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matter following the malpractice. At most, the record shows that during this time Behrens and Blunk had a general professional relationship, which is not considered continuous for the purposes of this exception.

We note that Behrens' and Blunk's relationship might be considered continuous from October 2001, when Behrens was notified of the department's investigation, until April 2003, when that investigation was complete, because the relationship dealt with that specific investigation. But assuming without deciding that this relationship was continuous for that period of time, and also assuming without deciding that this continuous relationship could toll not the statute of limitations but the running of Behrens' discovery period under the statute, we nevertheless conclude that Behrens' suit, brought more than 5 years after the termination of this relationship, was untimely.

Because we conclude that Behrens' suit was untimely, we need not decide whether it was also barred by the doctrine of in pari delicto.

CONCLUSION

Behrens' suit is barred by the 2-year statute of limitations set forth in § 25-222. The decision of the district court in favor of Blunk and his codefendants is affirmed.

AFFIRMED.

WRIGHT, J., not participating.

BUCKEYE STATE MUTUAL INSURANCE COMPANY, APPELLANT, v. RICHARD HUMLICEK, APPELLEE.

822 N.W.2d 351

Filed October 12, 2012. No. S-11-796.

1. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court resolves the questions independently of the lower court's conclusions.
2. **Subrogation: Words and Phrases.** Generally, subrogation is the right of one, who has paid the obligation which another should have paid, to be indemnified by the other.
3. **Subrogation: Equity.** Subrogation is an equitable principle applied not as a legal right but to subserve the ends of justice and do equity.

4. **Contracts: Subrogation.** In terms of the exercise of the right of subrogation, no general rule can be laid down which will afford a test for its application in all cases. The facts and circumstances of each case determine whether the doctrine is applicable.
5. **Contracts: Insurance: Subrogation: Equity: Tort-feasors.** In the context of insurance, the right to equitable subrogation is generally based on two premises: (1) A wrongdoer should reimburse an insurer for payments that the insurer has made to its insured, and (2) an insured should not be allowed to recover twice from the insured's insurer and the tort-feasor.
6. **Contracts: Insurance: Subrogation.** Under the so-called antisubrogation rule, no right of subrogation can arise in favor of an insurer against its own insured or coinsured for a risk covered by the policy, even if the insured is a negligent wrongdoer.
7. **Contracts: Insurance: Subrogation: Presumptions.** Absent an express subrogation agreement to the contrary, a tenant is conclusively presumed to be an implied coinsured of the landlord's insurance policy.

Appeal from the District Court for Butler County: MARY C. GILBRIDE, Judge. Affirmed.

Jarrod P. Crouse and Colin A. Mues, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellant.

Thomas A. Grennan and John A. Svoboda, of Gross & Welch, P.C., L.L.O., for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ.

MCCORMACK, J.

NATURE OF CASE

The owners of a duplex insured a building through two concurrently issued, identical policies—one for each unit. A fire damaged the entire structure, and the insurer paid the owners' claims under both policies. The insurer then brought this action to determine its subrogation rights against the tenant of one of the duplex units, who was allegedly negligent in starting the fire. The insurer concedes that pursuant to *Tri-Par Investments v. Sousa*,[1] the tenant was an implied coinsured under the policy covering the unit he lived in. Therefore, the insurer seeks to

[1] *Tri-Par Investments v. Sousa*, 268 Neb. 119, 680 N.W.2d 190 (2004).

recoup payments made for the damage only to the unit the tenant did not live in.

BACKGROUND

Bryan Hilderbrand and Ryan Hilderbrand own a duplex rental property. Richard Humlicek and Betty Humlicek were the tenants of unit 1292 of the duplex. The tenants of the other unit, unit 1282, are not parties to this action. The lease agreements between the Hilderbrands and the Humliceks provided that the tenants would obtain and keep in full force and effect renter's insurance covering their personal property, but that the Hilderbrands would obtain and keep in full force and effect fire and "all risk" coverage for the property. Specifically, the lease agreement stated that the Hilderbrands "shall obtain and keep in full force and effect . . . fire and 'all risk' extended coverage insurance for the full replacement value of the improvements located on the Leased Premises with a responsible insurance company or companies."

