission, statement, or act inconsistent with the claim afterwards asserted and sued upon, (2) action by the other party on the faith of such admission, statement, or act, and (3) injury to such other party, resulting from allowing the first party to contradict or repudiate the admission, statement, or act."

Brown v. State Farm Mut. Auto. Ins. Co., 776 S.W.2d 384, 386 (Mo. banc 1989) (quoting Mississippi-Fox Drainage Dist. v. Plenge, 735 S.W.2d 748, 754 (Mo.App. 1987)). In the case of an insurance company asserting a defense to a claim, the insured is required to show that a subsequently asserted defense is inconsistent with the initial defense. Shahan v. Shahan, 988 S.W.2d 529, 534 (Mo. banc 1999); Whitney v. Aetna Casualty & Surety Co., 16 S.W.3d 729, 733 (Mo.App. 2000). The mere filing of a lawsuit is not sufficient to establish that an insured has been prejudiced by the assertion of a subsequent defense. Shahan, 988 S.W.2d at 534.

Trinity would note that Shop has been unable to cite a single case that indicates an insurer is estopped from asserting that it was assigned its insured's right of recovery after claiming that its rights arose by subrogation. Needless to

say, estoppel in the context of asserting a defense to a claim is not the same as the assertion of a right to recover proceeds paid to an insured as the denial of a claim affects the insured's rights whereas the right to recover payment made to an insured, whether obtained through assignment or subrogation, rests solely with the insurer. It is only the party in whose name the right is to be asserted that differs. In either case, the right to recover belongs to the insurer.

Even if equitable estoppel were applicable to this case, Shop cannot establish any of the elements necessary to invoke the doctrine. Trinity is not prohibited from asserting an assignment even after initially contending that its right to recover was merely one of subrogation. The terms "assignment" and "subrogation" are often used interchangeably in policies of insurance, and an assignment can arise even where the term "subrogation" is present. Steele, 329 S.W.2d at 711; Hoorman, 349 S.W.2d at 379.

The terms are also used interchangeably when Courts of this state refer to an insurer's right of recovery. The St. Louis District Court of Appeals, in interpreting General Exch. Ins. Corp. v. Young, found that "the release and ***assignment*** in that case clearly showed that the parties to the contract of insurance intended that the insurer be ***subrogated*** to the rights of the insured." Hartford Accident & Indem. Co. v. J&S Sewer Constr. Co., 556 S.W.2d 206, 208 (Mo.App. 1977) (emphasis added). Other jurisdictions similarly note that "a subrogation agreement is

equivalent to an assignment." Rohner, Gehrig & Co. v. Capital City Bank, 655 F.2d 571, 579 (5th Cir. 1981). It follows that the terms are not inconsistent, especially considering that the basis of each is the right of the insurer to recover for payments made to the insured pursuant to the insurer's contractual obligations.

Shop itself concedes at page 17 of its Brief that the terms "assignment" and "subrogation" are consistent when it argues that the use of the term "transfer" is applicable to either theory of recovery. Shop cannot claim on one hand that the theories are consistent when arguing that the term "transfer" is ambiguous while at the same time arguing that they are inconsistent for estoppel purposes. Although there is a difference between "assignment" and "subrogation" with respect to the party in whose name a claim may be asserted, the ultimate outcome in either situation is the same: the party paying the loss is entitled to reimbursement from the responsible party either in that party's own name our through the party to whom payment is made. There is no inconsistency in asserting a right to recover that payment as either an assignment or subrogation.

By similar reasoning, Trinity has not acted against its interests in initially asserting that it had subrogation rights while later claiming that it had assignment rights. In either situation, the goal was to recover the payments made to Shop from the parties responsible for the damage to Shop's building and business. Whether Shop couched its recovery rights in terms of subrogation or assignment, which are

consistent and interchangeable terms according to Missouri Courts, the end result was recoupment of its payment from Ms. Farmer, the city of St. Louis, the Sheriff's Department of the city of St. Louis, and Mr. Beck. The only difference in the accomplishment of this recovery was whether Trinity's claim was to be prosecuted in its own name or in Shop's name.

Shop has cited Lake St. Louis Community Ass'n v. Ravenwood Properties, Ltd., 746 S.W.2d 642 (Mo.App. 1988), and Miskimen v. Kansas City Star Co., 684 S.W.2d 394 (Mo.App. 1984), in arguing that Trinity should be estopped from asserting that Shop assigned its rights after Trinity claimed that Trinity acquired a right of subrogation. Ravenwood Properties involved a community association asserting that a subdivision was not bound by restrictive covenants after having acted inconsistently in the past by assessing and collecting a variety of fees and by requiring complete compliance with the association's Architectural Review Board. 746 S.W.2d at 646-47. In Miskimen, the court held that the Kansas City Star was estopped from taking the position that contracts with its carriers were terminable at will after having recognized a continuing property interest in those contracts for ninety years. 684 S.W.2d at 401.

Ravenwood Properties and Miskimen are clearly distinguishable from this case in that neither discusses an insurer's interpretation of the terms and provisions of its policies of insurance, much less the difference between assignment and

subrogation. Shop appears to cite these cases for general statements of law regarding the doctrine of equitable estoppel and urges this Court to rely on them without giving any indication as to how the holdings are applicable to Shop's claim. In fact, the cases are not analogous to this action and do not support Shop's position that Trinity is estopped from asserting an assignment.

