No. 130242

IN THE SUPREME COURT OF

THE STATE OF ILLINOIS

ZURICH AMERICAN INSURANCE COMPANY, as subrogee of Community College District No. 508 d/b/a City Colleges of Chicago and CMO, a Joint Venture,

Plaintiff-Appellee,

v.

INFRASTRUCTURE ENGINEERING, INC.,

Defendant-Appellant.

From the Appellate Court of Illinois, First District
No. 1-23-0147

There Heard on Appeal from the Circuit Court of Cook County, Illinois
Case No. 2016 L 12712
The Honorable Patrick Sherlock, Judge Presiding

REPLY BRIEF AND ARGUMENT OF DEFENDANT-APPELLANT INFRASTRUCTURE ENGINEERING, INC.

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INTRODUCTION

Plaintiff, Zurich American Insurance Company ("Zurich"), has had three opportunities—in the Circuit Court, the Appellate Court, and this Court—to identify a "loss" sustained by its purported subrogor, Community College District No. 508 d/b/a City Colleges of Chicago ("City Colleges"). Instead of identifying an actual loss, however, Zurich continues to double-down on its assertion that an "insurable interest" is the equivalent of a "loss," without addressing the case law authority of Defendant Infrastructure Engineering, Inc. ("IEI") that holds directly to the contrary. Zurich also relies on the *ipse dixit* that City Colleges must have suffered a loss because it was the owner of a project damaged by flooding during construction. However, it is undisputed that Zurich's other subrogor in this litigation, CMO, a Joint Venture ("CMO"), was responsible for protecting and repairing the flood-damaged equipment at Malcolm X College during construction. Moreover, it is undisputed that CMO paid the deductible under the Builders Risk Policy out of its own pocket and used the money paid by Zurich to meet *its* own contractual obligation to timely deliver Malcolm X College. There was thus no loss to City Colleges because, simply put, CMO was entirely on the hook for the flood damage that occurred at Malcolm X College during construction.

Since CMO has no privity with IEI, Zurich is left to argue that it should be allowed to subrogate for breach of contract on behalf of City Colleges based on a loss sustained by, claimed by, and paid to CMO. In its opening brief, IEI spelled out why this would be problematic both as a matter of subrogation law and as a matter of contract interpretation. However, Zurich tries to brush these issues under the rug and encourages this Court to adopt a strained interpretation of its contractual subrogation provision that would allow it

to achieve what no other court in this state (or elsewhere) appears to have ever condoned. Zurich's position in this case is an overreach and should be rejected by this Court.

I. Zurich's Response Brief Confirms That City Colleges Did Not Sustain a Loss, Claim a Loss, or Receive Any Loss Payment under the Builders Risk Policy as a Result of the August 17, 2015 Flood Event at Malcolm X College.

In its opening brief, IEI set forth the undisputed evidence showing that any loss sustained as a result of the August 17, 2015 flood event during the construction of Malcolm X College was loss sustained solely by CMO, the general contractor; or put another way, that the only party in privity with IEI (City Colleges) had no damages. In its response, Zurich does not dispute the following:

- CMO had the sole contractual responsibility to furnish the Malcolm X College project by the substantial completion deadline of December 31, 2015 in accordance with the Contract Documents. (C. 9596 V6, 9623 V6, 9625 V6).
- CMO—not City Colleges—was obligated to repair any damage to construction as a result of the August 17, 2015 flood event because CMO needed to meet *its* contractual obligation to furnish a substantially complete Malcolm X College by December 31, 2015. (C. 9596 V6, 9623 V6, 9625 V6).
- CMO (not City Colleges) paid the Builders Risk policy deductible. (C. 9999 V7).
- CMO received 100% of the of the loss payment from Zurich. (C. 9944 V6 – 9945 V6).
- City Colleges had no involvement in submitting a claim to Zurich. (C. 7809 V5 – 7815 V5, 10037 V7, 10053 V7 – 10054 V7, 10676 V7).
- There is no evidence that the claim submitted by and paid to CMO was authorized by, assisted by, or directed by City Colleges. (C. 10713 V7 – 10716 V7; IEI Brief, p. 18).

- Zurich's subrogor, CMO, has no contractual privity with IEI. (R. 17; IEI Opening Brief, pp. 14-15).
- City Colleges did not suffer any damages caused by delays, and Zurich did not pay for any delays under the Builders Risk Policy. (IEI Opening Brief, p. 21).
- There is no evidence that CMO was, in fact, acting as the "agent" of City Colleges in pursuing a claim under the Builders Risk Policy. (IEI Opening Brief, p. 23).