The Hilderbrands obtained insurance coverage for the duplex building through Buckeye State Mutual Insurance Company (Buckeye). The two units of the duplex were covered by separate but identical policies. The policies were issued concurrently with the notation that the coverage was for "½ of duplex." The coverage in the policies was described as a "Dwelling Fire Special" and included general property damage and injury liability coverage for the unit covered, as well as coverage for personal property, related private structures, and loss of rent.

In May 2009, a fire damaged both units of the duplex. The fire originated in unit 1292. Richard allegedly caused the fire by negligently disposing of smoking materials in the garage attached to unit 1292.

Buckeye paid the Hilderbrands' claims for damages resulting from the fire to both units. Those damages included the damage to the building, damage to the Hilderbrands' personal property, and loss of rent.

Buckeye brought suit against Richard, seeking a declaration that Buckeye was entitled to pursue a subrogation claim against Richard for payments made in relation to unit 1282.

Buckeye did not pursue a subrogation claim against Richard for payments made in relation to unit 1292.

The district court granted Richard's motion for summary judgment and dismissed the action. The court reasoned that under *Tri-Par Investments*,[2] Richard was an implied coinsured with the Hilderbrands under both policies covering the two units of the single duplex structure. An insurer cannot subrogate against its own insured. The court also noted that, given the terms of the lease, it was Richard's reasonable expectation that the Hilderbrands would obtain fire insurance for the entire structure. Buckeye appeals.

ASSIGNMENTS OF ERROR

Buckeye asserts that the district court erred in (1) failing to overrule Richard's motion for summary judgment, (2) ruling that Richard is a coinsured with the Hilderbrands under Nebraska law, (3) failing to rule that Buckeye is allowed to subrogate against Richard, and (4) denying Buckeye's request for declaratory judgment.

STANDARD OF REVIEW

[1] When reviewing questions of law, an appellate court resolves the questions independently of the lower court's conclusions.[3]

ANALYSIS

[2-4] Buckeye asserts that it should have a right of subrogation against Richard for the payment made to the Hilderbrands for fire damage to unit 1282. Generally, subrogation is the right of one, who has paid the obligation which another should have paid, to be indemnified by the other.[4] Subrogation is an equitable principle applied not as a legal right but to subserve the ends of justice and do equity.[5] In terms of the exercise of the

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[2] *Id.*

[3] *State v. Kibbee, ante* p. 72, 815 N.W.2d 872 (2012).

[4] *Countryside Co-op v. Harry A. Koch Co.*, 280 Neb. 795, 790 N.W.2d 873 (2010).

[5] See *id.*

right of subrogation, no general rule can be laid down which will afford a test for its application in all cases.[6] The facts and circumstances of each case determine whether the doctrine is applicable.[7]

[5,6] In the context of insurance, the right to equitable subrogation is generally based on two premises: (1) A wrongdoer should reimburse an insurer for payments that the insurer has made to its insured, and (2) an insured should not be allowed to recover twice from the insured's insurer and the tortfeasor.[8] But under the so-called antisubrogation rule, no right of subrogation can arise in favor of an insurer against its own insured or coinsured for a risk covered by the policy, even if the insured is a negligent wrongdoer.[9] To allow subrogation under such circumstances would permit an insurer, in effect, to avoid the very coverage which its insured purchased.[10] In addition, the insurer should not be in a situation where there exists a potential conflict of interest which could affect the insurer's incentive to provide its insured with a vigorous defense.[11]

The antisubrogation rule has been extended to "implied coinsureds."[12] In *Jindra v. Clayton*,[13] we held that closely related family members who owned the property in joint tenancy were implied coinsureds under one family member's policy with the insurer covering the property. In *Reeder v. Reeder*,[14] we held that the brother of the homeowner who

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[6] *Jindra v. Clayton*, 247 Neb. 597, 529 N.W.2d 523 (1995).

[7] See *id.*

[8] See *Countryside Co-op v. Harry A. Koch Co., supra* note 4.

[9] See *Hans v. Lucas*, 270 Neb. 421, 703 N.W.2d 880 (2005).

[10] See, *Control Specialists v. State Farm Mut. Auto. Ins. Co.*, 228 Neb. 642, 423 N.W.2d 775 (1988); *Reeder v. Reeder*, 217 Neb. 120, 348 N.W.2d 832 (1984).