The most damaging aspect to Shop's claim that Trinity should be estopped from asserting an assignment is the fact that Shop at no time relied upon Trinity's claim that it was subrogated to Shop's rights. Shop claims that it would not have brought and pursued this lawsuit had it known Trinity would be able to claim a complete assignment. This contention contradicts Trinity's activity in prosecuting this claim as well as its position as to Trinity's right of recovery to this very day.

Shop claims in its Brief that Trinity's Property Loss Notice dated December 12, 1997 (L.F. at 133), indicates an intent to assert subrogation rights against the parties responsible for the loss. Shop also claims that an Affidavit submitted by Mr. Hinds, to which Trinity did not stipulate, establishes that Trinity Claim Representative Jerry Hickman was advised between the date of loss and January 10, 1998, that suit would be filed.

Shop concedes at page 35 of its Brief that the first notice it received that Trinity was beginning the process of recovering its payments from the responsible parties was at the earliest May 5, 1998. On January 10, 1998, almost four months

prior to this notice, Shop initiated this action. Shop cannot claim that it relied on Trinity's subrogation claim in filing suit in its own name when, by its own admission, suit was filed before any claim of subrogation was made.

Moreover, the facts found by the trial court, which are deemed to have been determined in accordance with the trial court's decision if there are disputes among those facts, indicate that suit was filed before Trinity asserted any right of recovery. In reviewing the Property Loss Notice referenced by Shop, it is clear that the writing pertaining to subrogation is different than the remainder of the writing on the Notice. The trial court was provided with this Notice by Shop and certainly took this into consideration when concluding that subrogation rights were not asserted until after suit was filed. The trial court also chose to ignore Mr. Hinds' affidavit to the extent it indicates Mr. Hickman or anyone else on behalf of Trinity took action inconsistent with a right of assignment at any time prior to January 10, 1998. Therefore, based on the trial court's own findings of fact, Shop could not have relied on any conduct on the part of Trinity in choosing to file suit in its own name.

Shop also cannot claim to have relied on any representation made by Trinity as to the interpretation of the Policy because the Policy language was equally available to Shop and its attorney. Almost fourteen months had passed between the time Shop submitted its insurance application and the time of the accident. It

has long been the law in Missouri that if an insured keeps a policy for an unreasonable length of time, he accepts the contents thereof, even where he it unable to read or understand the contents. Jenkad Enters., Inc. v. Transportation Ins. Co., 18 S.W.3d 34, 38 (Mo.App. 2000); Neuner v. Gove, 133 S.W.2d 689, 694 (Mo.App. 1939).

If the insured is unable to read or understand the terms of the policy, he may not later rely on statements by agents of the insurer without authority to bind the company concerning its provision. Neuner, 133 S.W.2d at 694. In Jenkad, which relied on the reasoning in Neuner, eight to ten weeks was deemed a sufficient amount of time to have read and examined the terms of the policy. Jenkad, 18 S.W.3d at 38. Neuner found that eight months was a reasonable amount of time to allow an insured to ascertain the terms and conditions of a policy. 133 S.W.2d at 694.

Shop had almost fourteen months to determine the terms and conditions of the Policy. The term "transferred" is equivalent to an "assignment" and there was no ambiguity in the meaning of the word. If Shop did not understand the "TRANSFER OF RIGHTS OF RECOVER AGAINST OTHERS TO US" section of the Commercial Property Conditions, it should have sought clarification of that section, particularly during the month between the time of the accident and the time suit was filed within which it retained an attorney. Shop cannot now state that

it relied on Trinity's purported interpretation of that section as creating a right of subrogation when the section unequivocally states that Shop's rights are assigned to Trinity and Shop had almost fourteen months to ascertain that meaning for itself.

Shop's argument that it relied on Trinity's assertion that it was subrogated to Shop's right of recovery is also contradictory in that Shop has consistently taken the position that Trinity had no right of recovery whatsoever for any item paid, through subrogation or otherwise. This position was confirmed as late as July 2, 1999, when Shop's attorney asserted that Trinity's subrogation claim was "unsubstantiated." (L.F. at 115.) Shop also claimed that even if Trinity had subrogation rights, it could not recover for Shop's structural damage claim because Shop was a tenant of the damaged building and could not maintain an action for that damage. (L.F. at 113-14.) Shop further states that the contents and fixtures were part of the building, and seems to believe that since it was a tenant it may not maintain an action for those items, either. (L.F. at 68, 93-94.)

Shop now concedes that Trinity may recover the $15,000.00 paid under the business income portion of the Policy, but argues that Trinity is not entitled to recover for the building and business personal property damage paid by Trinity because Shop's lawsuit does not seek recovery for those items.[3] However, until

[3] At one time, Shop conceded that Trinity was also entitled to recover for the business personal property damage claim made by Shop. (L.F. at 114.) Shop now

this appeal, Shop had also taken the position that Trinity was not even entitled to recover the amounts paid for business income loss. (L.F. at 68.)