At best, Zurich appears to make two arguments for why City Colleges had a loss. First, in a footnote, Zurich argues that "IEI is a third party that allegedly damaged City Colleges' property [and] City Colleges could have sued IEI to recover the repairs [*sic*] costs." (Zurich Response, p. 25 n.6). Initially, Zurich's placement of a substantive argument in a footnote is improper and should result in the argument being stricken. *See In re Marriage of King*, 208 Ill. 2d 332, 338 (2003) (striking footnotes that contained substantive material); *Lundy v. Farmers Group*, 322 Ill. App. 3d 214, 218 (2d Dist. 2001) (same). However, to the extent this Court considers Zurich's improperly made argument, this Court should reject the argument as conclusory and undeveloped. Zurich's argument still begs the fundamental question: What damage or loss did City Colleges sustain as a result of the August 17, 2015 flood event during construction when the general contractor, CMO, had the sole contractual obligation to deliver Malcolm X College to City Colleges by the contract deadline. IEI maintains that the answer is "none."

The situation here is akin to the purchase of a car to be built according to certain plans and specifications and to be delivered to the purchaser by a certain date. At the assembly plant, any number of things could go wrong: a defective part could be installed, there could be an oil spill that requires cleaning or replacement of parts, or there could be

human error that results in damage to a part, all of which would cost the car manufacturer money during the assembly process. These repairs, however, have no impact on the purchaser so long as it receives the car that it was promised for the price that it agreed to pay. Indeed, no one would ever say that the car buyer sustained damage or suffered a loss if it ultimately received exactly what it bargained for.

The same situation is presented here. City Colleges hired CMO, a general contractor, to build Malcolm X College according to certain plans and specifications. (C. 9623 V6). During the construction process, there was a rain storm that resulted in damage to mechanical equipment installed by CMO before it had fully connected the stormwater detention system. (C. 86-87 V1, 2155 V2). This flood event did not relieve CMO of its obligation to deliver the Malcolm X College to City Colleges by the contract deadline. (C. 9596, 9708 V6). Accordingly, CMO submitted a claim to Zurich, paid the policy deductible, and used the payment from Zurich to meet *its* contractual obligation to deliver Malcolm X College by the contract deadline. (C. 9898, 9944 – 9945 V6, 9999 V7). No damage or loss was ever suffered by City Colleges. Zurich's claim that City Colleges could have sued IEI is a red herring. City Colleges never had a basis to sue IEI because, as the Circuit Court found, City Colleges had no damage or loss to support a claim, which is the fundamental issue raised by this appeal and an issue that Zurich leaves largely unaddressed.

The second argument made by Zurich for why City Colleges suffered a loss follows along the lines of the first. According to Zurich, IEI has ignored that "on the day after the flooding incident, City Colleges was the owner of a damaged building in need of extensive repairs." (Zurich Response, p. 28). Zurich, however, "ignores" that: (a) the building was under construction at the time of the flooding incident; (b) the contractual deadline for the

general contractor, CMO, to deliver Malcolm X College to City Colleges was still 4 months away; and (c) the burden to make any "extensive repairs" was on CMO in order to meet *its* contractual obligation to City Colleges. (C. 2155 V2, 9596 V6). It is thus Zurich, not IEI, who has ignored pertinent facts in making its argument. The fact that Zurich does not dispute IEI's contention that Zurich's other subrogor in this litigation, CMO (a party who has no contractual privity with IEI), was fully responsible for the repairs necessitated by the August 17, 2015 flood event during construction is a tacit admission that City Colleges had no loss.

Zurich also does not dispute in this Court that City Colleges did not suffer any damages as a result of "delays" occasioned by the August 17, 2015 flood event. As noted in IEI's opening brief, Zurich raised this argument for the first time in its appellate reply brief without any record citation, and the Appellate Court relied on such purported "delays," in part, in reaching its conclusion that City Colleges had sustained a "loss." *See Zurich Am. Ins. Co. v. Infrastructure Eng'g, Inc.*, 2023 IL App (1st) 230147, ¶ 45. However, there is simply no evidence of "delays," or payment for "delays" by Zurich, and Zurich's silence on this point confirms that to be the case.