[11] See *Allstate Ins. Co. v. LaRandeau*, 261 Neb. 242, 622 N.W.2d 646 (2001).

[12] *Hans v. Lucas, supra* note 9, 270 Neb. at 427, 703 N.W.2d at 885. Accord *Tri-Par Investments v. Sousa, supra* note 1.

[13] *Jindra v. Clayton, supra* note 6.

[14] *Reeder v. Reeder, supra* note 10.

insured the property was an implied coinsured while residing as a guest in the property until it sold and his own house was built.

We explained in *Reeder* that whether the insurer could subrogate did not necessarily depend on categorizing the legal relationship of the wrongdoer to the named insured. Nor did it depend on whether the homeowner could sue the wrongdoer for negligent destruction of the property.[15] The question was instead whether, under all the circumstances, recovery by the insurer against the wrongdoer would be "in effect" recovery from the insured for the very risk that the insurer agreed to take upon payment of the premium.[16]

[7] But in *Tri-Par Investments*,[17] we adopted a per se rule governing the relationship of a tenant to the landlord's insurer. In *Tri-Par Investments*, we held that absent an express subrogation agreement to the contrary, a tenant is conclusively presumed to be an implied coinsured of the landlord's insurance policy.[18] We specifically rejected a case-by-case approach adopted by some other jurisdictions which would examine the landlord and tenant's intentions as shown by the lease agreement and the surrounding circumstances. Thus, we held that the tenant of a single-family home was an implied coinsured of his landlord's fire insurance policy and that the insurer could not subrogate against the tenant even if he were negligent in starting the fire.

We explained in *Tri-Par Investments* that the per se rule represents the better public policy for the landlord-tenant relationship. First, a per se rule provides legal certainty for tenants.[19] If there is a clear subrogation provision in the lease, tenants will be on notice that they must obtain insurance coverage for the realty if they wish to protect themselves from personal liability

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[15] *Id.*

[16] *Id.* at 126, 348 N.W.2d at 836.

[17] *Tri-Par Investments v. Sousa, supra* note 1.

[18] *Id.*

[19] *Id.*

in the event they negligently start a fire.[20] On the other hand, if there is not such a provision in the lease, then tenants do not need to obtain separate insurance coverage and can rely on the fire insurance obtained by the landlord.[21]

Second, the per se rule comports with the reasonable expectations of the parties and the current commercial reality. We explained that tenants reasonably expect that the owner of the building will provide fire insurance protection for the realty on both of their behalves. As stated in *Sutton v. Jondahl*,[22] the case usually cited as the progenitor of the per se rule,

> "it would not likely occur to a reasonably prudent tenant that the premises were without fire insurance protection or if there was such protection it did not inure to his benefit and that he would need to take out another fire policy to protect himself from any loss during his occupancy."[23]

The court in *Sutton* further observed that the insurance companies implicitly acknowledge this reality: "'Otherwise their insurance salesmen would have long ago made such need a matter of common knowledge by promoting the sale to tenants of a second fire insurance policy to cover the real estate.'"[24]

Third, we reasoned that the per se rule comports with the commercial reality that landlords will likely pass on at least part of the cost of the insurance premiums to the tenant in the form of rent.[25] And if the tenant is effectively paying part of the premiums, then it is equitable that the tenant shares in some of the protection that coverage affords.[26]

Fourth, we reasoned that a per se rule prevents "economic waste that will undoubtedly occur if each tenant in a multiunit

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[20] *Id.*

[21] *Id.*

[22] *Sutton v. Jondahl*, 532 P.2d 478 (Okla. App. 1975).

[23] *Tri-Par Investments v. Sousa, supra* note 1, 268 Neb. at 125, 268 N.W.2d at 196, quoting *Sutton v. Jondahl, supra* note 22.

[24] *Id.*

[25] See *Tri-Par Investments v. Sousa, supra* note 1.