In its Trial Brief, filed August 31, 2000, Shop argued that it was not seeking to recover any item of damage paid by Trinity. (L.F. at 93.) It added that Shop "was a tenant, and not an owner of the building at 2722 West [sic] Florissant Road, and therefore, can not bring an action for damage to the building (the cause of action for damage to the structure belonged to Ellen Keisker, who was a plaintiff in this lawsuit and settled her claim)." (L.F. at 93.) Furthermore, Shop "is seeking a judgment for the value of its business (destroyed by Defendants) based upon lost profits. Therefore, any recovery made by [Shop] will not include any of the items for which [Trinity] paid." (L.F. at 93-94.) Shop reiterated this position in its Reply to Trinity's Trial Brief. (L.F. at 68.)

There can be no subrogation until payment is made for a particular obligation for which another is liable. Shop's position, until this appeal, was that its lawsuit sought recovery for lost profits only. Shop believed its lost profits were not contained in any items of damage Trinity paid. In Shop's mind, there was the possibility of recovery for items it believed were not paid by Trinity. This is precisely why it filed suit in its own name. Shop should not now be allowed to

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appears to take the position that the right to recover for this item was not transferred to Trinity. (L.F. at 68, 93-94.)

argue that common sense would have dictated against filing suit if it had no right of recovery or that it relied on Trinity's assertion of subrogation in filing suit for any damages it does not believe Trinity could recover in the first place.

If it is Shop's position that an action may not be brought in its own name for any of the damages paid by Trinity, it certainly cannot also contend that it relied on Trinity's claim of subrogation rights in filing suit on its own because Shop did not believe such rights existed. A party cannot claim reliance on the assertion of another when that party does not believe the assertion to be true. State ex rel. Missouri-Nebraska Express, Inc. v. Jackson, 876 S.W.2d 730, 735 (Mo.App. 1994). Shop did not rely on any purported claim of subrogation made by Trinity and cannot now argue that Trinity is estopped from asserting that Shop assigned its rights.

In connection with its claim that it acted in reliance on Trinity's assertion of subrogation rights, Shop assigns error to the trial court's finding that "there is no evidence that [Trinity] intended, by asserting its subrogation rights, to cause [Shop] to maintain the action to its detriment." The trial court cited Ryan v. Ford, 16 S.W.3d 644, 651 (Mo.App. 2000), in support of its finding. Shop counters by citing Prouse v. Schmidt, 156 S.W.2d 919 (Mo. 1941), and In re Estate of Glover, 996 S.W.2d 559 (Mo.App. 1999), for a general statement of law that "intent is not a necessary element of estoppel."

It is interesting to note that two sentences later, citing directly from Prouse, Shop notes that one of the elements of equitable estoppel is that "[t]he 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." 156 S.W.2d at 921 (emphasis added). Obviously, the intent or expectation of the party, the latter of which still implies the anticipation of an outcome with a high degree of certainty, is a relevant consideration in determining the applicability of equitable estoppel. The trial court did not err in looking at Trinity's intent in determining the applicability of estoppel to this case.

The final element of a claim of estoppel is also fatal to Shop. Shop claims that it has been damaged by Trinity's purported assertion of a right of subrogation by investing time and incurring court costs, including special process server fees, filing fees, and deposition costs. Shop also alleges that Trinity allowed Shop to invest substantial time and effort for a period of two years, culminating in a settlement offer that was rejected by Trinity, before asserting that Shop's rights were assigned to Trinity.[4]

[4] The amount of time Shop claims was invested in this case is questionable based on the Court minutes. In reviewing those minutes, it appears that the first deposition notice was filed on March 15, 2000, and that the only other notice was

However, when an insurer is subrogated to the rights of its insured, the insured binds itself as a trustee to hold in trust for the benefit of the insurer any recovery in order to reimburse the insurer for its payments. Kroeker, 466 S.W.2d at 111. The insured is obligated to prosecute its cause of action diligently and to cooperate with the insurer in seeking recovery of the amounts paid. Id. Moreover, the insured must return any proceeds recovered to the insurer. Effertz, 795 S.W.2d at 426; Baker v. Fortney, 299 S.W.2d 563, 566 (Mo.App. 1957).

Quite simply, Shop did not suffer any damage if it relied on any allegation of subrogation provided by Trinity. A lawsuit filed in Shop's name would have been required and obligated Shop to assist and cooperate in the prosecution of the lawsuit, which includes the filing of the suit itself, responding to discovery, preparing the case, and attending depositions. The mere filing of a lawsuit is not sufficient to show that Shop was damaged by Trinity's alleged subrogation claim. Shop would further be required to hold in trust any recovery that did not exceed Trinity's payment of $141,609.49. Finally, the right to recover was Trinity's in the first place, and Shop cannot claim that it was damaged by the exercise of a right that did not belong to it.

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filed on October 23, 2000. This was the only trial preparation conducted other than written discovery and was well after Trinity asserted its assignment rights.