Zurich generally suggests in its response brief that the issue of whether City Colleges sustained a "loss" is of no relevance to this appeal. For example, Zurich seeks to reframe the issues presented for review by removing any mention of the word "loss" altogether, even though the question of whether City Colleges sustained a "loss" was a fundamental basis for IEI's petition for leave to appeal to this Court. (Zurich Response, p. 3). Zurich also mockingly notes in a footnote how many times the word "loss" was used in IEI's opening brief but, ultimately, provides little to no meaningful analysis on the

question of whether City Colleges sustained any actual "loss" in this case. (Zurich Response, p. 25 n.2). It makes no sense, however, to allow an insurer to step into the shoes of another party and bring a claim as the subrogee of that party when the purported subrogor had no loss in the first place. As noted in IEI's opening brief, "[i]t is well settled that a subrogee can have no greater right than the subrogor and can enforce only such rights as a subrogor could enforce." *Lobo IV, LLC v. V Land Chi. Canal, LLC*, 2019 IL App (1st) 170955, ¶ 118. Thus, the inability of Zurich to articulate any actual loss sustained by its purported subrogor City Colleges is fatal to its claim based in subrogation.

II. In the Absence of Any Actual Evidence of a Loss, Zurich Doubles-Down on Its Argument that an "Insurable Interest" Is the Equivalent of a "Loss" and Fails to Respond to Case Law Authority Holding to the Contrary.

In the absence of any actual loss to City Colleges, Zurich returns to its well-worn argument that City Colleges had an "insurable interest" in Malcolm X College and that this, alone, should suffice to allow it to pursue a subrogation claim on behalf of City Colleges against IEI. Zurich, however, fails to respond to either of IEI's cited cases that recognize an "insurable interest" is not the equivalent of a loss. *State Farm Mut. Auto. Ins. Co. v. Rodriguez*, 2013 IL App (1st) 121388, ¶¶ 12-14, 30; *Beman v. Springfield Fire & Marine Ins. Co.*, 303 Ill. App. 554, 555, 562-63 (1st Dist. 1940). Accordingly, Zurich has forfeited any argument that these cases do not set forth the prevailing law and that an "insurable interest" by itself is not a "loss." Ill. S. Ct. R. 341(h)(7) (eff. Oct. 1, 2020).

To the extent this Court chooses to consider Zurich's "insurable interest" argument notwithstanding a forfeiture, IEI notes that this argument is yet another red herring. The question of whether one has an "insurable interest" goes to the issue of policy validity. *Int'l Ins. Co. v. Melrose Park Nat'l Bank*, 145 Ill. App. 3d 286, 290 (1st Dist. 1986). "[T]he

reason for the requirement of an insurable interest is 'to prevent the use of insurance for illegitimate purposes.' " *Hawkeye-Security Ins. Co. v. Reeg*, 128 Ill. App. 3d 352, 355 (5th Dist. 1984) (quoting *Womble v. Dubuque Fire & Marine Ins. Co.*, 37 N.E.2d 263, 266 (Mass. 1941)). Here, IEI has *never* argued that the Builders Risk Policy is invalid. Rather, IEI's argument is that Zurich's purported subrogor, City Colleges, had no loss, and therefore Zurich's subrogation claim has no basis. Simply put, Zurich's "insurable interest" argument has nothing to do with the issue raised by this appeal.

Zurich nonetheless attempts to conflate the issues of "insurable interest" and "loss" by arguing, essentially, that because both CMO and City Colleges had an "insurable interest" in the project during its construction, the damages caused by the August 17, 2015 flood event during construction necessarily had to be a loss sustained by both CMO and City Colleges, collectively. However, this argument rests on two faulty assumptions: (1) that an "insurable interest" is the equivalent of a "loss" (which, for the reasons explained above and in IEI's opening brief, is not correct); and (2) that the "interests" of both City Colleges and CMO in the Malcolm X College project were the same, such that a "loss" to one was necessarily a "loss" to the other. Zurich's latter assumption is just as flawed as the first.

As an initial matter, Zurich takes a different position in this Court than it took in the Appellate Court. Previously, in its Appellate Reply brief, Zurich argued that, when CMO and City Colleges entered into the AIA Standard Form of Agreement Between Owner and Contractor (the "CMO Contract"), they "agreed to protect *their separate interests* under a single builder's risk policy." (Emphasis added.) (Zurich Appellate Reply, p. 11). Now, however, in apparent recognition that its earlier acknowledgment undermines

its argument here, Zurich contends that CMO and City Colleges had a "mutual interest" in builder's risk coverage. (Zurich Response, p. 16). This change in position—which is devoid of any analysis—is purely self-serving and should be rejected by this Court.

CMO and City Colleges had *separate* interests that were to be protected under the Builders Risk Policy, with each party's interests correlating to their respective responsibilities for the Malcolm X College project as allocated in the CMO Contract. (C. 9594 V6). City Colleges, for example, was "solely responsible for any loss or damage arising solely from . . . *Owner-required* means, methods, techniques, sequences or procedures. (Emphasis added.) (C. 9624 V6). CMO, on the other hand, was responsible for its own "construction means, methods, techniques, sequences and procedures," as well as other aspects of the project, such as delivering Malcolm X College by the contract deadline and, as pertinent here, "prevent[ing] damage, injury or loss to…the Work and materials and equipment to be incorporated therein, whether in storage on or off the site, under care, custody or control of the Contractor or the Contractor's Subcontractors or Sub-Subcontractors." (C. 9596, 9624, 9640 V6).

Here, Zurich fails to identify what specific project "interest" of City Colleges was impacted by the August 17, 2015 flood damage during construction at Malcolm X College. Again, it is undisputed that CMO was contractually responsible for delivering Malcolm X College by the contract deadline regardless of any flood damage to equipment during construction. The evidence thus shows that CMO sustained an actual "loss" because of its need to repair the flood-damaged equipment to meet its contractual obligation to City Colleges. However, City Colleges, itself, suffered no "loss" because its general contractor (CMO) was responsible for replacing the damaged equipment.

The fundamental flaw in Zurich's entire "insurable interest" argument becomes apparent when one considers that the Builders Risk Policy includes as "Additional Named Insureds" not just City Colleges and CMO, but also all "subcontractors of every tier" as well as "tenants at the project location." (C. 10579 V7). Taking Zurich's argument to its logical conclusion, every single subcontractor and/or tenant on the project would have sustained a "loss" due to the August 17, 2015 flood damage during construction merely because they had an "insurable interest" in the project. For example, if CMO entered into a hypothetical subcontract with a painter who painted the lines in the parking lot, Zurich could conceivably seek to recoup its entire loss payment under the Builders Risk Policy as the subrogee of that painter based solely on the fact that the painter had an insurable interest. This is absurd because, while the painter had an "insurable interest," it quite clearly had no "loss" due to flood damage in the basement of the partially constructed Malcolm X College. Indeed, the August 17, 2015 flood event during construction would have had no impact on the painter's "interest" in Malcolm X College, which would have been limited to the responsibilities outlined in its contract. Zurich's attempt to conflate an "insurable interest" with a "loss" thus runs afoul of both Illinois law and logic.

Zurich devotes a portion of its brief to a discussion of the purpose of builder's risk insurance, including how it is intended to work and pay claims regardless of fault, and from there, dovetails into an argument that City Colleges is an "insured" under the Builders Risk Policy. This entire argument should be disregarded by this Court as irrelevant. For starters, no one has ever disputed in this case that the Builders Risk Policy did exactly what it was supposed to do: pay a claim for loss sustained by Zurich's insured, CMO, as a result of flood damage during the construction of Malcolm X College. Also, no one has ever

disputed that City Colleges meets the definition of an "insured" under the Builders Risk Policy. The relevant inquiry here is whether Zurich can pursue a subrogation claim on behalf of a different insured, City Colleges, based on a loss sustained by, claimed by, and paid to CMO. None of Zurich's discussion about the purpose of builder's risk coverage or whether City Colleges is an "insured" has any bearing on that question. Instead, Zurich appears to be deflecting in an effort to avoid addressing the fundamental issue raised by this appeal.

Zurich next goes on to suggest, erroneously, that IEI's argument that City Colleges has not sustained a loss is based on unrelated contract terms: specifically, a term in the CMO Contract requiring CMO, not City Colleges, to purchase the Builders Risk Policy, and a term in the Builders Risk Policy that required CMO "to administer any insurance claims including the receipt of claim payments." (Zurich Response, p. 26). Contrary to Zurich's argument, IEI has not made any argument regarding the term in the CMO Contract that required CMO to purchase the Builders Risk Policy. It is unclear why Zurich suggests this. Also, contrary to Zurich's argument, IEI does not argue that Zurich has not sustained a "loss" based on the provision in the Builders Risk Policy that appoints CMO as the party "to administer any insurance claims." Rather, IEI's argument is based on CMO and City Colleges' respective responsibilities under the CMO Contract; the testimony of David Sanders that City Colleges had no involvement in the claim submitted by CMO and does not even know what Zurich paid; the testimony of Stephanie Calhoun that CMO paid the Builders Risk Policy deductible out of its own pocket; and the lack of any other evidence that City Colleges sustained a loss. (C. 9596 V6, 9999, 10037, 10053 – 10054 V7). Zurich does not even attempt to address the evidence cited by IEI. Nor does Zurich advance any

cogent argument for how City Colleges sustained a "loss" as a result of the August 17, 2015 flood event during construction. The fact that Zurich has chosen to respond to IEI's argument by mischaracterizing it, instead of addressing it, is a tacit admission that Zurich's position is without merit.

Zurich next provides this Court with an incomplete hypothetical based on the mischaracterization of IEI's argument addressed in the previous paragraph. In its proposed hypothetical, Zurich suggests that IEI's position in this case would be the reverse if City Colleges had purchased the Builders Risk Policy and was the party responsible for "handling the insurance claim and receiving the claim payments." (Zurich Response, pp. 26-27). According to Zurich, IEI would then contend that City Colleges had a "loss" because it handled the claim and received the claim payment. Zurich is incorrect. IEI's argument in this case does not turn on who "handles" a claim under the Builders Risk Policy. On the contrary, IEI's argument turns on who had the underlying contractual responsibility for repairing the damage caused by the August 17, 2015 flood event during construction and who, in fact, had a claim to submit under the Builders Risk Policy and had a loss compensated by the claim payment from Zurich. As set forth in IEI's opening brief and herein, the undisputed evidence shows that *CMO* was responsible for repairing the flood damaged equipment at Malcolm X College to meets *its* contractual obligations under the CMO Contract; that *CMO* submitted a claim under the Builders Risk Policy without any involvement or coordination with City Colleges; and that *CMO* received a loss payment from Zurich to effect repairs to meet *its* contractual obligations. (C. 9596, 9640, 9898, 9944 – 9945 V6, 10037, 10053 – 10054 V7). Put another way, all evidence of loss in this case reflets a loss sustained by CMO, not City Colleges. Zurich does not address

any of this cited evidence or IEI's arguments related thereto, and thus effectively concedes that City Colleges had no loss.

Lastly, Zurich improperly attempts to distinguish IEI's cited case of *New York Bd. of Fire Underwriters v. Trans Urban Constr. Co.*, 91 A.D.2d 115 (N.Y. App. Div. 1983), *aff'd on other grounds*, 60 N.Y.2d 912 (1983) in a footnote. Zurich's argument should be stricken for being improperly raised in a footnote. *See In re Marriage of King*, 208 Ill. 2d at 338; *Lundy*, 322 Ill. App. 3d at 218. To the extent it is not, this Court should reject Zurich's argument. The fact that the insurer in *Trans Urban* sought to subrogate against one of its own insureds had no bearing on the court's separate conclusion that the plaintiff-insurer could not pursue a subrogation claim on behalf of a subrogor with no loss. Zurich's attempt to distinguish the facts of *Trans Urban* also falls flat. The only relevant fact in *Trans Urban* is that the plaintiff-insurer's subrogor had no loss, just like here. Nowhere does Zurich dispute the court's holding that an insurer cannot subrogate on behalf of an insured with no loss. *Trans Urban Constr. Co.*, 91 A.D.2d at 122-23. It is that holding which the Circuit Court found warranted summary judgment, and which IEI asks this Court to follow here.

III. Zurich Provides No Persuasive Reason Why the Traditional Prerequisites to Subrogation Should Not Apply in the Context of Contractual Subrogation.

Zurich argues that the traditional prerequisites to subrogation should not apply to contractual subrogation claims because such prerequisites have their roots in equitable subrogation. According to Zurich, courts in this state should ignore concepts relied upon in the equitable subrogation context in favor of strict reliance on contractual subrogation provisions, whether or not such provisions carry the hallmarks of true "subrogation."

However, Zurich does not dispute IEI's argument that the traditional prerequisites to subrogation mirror existing Illinois law defining the concept of "subrogation" itself. Zurich also does not provide any argument for why such prerequisites should not serve a gate-keeping function to ensure that claims brought under a theory of contractual subrogation are, in fact, proper "subrogation" claims under Illinois law. Instead, Zurich devotes its response brief to debating whether appellate courts in this state have wrongly cited such prerequisites as applying to claims of contractual subrogation.

Zurich's argument elevates form over substance. The mere fact that subrogation can come in different forms does not mean that an iron curtain falls and prevents the courts of this state from evaluating whether claims brought under a subrogation theory—whether equitable or contractual—have the fundamental components of a true "subrogation" claim. In fact, it would appear that in any true subrogation case, application of the traditional prerequisites to subrogation, even in the contractual subrogation context, would have no bearing on the outcome because, again, they simply define the concept of "subrogation" itself: namely, "(1) a third party has caused a loss and is primarily liable to the insured for the loss, (2) the insurer is secondarily liable to the insured due to an insurance policy, and (3) the insurer pays the insured under that policy, thereby extinguishing the debt owed by the third party." *Trogub v. Robinson*, 366 Ill. App. 3d 838, 842 (1st Dist. 2006). This begs the question: why has Zurich pressed so hard in this case against application of these prerequisites? The answer, which is evident from Zurich's briefing, is that Zurich cannot establish that its contrived subrogor City Colleges had a loss. As a result, Zurich can only direct this Court to its contractual subrogation provision, alone, so that it can make the argument that the provision should be interpreted so as not to require any loss to have been

sustained by its subrogor, so long as it made a payment for *any* insured's loss. However, IEI set forth in its opening brief the numerous reasons why this is problematic, not the least of which is that it effectively creates a new cause of action allowing Zurich to sue under one party's contract for loss sustained by another party entirely. Zurich, however, avoids addressing these issues in its response brief.

Instead, Zurich argues against application of the traditional prerequisites to subrogation by contending that the courts in *Trogub v. Robinson*, 366 Ill. App. 3d 838 (1st Dist. 2006), *Econ. Premier Assur. Co. v. Country Mut. Ins. Co.*, 2021 IL App (1st) 192364-U[1], and *SwedishAmerican Hosp. Ass'n of Rockford v. Illinois State Med. Inter-Ins. Exch.*, 395 Ill. App. 3d 80 (2d Dist. 2009) "confused the distinction between contractual and equitable subrogation" when those courts stated that such prerequisites applied to both equitable *and* contractual subrogation claims. (Zurich Response, p. 20). Zurich's analysis is perfunctory at best. It essentially boils down to: (a) this Court cited the prerequisites to subrogation as the elements of an equitable subrogation claim in *Home Insurance Co. v. Cincinnati Insurance Co.*, 2013 Ill. 2d 307 (2004); and (b) *Trogub*, *Economy Premier*, and *SwedishAmerican Hospital* stated that such prerequisites applied to claims of both equitable and contractual subrogation without analyzing the difference between equitable and contractual subrogation claims. Notably, however, Zurich does not dispute that *Trogub* and *Economy Premier* were both contractual subrogation cases.

In the end, Zurich fails to explain how applying the traditional prerequisites to subrogation in both the equitable and contractual subrogation contexts results in any

[1] A copy of *Econ. Premier Assurance Co. v. Country Mut. Ins. Co.* was included in the appendix to IEI's opening brief in accordance with Illinois Supreme Court Rule 23(e)(1).

conflict, *other than* in a situation like here where the insurer is seeking to subrogate on behalf of one insured based on a loss sustained by, claimed by, and paid to a different insured, which IEI maintains is not true "subrogation." Put another way, Zurich's argument against application of the traditional prerequisites to subrogation can be traced directly to its unprecedented overreach in attempting to use one insured as a "straw man" to recover another insured's loss. IEI maintains that this Court should hold the traditional prerequisites to subrogation apply to both claims of equitable *and* contractual subrogation - if for no other reason than to ensure that claims couched in subrogation are, in fact, true subrogation claims and to prevent other insurers from doing what Zurich attempts here.

Lastly, Zurich argues, in a footnote, that it can satisfy the traditional prerequisites to subrogation even if they are applied here. This argument, relegated to a footnote, should be stricken. *See In re Marriage of King*, 208 Ill. 2d at 338; *Lundy*, 322 Ill. App. 3d at 218. However, in the event it is not, the issue of whether Zurich can meet the prerequisites to subrogation turns on whether it has paid a loss of its subrogor. For the reasons stated in Sections I and II *supra*, Zurich's purported subrogor, City Colleges, had no loss and therefore did not receive any payment for loss.

IV. The Subrogation Provision in the Builders Risk Policy Does Not Provide Zurich with the Right to Subrogate on Behalf of City Colleges Where the Undisputed Evidence Shows that City Colleges Did Not Sustain a Loss, Claim a Loss, or Receive Payment for a Loss.

Zurich argues that the subrogation clause in its policy should be enforced as written. On this, Zurich and IEI agree. However, Zurich's strained interpretation of its subrogation provision ignores the plain, ordinary, and popular meaning of the language used and also leads to absurd results as pointed out in IEI's opening brief. IEI's interpretation, on the other hand, gives the policy terms their plain, ordinary, and popular meaning, is consistent

with Illinois subrogation and contract law, and avoids any absurd results. Accordingly, IEI's interpretation of the subrogation provision—that it only permits subrogation on behalf of "the Insured" who suffered the loss Zurich has paid—must prevail.

The first sign that something is amiss with Zurich's policy interpretation argument is that, instead of beginning with an analysis of the actual policy language, Zurich discusses the purpose of builder's risk coverage and refers to extraneous documents that purport to show the intent of CMO and City Colleges in purchasing the Builders Risk Policy. Any interpretation of a policy, however, must begin with the language, which expresses the intention of the parties. *Cont'l Cas. Co. v. Hennessy Indus., Inc.*, 2019 IL App (1st) 180183, ¶ 19.

By the time Zurich gets around to analyzing the language of the subrogation provision in the Builders Risk Policy, Zurich argues that both City Colleges and CMO are "insureds" under the Builders Risk Policy (a point which IEI has never disputed) and then misrepresents IEI's argument as being that Zurich's subrogation rights are limited to the first named insured's recovery rights. That is not IEI's argument at all. IEI's argument is that the subrogation provision in the Builders Risk Policy can only be read to permit subrogation on behalf of the "insured" who has sustained a loss and whose loss has been paid by Zurich. IEI questions how its argument could have been any more clear given the issues presented and argued in its opening brief. Either Zurich fundamentally misunderstands IEI's argument, or it is again deflecting this Court's attention away from an argument to which it has no response.

Ultimately, this Court will find only the most limited plain language analysis of the contractual subrogation provision in Zurich's response brief, at least pertaining to the issue

actually raised by this appeal. Zurich's argument appears to be that: (a) City Colleges is an "insured" under the Builders Risk Policy (which, again, IEI does not dispute); and (b) the policy does not limit Zurich's subrogation rights to the first named insured (which, again, IEI does not dispute). Neither of these arguments address the fundamental question here: can the subrogation provision in the Builders Risk Policy be read to allow Zurich to subrogate for breach of contract on behalf of one insured (City Colleges) based on a loss sustained by, claimed by, and paid to a different insured (CMO)? IEI maintains that the answer is "no" for all of the reasons set forth in its opening brief.

Zurich's failure to respond to IEI's plain language arguments, including the absurd results stemming from Zurich's proposed interpretation of the subrogation provision contained in its Builders Risk Policy, should be deemed a forfeiture of this issue. Ill. S. Ct. R. 341(h)(7). This Court should enforce the contractual subrogation provision by its plain and ordinary terms, along the lines of IEI's proposed interpretation, and conclude that summary judgment was properly granted to IEI because Zurich's purported subrogor, City Colleges, had no loss giving rise to a right of subrogation.

V. The Brief of *Amicus Curiae* Is Improper and Advances No Public Policy Argument for Allowing Insurance Recoveries on Behalf of Purported Subrogors with No Loss.

The brief filed by *amicus curiae*, the National Association of Subrogation Professionals ("NASP") improperly parrots the arguments in Zurich's response brief and, at times, goes even further to make arguments that Zurich has forfeited as a result of its failure to respond.[2]

[2] For example, NASP attempts to distinguish IEI's cited cases of *State Farm Mut. Auto. Ins. Co. v. Rodriguez*, 2013 IL App (1st) 121388 and *Beman v. Springfield Fire & Marine Ins. Co.*, 303 Ill. App. 554, 555, 562-63 (1st Dist. 1940), which Zurich has not done itself.

" 'An amicus *curiae* is not a party to the action, but is, instead, a 'friend' of the court.' " *Burger v. Lutheran Gen. Hosp.*, 198 Ill. 2d 21, 62 (2001) (quoting *People v. P.H.*, 145 Ill. 2d 209, 234 (1991)). Arguments made by an *amicus* but not espoused by the parties have no biding effect on the parties. *P.H.*, 145 Ill. 2d at 234. Further, this Court has recognized that an *amicus* brief that simply makes the same arguments of the parties does not assist the court, as required by Illinois Supreme Court Rule 345. *See Froehler v. North American Life Ins. Co.*, 374 Ill. 17 (1940). Here, the *amicus* brief of NASP should be disregarded by this Court to the extent it is duplicative of Zurich's brief or makes arguments that Zurich has forfeited, as such is not the proper role of an *amicus curiae*.

IEI, nonetheless, will address briefly some of the problems with NASP's *amicus* brief. As an initial matter, NASP is under the mistaken impression that this case sounds in tort, when in fact there is a single cause of action against IEI for breach of contract. (NASP *amicus* brief, pp. 8, 12). This is a significant oversight. Unlike a cause of action in tort, the elements of a breach of contract claim are: (1) a valid and enforceable contract; (2) performance of the contract by plaintiff; (3) a breach of the contract by defendant; and (4) damages resulting from the breach. *Direct Energy Bus., LLC v. City of Harvey*, 2021 IL App (1st) 200629, ¶ 16. NASP ignores the contractual nature of the parties' dispute and simply parrots Zurich's conclusory argument that City Colleges must have had a loss because it was the owner of Malcolm X College, which fails for the reasons addressed in Sections I and II *supra*. NASP also ignores the fact that Zurich is continuing to pursue a subrogation claim against IEI as a subrogee of both City Colleges *and* CMO despite a lack of contractual privity between CMO and IEI. As discussed in IEI's opening brief, there can be only one explanation for why Zurich is pursuing a subrogation claim on behalf of

CMO: it is seeking to use the contractual privity of City Colleges and IEI to recover the loss of a completely different party, CMO. However, such a theory of recovery finds no basis in Illinois subrogation or contract law, which NASP fails to address.

Besides getting the law wrong, NASP also gets the facts wrong. Without any reference to the CMO Contract, NASP claims that "[t]he damage, as to CMO" stemming from the August 17, 2015 flood event during construction was "simply a blip" despite the large claim payout to CMO that Zurich seeks to recover here. (NASP *amicus* brief, p. 20). NASP also claims that the flood event during construction resulted in "tangible physical damage caused by IEI," but cites no evidence that IEI was responsible for any damage. (NASP *amicus* brief, p. 20). Ultimately, NASP's *amicus* brief contains no citations to the record and presents the "facts" as NASP wishes them to be, not as they actually are. NASP's brief should be disregarded for this reason as well.

As far its public policy argument is concerned, NASP suggests that a ruling in IEI's favor will undermine the offering of builder's risk insurance and "open[] the door to litigating every course of construction policy loss…" (NASP *amicus* brief, pp. 8-9). This position is absurd. For starters, neither Zurich nor NASP have identified a single case *ever* that has allowed what Zurich is seeking to do here, which illustrates that Zurich's proposed course of action is unprecedented and that disallowing it would have no bearing on the offering of builder's risk insurance in this state. Second, NASP's complaint that an insurer might have to "litigat[e] every course of construction policy loss" in connection with a subrogation claim should fall upon deaf ears. NASP is essentially arguing that an insurer should not have to establish that its purported subrogor suffered a loss in order to bring a subrogation claim. However, if the subrogor had no loss, on what basis could the insurer

possibly be suing? What cause of action could it be seeking to enforce when stepping into the shoes of its purported subrogor if the subrogor never had any loss in the first place? This is the fundamental question presented by this appeal and one that Zurich and NASP avoid addressing head-on.

CONCLUSION

For the reasons stated herein, and in its opening brief, Defendant-Appellant Infrastructure Engineering, Inc. respectfully requests that this Court reverse the judgment of the Appellate Court and affirm the judgment of the Circuit Court granting Defendant-Appellant's motion for summary judgment on Count III of Plaintiff's Complaint, and for any further appropriate relief.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 20 pages.

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CERTIFICATE OF SERVICE

I certify that I served, or caused to be served, the Reply Brief and Argument of Defendant-Appellant Infrastructure Engineering, Inc., to each party of record listed below, at their designated address, via electronic mail and via the Court's electronic filing system, from 200 S. Wacker Drive, Suite 2550, Chicago, Illinois 60606 on April 17, 2024.

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[X] Under penalties as provided by law pursuant to 735 ILCS 5/1-109, I certify that the statements set forth herein are true and correct.

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the above signed certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the above signed certifies as aforesaid that he verily believes the same to be true.

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