[26] See *id.*

dwelling or multiunit rental complex is required to insure the entire building against his or her own negligence."[27] We cited the reasoning of a Connecticut Supreme Court opinion that

> a rule which allocated to the tenant the responsibility of maintaining sufficient insurance to cover a claim for subrogation by the landlord's insurer would create a strong incentive for tenants to carry liability insurance for the value or replacement cost of the entire building, irrespective of the portion of the building they occupied.[28]

We concluded, "'[I]t surely is not in the public interest to require all the tenants to insure the building which they share, thus causing the building to be fully insured by each tenancy.'"[29]

Buckeye argues that the per se rule we adopted in *Tri-Par Investments* does not apply to the facts of this case. Specifically, Buckeye argues that the per se rule does not apply to the side of a duplex which is not rented by the tenant—at least when the insurer has crafted separate policies for each duplex unit.

Buckeye gives four fundamental reasons it believes the rule in *Tri-Par Investments* is inapplicable to unit 1282. First, Buckeye points out that Richard lacks an insurable interest in unit 1282. In *Tri-Par Investments*, we quoted *Sutton* at length. In that quotation, the *Sutton* court said the per se rule was "'derived from a recognition of a relational reality, namely, that both landlord and tenant have an insurable interest in the rented premises.'"[30]

Second, because each unit is covered by separate policies, Buckeye argues Richard is not in privity of contract with the Hilderbrands as to unit 1282. In cases before *Tri-Par Investments*, we expressed, in dicta, approval of the per se rule

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[27] *Id.* at 131, 680 N.W.2d at 199.

[28] *Id.* at 126, 680 N.W.2d at 196, citing *DiLullo v. Joseph*, 259 Conn. 847, 792 A.2d 819 (2002).

[29] *Id.* at 127, 680 N.W.2d at 196, quoting *Peterson v. Silva*, 428 Mass. 751, 704 N.E.2d 1163 (1999).

[30] *Id.* at 125, 680 N.W.2d at 195, quoting *Sutton v. Jondahl, supra* note 22.

and observed the concept of privity as a reason for the rule. In *Reeder*, we stated:

> "[I]nsurance companies expect to pay their insureds for negligently caused fire, and they adjust their rates accordingly. In this context, an insurer should not be allowed to treat a tenant, *who is in privity with the insured landlord*, as a negligent third party when it could not collect against its own insured had the insured negligently caused the fire."[31]

In *Jindra*, we similarly quoted the opinion of a secondary authority that landlord-tenants are coinsureds for subrogation purposes at least partially "'because of the reasonable expectations they derive from their privity under the lease.'"[32]

Third, Buckeye argues Richard could not have had "a reasonable expectation that the Hilderbrands would insure [unit] 1282 . . . for his benefit, or that his rent included payment for the separate insurance policy" on unit 1282.[33] On this point, Buckeye argues at length that the completely separate and distinct living units of a duplex are distinguishable from the distinct units of an apartment building. Buckeye points out that there are no common areas for a duplex. Buckeye concludes that the two units of a duplex are more like two adjacent separate homes on separate tracts of land.

Buckeye assumes it would be patently unreasonable for a tenant to expect that he or she would be protected from a subrogation action to recover damages paid under fire insurance covering the landlord's house next door. Buckeye argues that for the same reasons, it is patently unreasonable for the tenant of a duplex to expect protection under the other unit's fire protection policy. Relatedly, it would be patently unreasonable for the tenant of one side of a duplex to expect that any portion of

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[31] *Reeder v. Reeder, supra* note 10, 217 Neb. at 129, 348 N.W.2d at 837 (emphasis supplied), quoting *Rizzuto v. Morris*, 22 Wash. App. 951, 592 P.2d 688 (1979).

[32] *Jindra v. Clayton, supra* note 6, 247 Neb. at 604, 529 N.W.2d at 527, quoting 6A John Alan & Jean Appleman, Insurance Law and Practice § 4055 (Supp. 1994).

[33] Brief for appellant at 10.

his rent payment goes toward premiums paid for fire insurance coverage for the other side.

Fourth, Buckeye asserts that duplex tenants insuring the unit they do not rent do not present the concerns of economic waste present in the single family home in *Tri-Par Investments* or in apartment buildings—which Buckeye recognizes would be subject to the per se rule. The reasoning behind this assertion is somewhat unclear. Buckeye again points to the separateness of the policies covering each unit and the lack of common areas. Buckeye states that in a duplex, the tenants share only "one wall and a small band of roof."[34]

We find Buckeye's reasons unavailing. We can find no other case in which a court has been asked to address whether a tenant of a duplex is an implied coinsured of a separate, but closely related, fire insurance policy with the same landlord covering the other side. Indeed, cases involving duplexes are few and far between. Those that have been decided are in jurisdictions adopting a different subrogation test altogether[35] or a modified per se rule which excludes application to single-family homes.[36] We do not find these cases, or the unpublished decision discussed by Buckeye, particularly useful to our analysis.