Furthermore, Trinity did not sit by idly during the pendency of Shop's suit. Trinity attempted to join Shop's lawsuit by intervention and the city of St. Louis also sought consolidation of the suit filed in Trinity's name with this action. On both occasions, Shop objected to the inclusion of Trinity in this action because it believed Trinity did not have a right to recover any of the damages being sought by Shop. Shop's argument that Trinity in some way attempted to avoid pursuing an action against the responsible parties is therefore somewhat disingenuous.

Moreover, Shop's conduct with respect to the offer made by the city of St. Louis is the very reason that Trinity sought to intervene in Shop's action. Prior to October 15, 1999, Trinity's attorneys were negotiating with Shop's attorney as to the proper division of the $100,000.00 to be deposited by the City. Based on Shop's attorney's correspondence, it was clear that he was taking the position that Trinity was entitled to none of that money. As of October 15, 1999, Trinity's attorneys were still negotiating as to the distribution of the City's limits. On that same day, Shop's attorney (and not Trinity's attorney, as Shop argues) withdrew all offers with respect to the $100,000.00, thereby precipitating Trinity's attempted intervention in this suit. Shop's argument that Trinity sat back and waited for Trinity's efforts to bear fruit is therefore inaccurate because Trinity was

negotiating in good faith up until the time it became evident that Shop would take steps to block Trinity from recovering anything.[5]

Shop has failed to establish that the doctrine of equitable estoppel should be applied. The terms "assignment" and "subrogation" are not inconsistent theories as both pertain to the right of the insurer to recover for payments made to the insured pursuant to the insurer's contractual obligations. Shop did not rely on any assertion by Trinity that its rights were only in subrogation in that Shop did not believe Trinity had any right of recovery in the first place and furthermore did not believe that Trinity could assert a claim for any damages sought in this lawsuit. Finally, Shop cannot claim that it was damaged by allowing Trinity to assert that Shop assigned its rights to Trinity because Trinity is ultimately entitled to any amounts ultimately obtain from the at-fault parties. Since Shop cannot establish

[5] Shop's efforts to keep Trinity from recovering from the responsible parties is especially evident given the fact that Shop settled separately with Ms. Farmer for $6,000.00 of her $25,000.00 policy limits after withdrawing all offers with respect to the City's liability limits. This was a clear violation of the terms and conditions of the Policy, which required Shop to "do nothing after loss to impair [Trinity's rights]," and quite possibly precludes Trinity from making an additional claim against Ms. Farmer should Trinity be found to have only subrogation rights.

any element required to invoke the principle of estoppel, Trinity is not prohibited from asserting that Shop's rights were assigned.

## IV. THE TRIAL COURT DID NOT ERR IN AWARDING TRINITY THE ENTIRE $100,000.00 DEPOSITED INTO THE REGISTRY OF THE COURT BY THE CITY OF ST. LOUIS BECAUSE, EVEN IF TRINITY'S RIGHT TO RECOVER WAS BASED ONLY ON SUBROGATION, TRINITY WAS IMMEDIATELY ENTITLED TO RECOVER ITS PAYMENTS FROM THE PARTIES RESPONSIBLE FOR THE LOSS UNDER THE DOCTRINE OF SUBROGATION AND WAS FURTHER ENTITLED TO RECOVER EACH ELEMENT FOR WHICH IT PAID A CLAIM.

As an aside, Shop requests in Point III of its Brief that this Court determine the extent of Trinity's subrogation interest if in fact the Court finds that Shop's rights were not assigned to Trinity. Shop argues that since it was a tenant of the building located at 2722 North Florissant, an action cannot be brought for damage to the building and the contents thereof, which were fixtures and therefore part of the building, despite the fact that Trinity paid for these items under the building and personal property coverages of the Policy. Shop also contends that Trinity's recovery should be reduced by Shop's attorney's fees and litigation expenses incurred in bringing this action for the supposed "benefit" of Trinity. Finally, Shop argues that Trinity's recovery should be reduced by the percentage to which the city of St. Louis' liability limits reduce Shop's recovery.

Where an insured makes a property damage claim and all pertinent information pertaining to the value of the insured's loss has not been submitted at trial, the appellate court is authorized to remand the cause to determine the extent of the insured's damages. Franklin v. Farmers Mut. Ins. Co., 627 S.W.2d 110, 113 (Mo.App. 1982); Brown v. Shield Fire Ins. Co., 260 S.W.2d 337, 338-39 (Mo.App. 1953). This rule also applies when the insured sustains a partial loss in his property. American Family Mut. Ins. Co. v. Doug Rose, Inc., 841 S.W.2d 698, 702 (Mo.App. 1992). The trial court is in a better position to determine the extent of the insured's damages, especially when the trial court was presented with conflicting evidence as to the damages sustained. Id.

Shop has cited no case law supporting his proposition that this Court determine the extent of Trinity's subrogation interest. The trial court determined that Trinity's rights arose by assignment and therefore concluded that Trinity was entitled to recover for each element of damage on which Trinity paid a claim. No evidence was presented as to the extent of Shop's damages and no such determination was made by the trial court. In addition, no evidence was presented to the trial court regarding the propriety of any expenses or attorney's fees that Shop may claim in this case.

Moreover, there is obviously a disagreement as to the extent of the parties' interest to the interplead funds since Trinity claims that it is entitled to recover for

each element paid whereas Shop claims that Trinity's recovery is limited to the $15,000.00 paid pursuant to the business income coverage. Accordingly, the issue of Trinity's subrogation interest would be more appropriately remanded to the trial court if this Court determines that Shop's right of recovery was not assigned.

However, to the extent this Court is in a position to determine the extent of Trinity's interest to the interplead funds, Trinity is still entitled to the entire $100,000.00 paid into the registry of the trial court. Subrogation is defined as the substitution of one person in the place of a creditor so that the person so substituted succeeds to the rights of the creditor in relation to the debt. American Nursing Resources, Inc. v. Forrest T. Jones & Co., 812 S.W.2d 790, 794 (Mo.App. 1991). The doctrine of subrogation is equitable and "[i]ts aim is to do perfect justice and prevent injustice among the parties. . . ." Id. at 796. Subrogation occurs in the context of an insurance policy when the insurer, pursuant to its contractual obligation, pays all or part of the property damage incurred by the insured. Effertz, 795 S.W.2d at 426. While the right to sue remains with the insured, the insured has no right to keep the full recovery but instead must turn the proceeds over to the insurer. Effertz, 795 S.W.2d at 426; Baker, 299 S.W.2d at 566.

The recovery by the person standing in the shoes of the creditor is "to prevent unjust enrichment and to compel the ultimate discharge of an obligation by him who in good conscience ought to pay it." Tucker v. Holder, 359 Mo. 1039,

1046, 225 S.W.2d 123, 126-27 (1949). The person does not need the consent of the creditor but may immediately seek reimbursement by subrogation from the person primarily liable for the debt. Gibson v. Harl, 857 S.W.2d 260, 267 (Mo.App. 1993). The person is entitled to reimbursement even without a formal ***assignment*** of the right to recover. Id.

Even if Trinity's rights were only in subrogation, it would still be entitled to recover the entire $100,000.00 paid into the trial court registry to avoid the unjust enrichment of Shop. On April 9, 1998, the date Trinity paid Shop's claim, Trinity was immediately entitled to recover from the parties responsible for the loss. Trinity did not need the consent of Shop to seek reimbursement, though it advised Shop that it was interested in seeking to recoup its payments.

The equity of subrogation entitled Trinity to obtain immediate payment from the city of St. Louis, who was responsible for Shop's loss. Any recovery to which Shop was entitled from the city of St. Louis must ultimately be paid to Trinity to prevent injustice to the parties. To allow Shop any portion of the interplead funds, which were less than the total amount paid by Trinity, would unjustly enrich Shop at the expense of Trinity, who is rightfully entitled to those proceeds.

Shop is incorrect in arguing that Trinity may not maintain an action for damage to the building and the contents thereof if Trinity only had subrogation rights because Shop had an insurable interest in the building. "A person has an

insurable interest in property if she will derive pecuniary benefit or advantage from its preservation, or will suffer pecuniary loss or damage from its destruction, termination, or injury by the happening of the event insured against." DeWitt v. American Family Mut. Ins. Co., 667 S.W.2d 700, 705 (Mo. banc 1984). See also G.M. Battery & Boat Co. v. L.K.N. Corp., 747 S.W.2d 624, 626 (Mo. banc 1988); Sherwood Med. Co., 882 S.W.2d at 163. In determining the existence of an insurable interest, the emphasis is on the possibility of loss, not ownership. Sherwood Med., 882 S.W.2d at 163.

In G.M. Battery, the Missouri Supreme Court was called upon to determine whether a lessee had an insurable interest in a leased building. 747 S.W.2d at 625. In applying the rule on insurable interests, the Supreme Court determined that the lessee did have an insurable interest in the building because the lessee would suffer the loss if the building were destroyed. Id. at 627. The lessee had obligated itself under the terms of the lease to furnish insurance payable to the lessor. Id. See also Mitchell v. K.C. Stadium Concessions, Inc., 865 S.W.2d 779, 787 (Mo.App. 1993). Furthermore, the lessee stood to lose the remaining term of the lease. G.M. Battery, 747 S.W.2d at 627. The Court held that the lessee was therefore entitled to recover the full amount of its policy, even with respect to the building. Id. In determining whether a lessee bears the risk of damage to a leased building,

Missouri courts will also look to whether the lease requires the lessee to return the premises in good order. Mitchell, 865 S.W.2d at 787.

The terms of the Lease between Shop and the Keiskers imposed the responsibility for repairs upon Shop. Shop was required to maintain the premises in good and safe condition and was required to surrender the premises in as good condition received. The Lease also provided that it was to terminate upon the total destruction of the building.

It stands to reason that the risk of loss to the building, and the right to recover from a third party that damaged the building, was Shop's. If there was damage to the building, Shop was required to conduct the repairs. Shop would be in breach of the Lease if there was damage to the building that was not repaired prior to surrendering the premises at the expiration of the Lease. Shop also stood to lose the balance of the Lease term if the building were totally destroyed prior to the expiration of the Lease. In fact, Shop's interest in the building was such that Mr. Hinds indicated in the Commercial Insurance Application that Shop was the owner of the building.

Moreover, the essence of the Lease agreement was the use of the building itself. If Shop did not have a building within which to conduct its business, it could not have survived as a restaurant. The existence of the building was paramount to the continuation of Shop's business, and without the building, Shop

could not continue to act as a restaurant. The risk of loss to the building certainly belonged to Shop and it therefore had an insurable interest in the building that created a right to recover in Shop when the building was damaged. This right was assigned to Trinity once Trinity paid pursuant to the terms and conditions of the Policy.

Furthermore, it would be inconsistent to allow Shop to continue to assert that it may not bring a lawsuit for damage to the building when it has already received insurance proceeds from Trinity for that damage. Shop should not be able to submit a claim for damage to the building under the Policy issued by Trinity and later assert that Shop is not entitled to recover that damage from the responsible party after that claim is paid. This inequity is bolstered by the fact that Mr. Hinds represented in the Commercial Insurance Application that Shop was the owner of the building. In addition, Shop was required to maintain insurance on the premises by the terms of the Lease for the benefit of both itself and the Keiskers.[6]

[6] Trinity would note that although the Lease required Shop to provide the Keiskers with a Certificate of Insurance naming the Keiskers as additional insureds, it does not appear that this was done given the fact the application did not indicate that the Keiskers were to be named insureds and given the fact the Keiskers do not appear in the declarations pages. Since Shop was the only named insured under the policy, Shop was the only entity that could recover payment

These facts clearly indicate that Shop desired to bear the risk of loss for damage to the building and that any subsequent right to recover for such damage rested with Shop. Since those rights were transferred to Trinity by either assignment or subrogation, Trinity now stands in the shoes of Shop and may recover for the building damage loss paid to Shop under the Policy.

Trinity is also entitled to recover for damage to the contents of Shop's building on which Trinity paid a claim. Trinity would note that as late as April 13, 1999, Shop took the position that Trinity had at least "a right of subrogation with respect to the contents. . . ." Now it takes the contradictory position that Trinity may not recover for the contents damage because the contents were primarily fixtures.

Even if the contents of the building are deemed to be part of the structure, Shop may recover for damage to the contents and, in turn, Trinity has been assigned (or at the very least is subrogated to) that right of recovery. The Commercial Lease between the Keiskers and Shop provided that Shop shall "maintain the premises in good and safe condition, including plate glass, electrical wiring, plumbing and heating installations and any other system or ***equipment***

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under the terms of the policy. However, this does not appear to have any impact on Shop's and in turn Trinity's right to recover for damage to the building. See G.M. Battery, 747 S.W.2d at 627.

upon the premises. . . ." (emphasis added). Under Missouri law, "[t]rade fixtures, even those attached to the building, unless the parties provide otherwise, are generally considered to be retained by the tenant." Mitchell, 865 S.W.2d at 788.

Here, the Commercial Lease expressly provided that equipment upon the premises would be the responsibility of Shop. Even if this is not deemed to encompass fixtures, there is no other provision in the Commercial Lease discussing the retention of those fixtures. Under Missouri law, the responsibility for those fixtures would rest with Shop. Accordingly, Trinity may recover for the damage claim it paid with respect to the contents of the building.

Shop also contends that because its lawsuit was for lost profits and not for structural and property damage, Trinity is not entitled to the interplead funds. This argument implies that Trinity could file a separate action to recover these items from the responsible parties. However, as the trial court correctly noted, Shop's suggestion ignores Missouri's prohibition against splitting causes of action.

Parties are precluded from filing multiple suits against a single defendant on portions of the same cause of action. General Exch. Ins. Corp., 357 Mo. at 1106, 212 S.W.2d at 400. The rule is designed to prevent "harassment of a defendant by a multitude of law suits for the same tortious act." State ex rel. Home Serv. Oil Co. v. Hess, 485 S.W.2d 616, 619 (Mo.App. banc 1972). To accommodate this policy, insurers often draft their policies to provide for an assignment of the

insured's entire claim, including the part to which the insurer is subrogated as well as the part that it did not pay. American Nursing Resources, 812 S.W.2d at 798.

In Hess, Home Service Oil Company was a defendant in two lawsuits filed by separate insurers for damage caused to its insured's loading dock and cargo. 485 S.W.2d at 617-18. One insurer filed suit for damage to the dock, while the other filed suit for damage to the cargo. Id. In ruling that this constituted an improper splitting of a cause of action, the St. Louis District Court of Appeals, en banc, noted that it is possible for damages of many different kinds, including fire, business interruption, and personal effects, to result from one act. Id. at 619. The defendant should not be required to defend each claim separately, but should instead defend against each claim in one action. Id.

Similarly, Shop should not be allowed to bring this suit for lost profits only without any consideration being given to the structural and business income damage it sustained. Even if Trinity's rights are in subrogation, it is still entitled to bring an action in Trinity's name to recover each of these items. If Shop is allowed to proceed simply to recover its lost profits, the city of St. Louis would be subject to multiple lawsuits when Trinity later files its own action to recover the structural and business income damage claims it paid. This course of action would violate the prohibition against filing multiple lawsuits on different portions of the same action. The trial court was correct in awarding the entire $100,000.00 to Trinity as

compensation for each element of damage paid to Shop to avoid subjecting the city of St. Louis to multiple lawsuits for separate elements of damage.

Shop is also incorrect in arguing that Trinity is required to reimburse Shop its attorney's fees because Trinity would otherwise be unjustly enriched by the efforts of both Shop and its attorney in bringing this action. In order to recover under the theory of unjust enrichment, the complaining party must show (1) that a benefit was conferred on the defendant, (2) that the defendant appreciated the benefit, and (3) that the defendant accepted and retained the benefit under circumstances that would render retention of the benefit inequitable. Kujawa v. Billboard Cafe at Lucas Plaza, Inc., 10 S.W.3d 584, 588 (Mo.App. 2000) (quoting Erlson v. Vee-Jay Contracting Co., 728 S.W.2d 711, 713 (Mo.App. 1987)). With respect to attorney's fees, the key showing is that the attorney conferred a benefit on the party against whom those fees are sought. International Materials Corp. v. Sun Corp., 824 S.W.2d 890, 895 (Mo. banc 1992); American Civil Liberties Union/Eastern Missouri Fund v. Miller, 803 S.W.2d 592, 595 (Mo. banc 1991).

Shop did not and will not confer any benefit on Trinity, even if Trinity is allowed to recover the entire amount paid into the trial court registry by the city of St. Louis. Until this appeal, Shop has taken the position that Trinity may not recover for any element of damage paid to Shop, and only now concedes that Trinity is at least entitled to the $15,000.00 in business income loss paid by Trinity.

The lawsuit was not filed for the benefit of Trinity and any work done by Shop and its attorney was to recover "lost profits," an element of damage that Shop believed Trinity was not entitled to recover. Following a judgment or the resolution of Shop's lawsuit, Trinity would be collaterally estopped from bringing an action for the building damage, contents damage, and business income loss claims it paid, thereby preventing any recovery whatsoever.

In fact, Shop has done its best to ensure that Trinity never recovers any of the damages paid to Shop or receives a benefit from any of the at-fault parties. Shop filed suit seeking damages under the guise of "lost profits" and alleged that Trinity was not entitled to any amount Shop may recover. Shop objected to Trinity's intervention in this lawsuit when Trinity learned that Shop did not believe that Trinity could recover for any damages paid. Trinity also objected to the consolidation of this case with the independent action filed by Trinity.

Moreover, Shop released Ms. Farmer and agreed not to sue her in exchange for $6,000.00, thereby preventing Trinity from bringing an action against her in Shop's name should Trinity be deemed to be merely subrogated to Shop's rights. Shop did not remit any of these funds to Trinity despite the fact Shop concedes that Trinity is at least entitled to recover the business income loss paid by Trinity. No benefit has been conferred on Trinity by Shop in filing or prosecuting this suit, nor will a benefit be conferred if Trinity recovers from the city of St. Louis because

Shop's purpose in filing the lawsuit was to recover for an item of damage to which it believed Trinity was not entitled.

Everything Shop and its attorney have done has been in an effort to prevent Trinity from recovering any of the payments made to Shop under the Policy, despite the fact the Policy expressly states that Shop will do nothing to impair Trinity's right of recovery. Trinity was also required to retain its own lawyer to protect its rights once it realized that Shop was impairing Trinity's right of recovery. Trinity should not now be required to reimburse Shop for the attorney's fees of a second lawyer because Shop's attorney took no action for the benefit of Trinity.

Shop suggests that if Trinity's recovery is to be reduced in accordance with the expenses of litigation incurred by Shop, the Court should follow the worker's compensation formula set forth in Ruediger v. Kallmeyer Bros. Serv., 501 S.W.2d 56, 59-60 (Mo. banc 1973). Even assuming Trinity's recovery should be reduced, Shop has failed to indicate how the Ruediger formula is applicable to this case. Ruediger involves worker's compensation, whereas this case involves insurance proceeds in the context of property damage. Accordingly, Ruediger has no bearing on the present action.

Finally, Trinity's interest should not be reduced as a result of the liability limits applicable to the city of St. Louis. Shop curiously "asserts" that since the

city of St. Louis' liability is subject to a statutory limit of $100,000.00, which Shop contends will not fully compensate it for its damages, then any recovery to which Trinity is entitled should be reduced by the percentage to which these liability limits reduce Shop's recovery. Trinity would note that Shop cites no case law supporting this proposition and that it is merely a "suggestion" as to the allocation of funds.

Shop's position is similarly not supported under the equitable principles of subrogation (if in fact Trinity's rights are merely created by subrogation as opposed to an assignment), which aims "to do perfect justice and prevent injustice among all the parties. . . ." American Nursing Resources, Inc., 812 S.W.2d at 796. Trinity paid 100% of the actual cash value of Shop's structural damage and contents damage as well as the limit of liability available for business income loss claims pursuant to its contractual obligations, an amount to which Mr. Hinds has agreed in the Statement as to Full Cost of Repair that he signed on behalf of Shop.

The fact that Shop may have incurred damage in excess of the actual cash value paid to it does not change the fact that Trinity paid 100% of its obligation under the Policy. Trinity would note that it paid less than its limit of liability with respect to the structural and contents damage portions of Shop's claim, indicating that Shop was fully compensated for the actual cash value of each of these items.

To the extent the amount to be recovered from the City does not exceed the actual cash value paid, Trinity should also be entitled to recover 100% of those funds.

Even based on Shop's "assertion," Trinity is more than entitled to full recovery of the $100,000.00 paid into the Court by the City. Shop received 81.12% of its damage claim from Trinity and did not receive anything less than the full amount Trinity was contractually obligated to pay. Considering the fact that Shop received an additional $6,000.00 from Ms. Farmer and has released her such that Trinity has been prevented from seeking recovery from her, that percentage rises to 84.56%. If Trinity receives $100,000.00 from the City, it will have recovered only 70.62% of the amount it was contractually obligated to pay. Based on Shop's "assertion" and the equitable principles of subrogation, it is more than reasonable to allow Trinity to recover the entire $100,000.00 to be paid into the Court.

If Trinity's rights are only in subrogation, it is still entitled to recover the entire $100,000.00 paid into the registry of the trial court. The equity of subrogation entitles Trinity to reimbursement from the parties at fault for Shop's loss. Shop would be unjustly enriched if it were allowed to recover any of the interplead funds because Trinity is ultimately entitled to those funds as a result of its payments. To hold otherwise would be to create the injustice that subrogation seeks to avoid.

Trinity is further entitled to recover for each element of damage paid, including building and personal property loss, as Shop had an insurable interest in each element of damage on which it paid. Trinity is also not obligated to reimburse Shop's attorney's fees and expenses in bringing this action in that Shop conferred no benefit on Trinity in bringing this action. Finally, there is no support for reducing Trinity's recovery by the percentage Shop's recovery against the city of St. Louis may be reduced based on the City's statutory liability limits.

## CONCLUSION

The trial court did not error in awarding Trinity the entire $100,000.00 deposited into the registry of the trial court. Shop clearly and unambiguously assigned its rights to Trinity. Trinity has not been estopped from asserting that assignment because it has not taken a position inconsistent with assignment, Shop has not relied on any assertions made by Trinity with respect to its right of recovery, and Shop has not suffered any damage from any inconsistent position Trinity may have taken.

In addition, Trinity is entitled to recover the entire amount of the claim it paid and is not obligated to reimburse Shop for any attorney's fees incurred because Trinity received no benefit from Shop's filing of this lawsuit. Even if Trinity's rights are only created by subrogation, principles of fairness require that it receive the entire $100,000.00, which constitutes only slightly less that seventy-one percent of the claim it paid, after Trinity paid over eighty percent of Shop's damages.

The bottom line is that Trinity paid Shop $141,609.49 under the Commercial Property Coverage provided by the Policy. Pursuant to the terms of the Policy, Trinity was assigned (or at the very least subrogated to) Shop's right to recover. Instead of cooperating with Trinity in the prosecution of Trinity's claim against the at-fault parties, Shop has instead acted to prevent Trinity from recovering any

amounts from the at-fault parties. Shop has filed suit in its own name, the resolution of which would likely have collaterally estopped Trinity from bringing an action against the same parties to recover the payments to which Trinity is entitled. Shop has also released one party, Ms. Farmer, thereby further impairing Trinity's right to recover from her in contravention with the terms of the Policy. Trinity is entitled to recover the entire amount paid under the Policy without reduction for any fees and expenses incurred by Shop because Shop has taken no action for the benefit of Trinity.

**WHEREFORE,** Trinity prays this Court affirm the trial court's Order and Judgment that Trinity is entitled to recover the sum of $100,000.00 deposited into the registry of the trial court by the city of St. Louis in satisfaction of Shop's claim.

Respectfully submitted,

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TRINITY UNIVERSAL INSURANCE
COMPANY

## RULE 84.06(c) CERTIFICATION

Andrew D. Ryan, being first duly sworn on oath, states the following in accordance with Rule 84.06(c) of the Missouri Rules of Civil Procedure:

1. Respondent's Brief contains the information required by Rule 55.03 of the Missouri Rules of Civil Procedure.

2. Respondent's Brief complies with the limitations contained in Rule 84.06(b) of the Missouri Rules of Civil Procedure.

3. Respondent's Brief contains 16,610 words, exclusive of the cover, certificate of service, certificate required by Rule 84.06(c) of the Missouri Rules of Civil Procedure, and appendix.

4. The floppy disk filed in conjunction with Respondent's Brief has been scanned for viruses with Norton AntiVirus and is virus free.

_____
Andrew D. Ryan

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

On this 13th day of May, 2002, before me the undersigned Notary Public in and for said County and State, personally appeared Andrew D. Ryan, being first duly sworn on oath, and executed the above Rule 84.06(c) Certification, and did so as his own free act and will.

In testimony whereof, I have hereunto set my hand and affixed my original seal the day and year last written above.

My Commission Expires: _____

## CERTIFICATE OF SERVICE

The undersigned does hereby certify that two copies of Respondent's Brief were mailed this 13th day of May, 2002, by United States mail, postage prepaid, to Mr. Michael F. Merritt, 725 Old Ballas Road, Creve Couer, Missouri 63141-7013, Attorney for Plaintiff-Appellant.

# APPENDIX

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