We agree with the district court that the rule in *Tri-Par Investments* applies to bar subrogation against a duplex tenant as to both sides of the building. A shared insurable interest and privity between the landlord and tenant are part of the backdrop to the development of the per se rule in *Sutton* and similar cases, but those concepts do not form a bright line for the rule's applicability. In fact, in *Tri-Par Investments*, we mentioned neither privity nor shared possessory interests when summarizing our four reasons for adopting the per se rule.

Lack of privity or lack of possessory interest does not preclude application of the per se rule in other jurisdictions when

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[34] *Id.* at 13.

[35] See, *American Fam. Mut. Ins. v. Auto-Owners Ins.*, 757 N.W.2d 584 (S.D. 2008); *Koch v. Spann*, 193 Or. App. 608, 92 P.3d 146 (2004).

[36] See *Hartford Fire Ins. Co. v. Warner*, 91 Conn. App. 685, 881 A.2d 1065 (2005).

the fire damage is to another apartment unit in a multiunit building.[37] The tenant of one apartment unit never is in privity with the landlord as to the lease of another apartment. And the tenant of one apartment does not have a possessory interest in the unit leased by another. In *Tri-Par Investments*, we explicitly referred to the per se rule as applicable to a "multiunit dwelling or multiunit rental complex."[38] Thus, we have indicated that lack of privity or possessory interest will not preclude the operation of the per se rule.

Buckeye also focuses on the concept of privity more narrowly in relation to the insurance contract. Buckeye seems to concede that if there is a single policy covering the building, then a tenant who is in privity with the landlord for one unit is in privity with respect to that single policy covering all units. If an insurer crafts separate policies for each unit, however, Buckeye believes privity as to other units is destroyed and the per se rule is no longer applicable.

As already stated, our decision in *Tri-Par Investments* does not support the conclusion that privity is even a particularly pertinent element to the per se rule. It certainly does not support Buckeye's view of privity as a bright line limiting the applicability of the per se rule. Furthermore, it would be against sound public policy to permit the insurer's crafting of simultaneous and identical, but "separate," policies to change the ultimate equities under consideration. To do so would encourage precisely the kind of gamesmanship and unpredictability the per se rule was adopted to avoid. A tenant who is not involved in securing the insurance coverage and who has not clearly been advised of a subrogation right in the lease will not know how the landlord and the insurance company have agreed

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[37] See, e.g., *Federal Ins. Co. v. Commerce Ins. Co.*, 597 F.3d 68 (1st Cir. 2010); *Trinity Universal Ins. Co. v. Cook*, 168 Wash. App. 431, 276 P.3d 372 (2012); *Dattel Family Ltd. Partnership v. Wintz*, 250 S.W.3d 883 (Tenn. App. 2007); *Middlesex Mut. Assur. Co. v. Vaszil*, 279 Conn. 28, 900 A.2d 513 (2006); *McEwan v. Mountain Land Support Corp.*, 116 P.3d 955 (Utah App. 2005); *Cambridge Mut. Fire Ins. Co. v. Crete*, 150 N.H. 673, 846 A.2d 521 (2004).

[38] *Tri-Par Investments v. Sousa, supra* note 1, 268 Neb. at 131, 680 N.W.2d at 199.

to insure the building. The tenant will not know whether it is one policy for the whole building or multiple policies for multiple units. Thus, in the event the landlord and insurer craft the coverage under two policies instead of one, the tenant would not be put on notice of the need to secure his or her own fire insurance coverage.

In arguing that reasonable expectations for a duplex—as opposed to other tenements—make the per se rule inapplicable, Buckeye again unduly narrows a reason behind the per se rule and misses the point. In *Tri-Par Investments*, we did not examine whether the tenant reasonably expected his rent payments to go toward insurance premiums or reasonably expected that the landlord intended a benefit to the tenant when obtaining insurance coverage for the building. The question was instead whether the average tenant would reasonably expect to be covered by the landlord's insurance.

Buckeye agrees that *Tri-Par Investments* clearly mandates that the duplex tenant, absent a clear provision to the contrary, does not have to buy fire protection for his or her own unit. The tenant is an implied coinsured as to the landlord's insurance coverage for that unit. It would be odd that a tenant who does not have to purchase fire insurance for the unit leased should have to purchase coverage for the unit not leased.

In fact, based on the tenant's reasonable expectations, at least one court has found under the case-by-case approach that the antisubrogation rule precludes liability as to another unit, even when it permits subrogation as to the negligent tenant's unit. The Supreme Court of Maryland, in *Rausch v. Allstate*,[39] adopted a case-by-case approach and concluded under the surrounding circumstances that the insurance company had a right of subrogation against the tenant for the damages to the tenant's unit. Yet, without examination of the totality of the circumstances, the court denied subrogation as to any of the other units where the fire had spread. The court thus seemed to adopt a per se rule *only for those units not leased by the tenant*. The court reasoned that unless faced with a very clear contractual provision to the contrary, it is unlikely

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[39] *Rausch v. Allstate*, 388 Md. 690, 882 A.2d 801 (2005).

that "the tenant is thinking beyond the leased premises or, as a practical matter, would be able to afford, or possibly even obtain, sufficient liability insurance to protect against such an extended loss."[40]

We find that to be equally true whether there is one other unit or many other units. The tenant is not thinking beyond the leased premises unless the lease agreement alerts the tenant otherwise. The right to subrogation does not depend on the number of walls separating the units or whether there are common areas. The pertinent fact is that there is one building in which the fire from one unit within that building can easily spread to another. It is reasonable for the tenant to presume that the landlord has fire protection for that building. And it is reasonable for a tenant to expect that if he negligently starts a fire, the insurance company will not sue him to recoup payments made under a policy which was purchased by the landlord precisely for such an occurrence. A reasonable duplex tenant is not on notice, absent clear language in the rental agreement to the contrary, of the need to purchase separate fire insurance.

Finally, while Buckeye is correct that the more units involved, the more economic waste, the relatively small amount of economic waste in *Tri-Par Investments* did not preclude application of the per se rule. The only difference between the tenant's duplicative insurance in *Tri-Par Investments* and the duplicative insurance that would result if we adopted Buckeye's position here is that the duplex tenants would split the burden to insure the building in half—insuring each other's unit, but not their own.

In the end, Buckeye can only be granted the right to subrogation where necessary to subserve the ends of justice and do equity.[41] Such ends are not present when the insurer is attempting to recoup payments for the very risk purchased by the insured. Especially since our decision in *Tri-Par Investments*, insurers understand that absent an express agreement otherwise, they have no subrogation rights against unnamed tenants

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[40] *Id.* at 716, 882 A.2d at 816.

[41] See *Countryside Co-op v. Harry A. Koch Co., supra* note 4.

who negligently start a fire. Such tenants will be considered implied coinsureds. It is the commercial reality that insurers, being aware of our decision in *Tri-Par Investments*, will charge premiums sufficient to cover that risk. It is equally true that landlords will charge rent in some measure based on their expenses. Those expenses include insurance premiums. And especially since our decision in *Tri-Par Investments*, it is reasonable for tenants to concern themselves only with the unit they rent and to assume they are protected through insurance procured by the landlord for the realty, unless there is a provision in the lease clearly stating otherwise.

All of this is true regardless of the size of the building or how it is divided. The equitable factors which led our court to adopt the per se rule for the tenant of a single house is equally applicable whether that house is divided into two, three, or four or more units, and it is equally applicable whether the insurer divides the policies to correspond to each unit or issues a single policy for the building. We will not adopt a rule which would protect the tenant of a duplex unit from the damages caused in the unit occupied, while leaving the tenant open to subrogation for damage to the other side if the fire spreads beyond the single wall which divides them.

Because there was no express subrogation agreement in this case, the per se rule makes Richard an implied coinsured under the Hilderbrands' policies with Buckeye. Accordingly, the court was correct in denying Buckeye's right to subrogation.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED.