No. 128012

In the

Supreme Court of Illinois

MONROE SHECKLER and DOROTHY SHECKLER,

Plaintiffs-Appellees,

v.

AUTO-OWNERS INSURANCE COMPANY,

Defendant-Appellant,

RONALD McINTOSH,

Defendant,

and

WAYNE WORKMAN,

Defendant-Appellee.

On Appeal from the Illinois Appellate Court, Third Judicial District, No. 3-19-0500
There Heard on Appeal from the Circuit Court of the Tenth Judicial Circuit,
Tazewell County, Illinois, No. 2018 MR 149.
The Honorable **Michael D. Risinger**, Judge Presiding.

BRIEF AND APPENDIX OF APPELLANT

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NATURE OF THE CASE

This case presents a simple question: whether under Illinois law, a court can use a landlord's first-party dwelling policy ("Dwelling Policy") to create and impose on the insurer a duty to defend the landlord's tenants in a third-party liability suit, even though (a) the Dwelling Policy does not identify the tenants as covered insureds, (b) the Dwelling Policy does not offer third-party liability coverage in the first place, and (c) the landlord's actual third-party liability policy ("Landlord Liability Policy"), which also does not identify the tenants as covered insureds, expressly excludes coverage for the allegations against the tenants. The Third District erred by answering this question in the affirmative. *See* Opinion, (A-13)¶ 45.[1]

This Court has made clear that the plain terms of the policy govern whether an insurer has a duty to defend. Here, not only does the Opinion fail to enforce these terms (which the Third District found "unavailing"), it only tacitly identifies the particular policy (the Dwelling Policy, rather than the Landlord Liability Policy) that purportedly affords this coverage in the first place, instead conflating two different types of policies which, by their very nature, call for fundamentally different obligations—a distinction which Illinois courts have long recognized.

In any event, as a matter of law, the tenants are not entitled to a third-party liability defense under any of the landlord's policies—whether the Dwelling Policy, the Landlord Liability Policy, or any judicially-created hybrid of the two. Even though it is the only policy that actually offers a defense to third-party claims, the Opinion concedes that the tenants are not entitled to coverage under the Landlord Liability Policy, and for good

[1] Auto-Owners Insurance Company ("Auto-Owners") refers to the Third District's October 22, 2021 Order as the "Opinion" (See Appendix, A-1 – A-21)

reason: the Landlord Liability Policy does not cover the tenants, and even if it did, the Landlord Liability Policy unequivocally excludes the precise third-party coverage that the tenants demand.

Nonetheless, the Opinion manufactures this exact coverage under the landlord's *Dwelling Policy*. Yet, the Dwelling Policy also does not cover the landlord's tenants, and even if it did, the Dwelling Policy (like any first-party property policy) does not offer *anyone* a defense to third-party claims, let alone implied "coinsureds" in particular. And, because this duty to defend (unlike subrogation) is not an issue of equity, but instead a question of law governed by the policy itself, Illinois law prohibits the Third District from invoking "equity" to abandon the Dwelling Policy's unambiguous terms and craft a hybrid first-party property policy that now includes a third-party liability defense. The result: not only does the Opinion become the first "reported case[] in Illinois" to expand *Dix Mut. Ins. Co. v. LaFramboise* to third-party liability defense "absent an express agreement," it does so under a policy that does not offer such coverage in the first place. 149 Ill. 2d 314, 323 (Ill. 1992); *Hacker v. Shelter Ins. Co.*, 388 Ill. App. 3d 386, 393 (5th Dist. 2009).

ISSUE PRESENTED

Whether the Third District erred by using a landlord's first-party dwelling policy to create and impose on the insurer a duty to defend the landlord's tenants in a third-party liability suit, even though (a) the dwelling policy does not identify the tenants as covered insureds, (b) the dwelling policy does not offer third-party liability coverage in the first place, and (c) the landlord's actual third-party liability policy, which also does not identify the tenants as covered insureds, expressly excludes coverage for the allegations against the tenants.

STATEMENT OF JURISDICTION

The Court has jurisdiction under Ill. S. Ct. R. 315. On August 7, 2019, the Circuit Court granted Auto-Owners' motion for summary judgment, and denied the motions for summary judgment by Monroe and Dorothy Sheckler ("Shecklers"), and by Wayne Workman ("Mr. Workman"). *See* C564–66. On October 22, 2021, the Third District reversed the Circuit Court's grant of summary judgment in favor of Auto-Owners. *See* Opinion, (A-13) ¶ 45, and on December 7, 2021 denied Auto-Owners' Petition for Rehearing. On February 14, 2022, Auto-Owners timely filed a petition for leave to appeal, which the Court granted on May 25, 2022.

STATEMENT OF FACTS AND PROCEEDINGS

I. The McIntoshs' Dwelling Policy and Landlord Liability Policy

Ronald McIntosh ("Mr. McIntosh") owned certain real property in Pekin, Illinois ("Property"), for which Mr. McIntosh obtained two separate insurance coverages from Auto-Owners: (1) the first-party Dwelling Policy and (2) the third-party Landlord Liability Policy. *See* C128–75. Under both the Dwelling Policy and the Landlord Liability Policy, Mr. McIntosh and Rita Kay McIntosh (collectively, "McIntoshs") are the only named insureds, *see* C132–34, which the Dwelling Policy defines as follows:

> a. you (defined as the "first named insured shown in the Declarations and if an individual, your spouse who resides in the same household"); b. your relatives (defined as "a person who resides with you and who is related to you by blood, marriage or adoption . . ."); and, c. any other person under the age of 21 residing with you who is in your care or the care of a relative.

C159–160. The Landlord Liability Policy similarly defines "insured" as follows:

> [W]hen you are designated in the Declarations as: a. an individual, you; b. a partnership or joint venture, you, your partners, your members and their spouses; c. a limited liability company, you and your members. Your managers are also insureds, but only with respect to their duties as such; d.

> an organization other than a partnership, joint venture or limited liability company, you, your executive officers or directors.

C144.

Like with any first-party property insurance, the Dwelling Policy entitles the insureds (*i.e.*, the McIntoshs) to reimbursement for damage to the Property itself, *see* C163 (Auto-Owners will "cover risk of accidental direct physical loss to covered property . . ."), but it does not establish any duty to defend or indemnify claims by third parties—against the named insureds or otherwise. *See id*. By contrast, the Landlord Liability Policy covers third-party claims that "any insured becomes legally obligated to pay . . . because of or arising out of bodily injury or property damage." C144. However, even for such claims against the named insureds, the Landlord Liability Policy specifically excludes coverage for "property damage to property occupied or used by any insured or rented to or in the care of any insured." C145. By March 19, 2015, the McIntoshs had fully paid the annual premiums for both the Dwelling Policy and the Landlord Liability Policy. *See* C235–37; C118–27.

On August 6, 2015, the Shecklers entered into a written agreement with Mr. McIntosh to lease the Property ("Lease"). *See* 118–27; C235. Pursuant to the Lease, the Shecklers agreed to maintain and repair the Property at their own expense, *see* C122–23, and that Mr. McIntosh would not be liable for any damage occurring on the Property unless Mr. McIntosh himself caused it, with the Lease specifically providing as follows:

> Owner shall not be liable for any damages or injury to Tenant, or any other person, or to any property, occurring on the premises, or any part thereof, or in common areas thereof, unless such damage is the proximate result of the negligence or unlawful act of Owner, his agent or employees. Tenant agrees to hold Owner harmless from any claims for damages no matter how caused, except for injury or damage for which Owner is legally responsible.

See C123. The Lease further required the Shecklers to "turn over possession of the [Property] in the same condition as premises were at the time [the Shecklers] first occupied" the Property. C125.

Moreover, while the Lease explained that Mr. McIntosh would maintain fire insurance "on the premises only"—*i.e.*, first-party dwelling insurance to reimburse Mr. McIntosh for damage to his Property—the Lease did not require Mr. McIntosh to obtain any insurance for the Shecklers (dwelling, third-party liability, or otherwise), *see* C121, nor did any of the parties intend or expect that Mr. McIntosh would do so.[2] *See* C118–127; C452–53. Accordingly, neither the Landlord Liability Policy nor the Dwelling Policy identifies the Shecklers as insureds or coinsureds, either in name or description (*e.g.*, "tenants"). *See* C132–34; C144; C159–60. And, because the McIntoshs had fully paid the premiums for both the Dwelling Policy and the Landlord Liability Policy nearly five months before the Shecklers even entered the Lease or paid rent, the Shecklers did not contribute in any way (directly or indirectly) to the McIntoshs' premiums for either Policy. *See* C180–81; C235–38; R7.

[2] In his affidavit, Mr. McIntosh averred that (a) he never entered into an agreement with the Shecklers regarding liability insurance, (b) the Shecklers did not even know that he had liability insurance prior to the fire, (c) he did not intend to provide the Shecklers with liability insurance, (d) he did not provide prior tenants with liability insurance, and (e) it was the Shecklers' responsibility to obtain liability insurance. *See* C452–53. In the face of Mr. McIntosh's affidavit, the Shecklers neither presented any counter-affidavits nor any other evidence contradicting these facts. *See generally* C62–101; C216–17; C223–24; C296–301; *see also US Bank, NA v. Avdic*, 2014 IL App (1st) 121759, ¶ 31 (1st Dist. 2014) ("Facts contained in an affidavit in support of a motion for summary judgment which are not contradicted by counteraffidavit are admitted and must be taken as true for purposes of the motion.") (quotations omitted)).

II. The Accident and Ensuing Litigation

On August 26, 2015, after Mr. Workman attempted to repair a gas leak at the Property, a fire erupted and damaged the Property. *See* R8; C27. Subsequently, Mr. McIntosh submitted a first-party claim under the Dwelling Property, and Auto-Owners paid for the damage. *See* R8; *see also* C158–72. On April 25, 2017, because Mr. Workman's negligent repair caused the Property's damage, Auto-Owners—as subrogee of Mr. McIntosh and pursuant to the Dwelling Policy—asserted a claim against Mr. Workman to recover the amounts that Auto-Owners paid to Mr. McIntosh. *See* C28; C50; C172. On September 14, 2017, Mr. Workman sued the Shecklers, alleging that their own negligence contributed to the Property's damage. *See* C28; C50.

On November 1, 2017, the Shecklers tendered to Auto-Owners the defense of Mr. Workman's negligence claims against them. *See* C28–29; C50. Because the Dwelling Policy did not establish any duty to defend or indemnify third-party claims, the Shecklers instead submitted their claim under the Landlord Liability Policy. *See id*. (Shecklers alleging that they tendered defense to Auto-Owners because they "did not have any other liability insurance coverage to defend them"). On January 26, 2018, pursuant to the plain language under the Landlord Liability Policy and its exclusions (along with the Dwelling Policy), Auto-Owners denied the Shecklers' claim. *See id*.

III. The Circuit Court Enters Judgment Against the Shecklers

On July 2, 2018, the Shecklers brought the present action, seeking a declaration of their rights under the McIntoshs' "policy." *See* C8–12. On August 7, 2019, the Circuit Court granted Auto-Owners' motion for summary judgment, and denied the motions for

summary judgment by the Shecklers and Mr. Workman, specifically holding that Auto-Owners "does not owe a duty to defend [the] Sheckler[s]." C564–66; *see* R95.

IV. The Third District Reverses the Circuit Court's Judgment

On August 19 and August 23, 2019, respectively, Mr. Workman and the Shecklers filed notices of appeal with the Third District. *See* Opinion, (A-4) ¶ 9. While Mr. Workman's appeal was pending, the jury in Auto-Owners' subrogation action returned a verdict in Mr. Workman's favor. *See* Opinion at (A-4) ¶ 9. Thus, needing no contribution from the Shecklers, Mr. Workman voluntarily dismissed his appeal. *See id*. Moreover, because the Shecklers no longer required indemnification, the only remaining issue on appeal was the Circuit Court's conclusion that Auto-Owners had no duty to defend the Shecklers. *See id*. ¶ 1 ("In this insurance coverage dispute, we must decide whether an insurer's duty to defend extends to the tenants of the insured property against a third-party negligence contribution claim when the tenants are not identified as persons insured under the policy.").

On October 22, 2021, the Third District reversed the Circuit Court's grant of summary judgment in favor of Auto-Owners, using the McIntoshs' first-party Dwelling Policy to create Auto-Owners' purported duty to defend the Shecklers in a third-party liability suit, even though (a) the Dwelling Policy does not identify the Shecklers as covered insureds, (b) the Dwelling Policy offers no third-party liability coverage in the first place, and (c) the McIntoshs' actual third-party liability policy (*i.e.*, the Landlord Liability Policy), which also does not name the Shecklers as covered insureds, expressly excludes the precise coverage that they demand. *See id*. at ¶ 45. On December 7, 2021, denied Auto-Owners' Petition for Rehearing.

STANDARD OF REVIEW

The Court reviews de novo a trial court's decision to grant or deny a motion for summary judgment, along with an appellate court's reversal of that decision. *See Nichols v. Fahrenkamp*, 2019 IL 123990, ¶ 13 (Ill. 2019).

ARGUMENT

The Third District erred by using the McIntoshs' first-party Dwelling Policy to create Auto-Owners' duty to defend Mr. McIntosh's tenants in a third-party liability suit. Under Illinois law, "[t]o determine whether an insurer has a duty to defend, the [C]ourt must look to the allegations of the underlying complaint and compare those to the relevant provisions of the insurance policy." *Hacker*, 388 Ill. App. 3d at 388–89 (citations omitted). To construe the policy, the Court's "primary objective" is to "ascertain and give effect to the intentions of the parties as expressed by the language of the policy," which the Court does by giving this language its "plain and ordinary meaning." *Id*. (quoting *Valley Forge Ins. Co. v. Swiderski Electr., Inc.,* 223 Ill. 2d 352, 362 (Ill. 2006)); *see Ill. State Bar Ass'n Mut. Ins. Co. v. Canulli*, 2020 IL App (1st) 190142, ¶ 21 (1st Dist. 2020); *Perry v. Fidelity Nat. Title Ins. Co.*, 2015 IL App (2d) 150168, ¶ 12 (2nd Dist. 2015); *Allstate Ins. Co. v. Greer*, 396 Ill. App. 3d 1037, 1039 (3d Dist. 2009); *Econ. Fire & Cas. Co. v. Brumfield*, 384 Ill. App. 3d 726, 730 (4th Dist. 2008).

Here, in order to create Auto-Owners' duty to defend the Shecklers against third-party claims, the Third District declined to enforce the policy language to which Auto-Owners and its insureds agreed, including by ignoring certain dispositive provisions altogether. *See* Opinion, (A-12) ¶ 39 (policy language is "unavailing"). In fact, not only does the Opinion fail to address "the relevant provisions of the insurance policy," it only

tacitly identifies the particular policy—the Dwelling Policy, rather than the Landlord Liability Policy—that purportedly affords this coverage in the first place. Instead, the Opinion imprecisely weaves in and out of the Dwelling Policy (which reimburses insureds for damage to the property itself) and the Landlord Liability Policy (which affords insureds a defense to third-party claims), thereby obliterating the distinction between fundamentally different policies that call for fundamentally different obligations.[3] *See* Opinion, (A-13) ¶ 40 ("If a tenant is a coinsured [under the Dwelling Policy], then the insurer owes that coinsured a *duty to defend and indemnify* the tenant with respect to a claim for negligently caused fire damage to the insured premises.") (emphasis added).

In any event, as a matter of law, the Shecklers are not entitled to coverage under the Dwelling Policy, the Landlord Liability Policy, or any judicially-created hybrid of the two.

I. The Dwelling Policy Does Not Cover The Shecklers, And Even If It Did, The Dwelling Policy Does Not Offer Third-Party Liability Coverage To Anyone

Illinois courts have made clear that the plain language of the policy governs whether an insurer has a duty to defend. *See supra* p. 8–9 (collecting cases). Here, like with any first-party property insurance, the Dwelling Policy entitles the insureds to reimbursement for "accidental direct physical loss" to the Property itself. C163. Accordingly, Auto-Owners does not have a duty under the Dwelling Policy to defend the Shecklers in a third-party liability suit because (a) the Shecklers are not insureds under the Dwelling Policy,

[3] Indeed, the Court need only review the Opinion's frame of the issue itself, which does not even identify the particular policies at issue, let alone distinguish between them. *See* Opinion, (A-1) ¶ 1 ("In this insurance coverage dispute, we must decide whether an insurer's duty to defend extends to the tenants of the insured property against a third-party negligence contribution claim when the tenants are not identified as persons insured under *the policy*.") (emphasis added).

and (b) even if they were implied "coinsureds," the Dwelling Policy does not offer third-party liability coverage in the first place.

A. The Dwelling Policy Does Not Cover The Shecklers

The Dwelling Policy only names the McIntoshs as covered insureds, and it never mentions the Shecklers in name or description (*e.g.*, "tenants"). *See* C132–34. Moreover, the Shecklers do not fall under the Dwelling Policy's unambiguous[4] definition of "insureds," which only includes the following:

> a. you (defined as the "first named insured shown in the Declarations and if an individual, your spouse who resides in the same household"); b. your relatives (defined as "a person who resides with you and who is related to you by blood, marriage or adoption . . ."); and, c. any other person under the age of 21 residing with you who is in your care or the care of a relative.

C159–60. Accordingly, under its plain terms, the Dwelling Policy does not cover the Shecklers. *See supra* p. 8–9 (policy governs insurer's duty to defend).

By wielding *Dix* to abrogate this unambiguous agreement between Auto-Owners and its insureds, the Opinion misconstrues both *Dix* and the facts in this case. In *Dix*, the Court itself emphasized the narrowness of its holding, *see* 149 Ill. 2d at 323 (decision limited to "the particular facts of this case"), and every subsequent Illinois appellate court has rejected any suggestion that *Dix* is a license to judicially-appoint tenants as coinsureds under their landlords' dwelling policies which (like here) make no mention of those tenants—a point on which both the Third District's Majority and Dissent actually agree. *See* Opinion, (A-6) ¶ 19 (*Dix* "narrow[ed] its ruling to 'the particular facts of [that] case'"); J. McDade, Dissenting, (A-16) ¶ 55 (describing *Dix*'s "narrow holding"); *see also Hacker*, 388 Ill. App. 3d at 393 ("*Dix* is limited to 'the particular facts of [that] case'") (citations

[4] The Shecklers have never argued that any provisions in the Dwelling Policy are ambiguous. *See generally* C283–94.

omitted); *ESL Delivery Services Co. v. Delivery Network, Inc.*, 384 Ill. App. 3d 451, 456 (5th Dist. 2008) ("The language of the *Dix* decision limits its application"); *Pekin Ins. Co. v. Murphy*, 2014 IL App (2d) 140020-U, ¶ 14 (2nd Dist. 2014) (same).

Instead, *Dix* did the opposite, reinforcing Illinois' longstanding rule that a tenant is "liable for fire damage caused to the leased premises by his negligence"—and therefore, not an implied coinsured—unless the record overcomes that presumption and proves that the parties "intended to exculpate the tenant" from their own liability. *Dix*, 149 Ill. 2d at 319; *see Hacker*, 388 Ill. App. 3d at 393 (insufficient evidence to prove that parties intended exculpate tenant from own negligence); *ESL Delivery Services*, 384 Ill. App. 3d at 456 (same); *Murphy*, 2014 IL App (2d) 140020-U, ¶ 14 (same); *see also* J. McDade, Dissenting, ¶ 61 (same).

Here, like in *Hacker*, *ESL Delivery Services*, and *Pekin*, the record contains *no evidence* (let alone sufficient evidence) to overcome this well-established principle and prove that Mr. McIntosh and the Shecklers intended to "exculpate" the Shecklers from liability for their own negligence—whether to third parties or otherwise. To the contrary, the Lease plainly states that (a) Mr. McIntosh is not liable for any damage occurring on the Property unless Mr. McIntosh himself caused it, (b) the Shecklers must maintain and repair the Property at their own expense, (c) the Shecklers must return the Property to Mr. McIntosh in its prior condition, and (d) the Shecklers must even "hold [Mr. McIntosh] harmless from any claims for damages no matter how caused." *See* C122–25. Thus, because the Lease kept the Shecklers' liability with the Shecklers themselves, it should be no surprise that the Lease did not require Mr. McIntosh to obtain insurance for the Shecklers (dwelling, third-party liability, or otherwise), nor did any of the parties intend or

expect that Mr. McIntosh would do so—all culminating in a Dwelling Policy which, again, makes no mention of the Shecklers. *See* C118–27; C132–34; C452–53. Since *Dix*, Illinois courts have concluded that similar provisions do not "exculpate" tenants from their own liability for property damage. *See Murphy*, 2014 IL App (2d) 140020-U, ¶ 8 (lease required tenants to maintain and repair property at own expense, and hold landlord harmless from property damage).

Nonetheless, the Opinion clings to the mere fact that in the Lease, Mr. McIntosh explained that he would obtain first-party dwelling insurance for "the premises only." *See* Opinion, (A-9) ¶ 28. Yet, this actually just begs the question: whether a landlord obtains first-party dwelling insurance (which is common) does not answer the separate question of whether the landlord intended for the tenant to become a coinsured under that policy, albeit without saying so. In other words, the Third District used the mere existence of the Dwelling Policy itself as proof that Mr. McIntosh intended the Dwelling Policy to cover the Shecklers—again, despite the fact that (a) the Dwelling Policy never mentions the Shecklers, *see* C132–34 (b) the Shecklers do not satisfy the Dwelling Policy's unambiguous definition of "insured," *see* C159–60, and if the policy language itself was not enough, (c) the uncontroverted evidence establishes that none of the parties intended or expected Mr. McIntosh to obtain insurance for the Shecklers. *See* C118–27; C452–53.

As a result, the Third District is left with the mere fact that the Shecklers (like any tenant) ultimately paid rent. *See* Opinion, (A-8) ¶ 24. Thus, the Opinion effectively establishes the *per se* rule against which Illinois courts have warned, and in doing so, turns

on its head Illinois' presumption that tenants are liable for their own negligence.[5] *Dix*, 149 Ill. 2d at 319; *see Hacker,* 388 Ill. App. 3d at 392 (tenant not coinsured merely by paying rent); *ESL Delivery Services*, 384 Ill. App. 3d at 456 (same); *Murphy*, 2014 IL App (2d) 140020-U, ¶ 8 (same); *see also* J. McDade, Dissenting, (A-16) ¶ 55 ("There is nothing in the *Dix* court's reasoning that asserts a general rule that whenever tenants pay rent and their landlords insure the leased premises that the tenants are automatically coinsured under the insurance policy as a matter of law").

Worse yet, the Opinion builds this new rule on reasoning that contravenes *Dix* itself, which held that "[u]nder the particular facts of [that] case," the tenant—through *prior* rent payments—had necessarily "contributed" to the landlord's ultimate payment of insurance premiums. *Dix*, 149 Ill. 2d at 323. Here, by contrast, the McIntoshs had fully paid the premiums for both the Dwelling Policy and the Landlord Liability Policy *nearly five months* before the Shecklers even entered the Lease or paid rent, which means that the Shecklers did not—and could not—contribute in any way (directly or indirectly) to the McIntoshs' premiums. *See* C180–81; C235–38; R7. Undeterred, the Opinion transforms *Dix*'s narrow "contribution" rationale into an all-encompassing "reimbursement" rule—a rule that will make it virtually impossible for landlords to preserve Illinois' presumption that tenants (which always pay rent) are liable for their own negligence. *See* J. McDade, Dissenting, (A-17) ¶ 58 ("Based on the facts of this case, which are significantly different in this regard from those of *Dix*, such an inference would be totally unwarranted").

[5] Despite the practical effect of its holding, the Third District itself acknowledges that "the payment of rent alone [is not] sufficient for the tenant to attain the status of a coinsured." Opinion, (A-8) ¶ 23 (citing *Dix*, 149 Ill. 2d at 325, J. Freeman, Concurring).

In short, because the Shecklers are not covered insureds, the Third District erred by holding that they are entitled to coverage under the Dwelling Policy.

B. Even If The Dwelling Policy Covered The Shecklers, The Dwelling Policy Does Not Offer Third-Party Liability Coverage To Anyone

Setting aside that the Dwelling Policy does not cover the Shecklers, the Dwelling Policy does not include a duty to defend *anyone* against third-party liability claims, let alone implied-coinsureds in particular. Instead, the Dwelling Policy only reimburses the insureds for "accidental direct physical loss" to the Property itself—a limitation which the Shecklers themselves seemingly recognized by instead tendering their claim under the Landlord Liability Policy. *See* C158–72; *see also* C28–29 (Shecklers alleging that they tendered defense to Auto-Owners because they "did not have any other liability insurance coverage to defend them").

This policy language (and the Shecklers' tender) is not surprising, as the Dwelling Policy—like any first-party property coverage—is, by its very nature, not a liability policy at all. *See Rich v. Principal Life Ins. Co.*, 226 Ill. 2d 359, 371 (Ill. 2007) (when construing policy, Court must "tak[e] into account the type of insurance provided, the nature of the risks involved, and the overall purpose of the contract"). The Fifth District itself emphasized this distinction when it declined to extend *Dix*'s narrow holding to third-party liability defense, explaining that while first-party dwelling policies "cover[] losses to the leased property," liability insurance "covers losses resulting from an individual's liability to third parties." *Hacker*, 388 Ill. App. 3d at 392; *see Ill. Tool Works, Inc. v. Commerce & Ind. Ins. Co.*, 2011 IL App (1st) 093084, ¶ 37 (1st Dist. 2011) (first-party policy provides "what the insurer owes the insured directly for losses the insured suffered," but third-party liability policy provides "the defense and/or indemnification the insurer owes the insured

against third-party claims for covered losses the third party suffered as a result of the insured's action or inaction").

As a matter of law, this should have ended the Opinion's analysis. *See supra* p. 8–9 (plain policy language governs insurer's duty to defend). Yet, finding this clear policy language (and generally, the nature of first-party policies) "unavailing," the Third District nonetheless crafted a duty to defend under the first-party Dwelling Policy, describing this creation as an "equitable extension" of *Dix*—a case in which this Court merely held that under a first-party dwelling policy,[6] "well-settled" equitable principles prohibit an insurer from affirmatively subrogating against its own coinsured. *Dix*, 149 Ill. 2d at 323. In other words, the Third District has ballooned this admittedly-narrow holding into a new rule that under a *first-party dwelling policy*, the insurer must *defend* its coinsured against *third-party claims*.

But again, this is not what the Dwelling Policy (or any first-party property policy) does, which means that the Third District either (a) read a third-party liability policy into the Dwelling Policy, and then applied *Dix* to this judicially-created hybrid, or (b) extended *Dix* to third-party liability policies generally, and the Landlord Liability Policy in particular. As detailed below, the latter suffers from several defects, including that the Landlord Liability Policy does not cover the Shecklers, and in any event, it unequivocally excludes coverage for the allegations against them. *See infra* p. 18–22. Indeed, the Opinion itself concedes that the Landlord Liability Policy offers no coverage to the Shecklers.[7] *See*

[6] The *Dix* Court described first-party dwelling policies as "fire insurance." *Dix*, 149 Ill. 2d at 318.

[7] While the Third District only addresses *Hacker* in passing, this brief acknowledgement itself reinforces the basic defect in the Opinion: in *Hacker*, the court was at least addressing a third-party liability policy—which actually includes a duty to defend against third-party

Opinion, (A-12) ¶ 37–38 *See* ¶ 37–38 (unlike in *Hacker*, which involved "the landlord's liability policy," "[t]he Shecklers are coinsured under the landlord's *fire policy* for the leased premises.") (emphasis added).

Thus, what remains is the Third District's new hybrid first-party "dwelling policy" that now includes a duty to defend against third-party claims—all in the name of "equity." *Id*. at ¶ 25. Yet, as this Court has consistently held, an insurer's "duty to defend" is not a function of "equity" at all, but rather a question of law governed by the plain terms of the policy. *See Zurich Ins. Co. v. Raymark Indus., Inc.*, 118 Ill. 2d 23, 48 (Ill. 1987) ("The insurer's duty to defend its insured arises from the undertaking to defend as stated in the contract of insurance."); *see also* APPLEMAN ON INS. L. & PRACTICE § 4682 ("The duty to defend is contractual, and if there is no contract to defend there is no duty to defend.").

Therefore, as every other Illinois court has explained, *Dix* and its equitable principles have nothing to do with—and cannot provide a basis for—an insurer's duty to defend. *See Hacker*, 388 Ill. App. 3d at 392 ("The *Dix* court's analysis of the equities of subrogation is not relevant in determining an insurance company's duty to defend"); *Combs v. Schmidt*, 2012 IL App (2d) 110517, ¶ 19 (2nd Dist. 2012) (agreeing with *Hacker* and noting that "*Dix* and its progeny all involved subrogation," which is what made "equitable considerations relevant"); *ESL Delivery Services*, 384 Ill. App. 3d at 456 (*Dix* is not relevant to an insurer's duty to defend third-party claims); *see also* J. McDade, Dissenting, ¶ 56 ("The majority's conclusion and holding are premised on a reading of *Dix*

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claims—and the court *still* found that the insurer did not have such a duty. *See* Opinion, (A-12) ¶ 37 ("The tenant in [*Hacker*] argued she was a coinsured under the landlord's liability policy, not the fire policy."). The Dwelling Policy, by contrast, does not include a duty to defend *anyone* against third-party liability claims.

that goes well beyond the case's narrow holding and are, therefore, misplaced. In fact, *Dix* has nothing to do with the issue before us.").

Instead, the proper analysis begins and ends with the unambiguous language to which the parties agreed. *See supra* p. 8–9 (collecting cases); *see also Hacker*, 388 Ill. App. 3d at 392 (whether insurer has duty to defend "does not involve the application of an equitable doctrine," but instead "is a matter of contract construction and involves comparing the insurance contract with the allegations of the underlying complaint"). Accordingly, at least prior to this Opinion, "[n]o reported cases in Illinois [had] expanded the *Dix* decision" to an insurer's defense of third-party liability claims, "absent an express agreement between the parties that the landlord would insure the tenant against liability to third parties"—an arrangement which Illinois courts have found "not common," and which tenants therefore "cannot reasonably expect." *Hacker*, 388 Ill. App. 3d at 392–93; *ESL Delivery Services*, 384 Ill. App. 3d at 456 ("there is no evidence that the parties intended the landlord to bear the burden of losses suffered by third parties as a result of the tenant's negligence").

Here, even with Mr. McIntosh's explanation that he would obtain first-party dwelling insurance—which the Third District found dispositive—neither the Dwelling Policy nor the Lease contain *any* language (let alone "express") establishing a duty to defend *anyone* (including the Shecklers) against third-party claims, and the uncontroverted evidence proves that none of the parties intended or expected that Mr. McIntosh would provide such coverage. *See* C118–27; C132–34. In other words, even if the parties "might have intended that [the Shecklers] would not be liable for any fire damage to the leased premises, there is no language in the [L]ease [or the Dwelling Policy] to indicate that [the

Shecklers] would not be liable to third parties for losses [they] cause[] through [their] own negligence." *Hacker*, 388 Ill. App. 3d at 393; *see ESL Delivery Services*, 384 Ill. App. 3d at 456 ("There is a provision in the lease with respect to [the landlord's] responsibility to procure insurance covering the contents of its office space, *but that provision makes no reference to third-party claims*.") (emphasis added).

If the parties desired such an arrangement, they would have said so. *See Chatham Corp. v. Dann Ins.*, 351 Ill. App. 3d 353, 359 (1st Dist. 2004) ("well-established rule that a court will not add terms to the contract of insurance which the parties have not included in the language of the policy"). Indeed, to use the Third District's reasoning that the parties presumably know the law (including *Dix* in particular), *see* Opinion, (A-9) ¶ 26, they certainly would have said so given that no Illinois court had *ever* expanded *Dix* to defending third-party liability claims—whether under a dwelling policy or third-party liability policy. *See Hacker*, 388 Ill. App. 3d at 392–93. To this end, a policy *does* exist for such coverage (*i.e.*, the Landlord Liability Policy), and the parties still chose to exclude the Shecklers from it. *See infra* p. 18–22. To make matters worse, the Landlord Liability Policy also unequivocally excludes coverage for third-party liability arising from damage to the Property. *Id.* Thus, by manufacturing this exact coverage under *the Dwelling Policy*, the Third District effectively deleted these exclusions and awarded the Shecklers "through the backdoor" (the Dwelling Policy) what they are plainly and admittedly "barred from accomplishing through the front [door]" (the Landlord Liability Policy). *See* Opinion, (A-11) ¶ 32.

The Opinion's judicial revisions to the parties' unambiguous agreements are particularly problematic given the serious consequences of this hybrid first-party

dwelling/third-party liability policy. The Opinion represents a massive expansion of coverage, effectively transforming first-party insurance into third-party liability coverage, which will impact not only the parties in this case—who did not agree to such a policy—but the insurance industry writ large. *See Hacker*, 388 Ill. App. 3d at 392; *Ill. Tool Works*, 2011 IL App (1st) 093084, ¶ 37. Indeed, the Opinion actually creates *more* rights for implied coinsured tenants than the named insureds themselves (*i.e.*, the landlords), which pursuant to the plain terms of the Dwelling Policy, would not be entitled to a defense or indemnity against third-party claims. And, despite having *less* coverage under their own insurance policy, these landlords—particular those with large numbers of tenants—would now be responsible for insuring the third-party liability of "perhaps hundreds or thousands of tenants, depending on the size of the building," which "would likely be cost-prohibitive considering the magnitude of the potential risk covered by the policy." *Hacker*, 388 Ill. App. 3d at 393.

The Court can restore decades of Illinois precedent and the parties' intent by simply enforcing the unambiguous terms to which they agreed under the Dwelling Policy, which does not include a duty to defend *anyone* against third-party liability claims, and certainly not unnamed tenants like the Shecklers. The Third District erred by declining to do so.

II. The Landlord Liability Policy Does Not Cover The Shecklers, And Even If It Did, The Landlord Liability Policy Expressly Excludes Coverage In This Case

The Third District concedes that the Shecklers are not entitled to coverage under the Landlord Liability Policy, even though this is the only policy that actually affords a defense to third-party liability claims. *See* Opinion, (A-12) ¶ 37–38. Nonetheless, the Opinion repeatedly conflates the two different policies, concluding that "[i]f a tenant is a coinsured [under the Dwelling Policy], then the insurer owes that coinsured *a duty to*

defend and indemnify the tenant with respect to a claim for negligently caused fire damage to the insured premises." *Id*. at (A-13) ¶ 40 (emphasis added). Thus, to the extent that the Opinion—indirectly and without saying so—used the Landlord Liability Policy to create Auto-Owners' purported duty, the Court should make clear that like the Dwelling Policy, the Landlord Liability Policy does not offer the coverage that the Shecklers demand.

Again, the plain language of the policy dictates whether an insurer has a duty to defend. *See supra* p. 8–9. Here, the Landlord Liability Policy covers third-party claims that "any insured becomes legally obligated to pay . . . because of or arising out of bodily injury or property damage." C144. Moreover, the Landlord Liability Policy specifically excludes coverage for "property damage to property occupied or used by any insured or rented to or in the care of any insured." C145. Accordingly, Auto-Owners does not have a duty under the Landlord Liability Policy to defend the Shecklers in a third-party liability suit because (a) the Landlord Liability Policy does not cover the Shecklers, and (b) even if they were implied "coinsureds," the Landlord Liability Policy expressly excludes the precise coverage for the allegations against the Shecklers.

A. The Landlord Liability Policy Does Not Cover The Shecklers

The Landlord Liability Policy only names the McIntoshs as covered insureds, and it never mentions the Shecklers in name or description (*e.g.*, "tenants"). *See* C144. Moreover, the Shecklers do not fall under the Landlord Liability Policy's unambiguous definition of "insureds," which only includes the following:

> [W]hen you are designated in the Declarations as: a. an individual, you; b. a partnership or joint venture, you, your partners, your members and their spouses; c. a limited liability company, you and your members. Your managers are also insureds, but only with respect to their duties as such; d. an organization other than a partnership, joint venture or limited liability company, you, your executive officers or directors.

Id. Accordingly, under its plain terms, the Landlord Liability Policy does not cover the Shecklers. *See supra* p. 8–9 (policy governs insurer's duty to defend).

Moreover, the Third District itself declined to use *Dix* to appoint the Shecklers as implied coinsureds under the Landlord Liability Policy, and for good reason. *See* ¶ 37–38 (unlike in *Hacker*, which involved "the landlord's liability policy," "[t]he Shecklers are coinsured under the landlord's *fire policy* for the leased premises.") (emphasis added). As detailed above, "[n]o reported cases in Illinois have expanded the *Dix* decision" to an insurer's defense of third-party liability claims, "absent an express agreement between the parties that the landlord would insure the tenant against liability to third parties." *Hacker*, 388 Ill. App. 3d at 392–93; *ESL Delivery Services*, 384 Ill. App. 3d at 456 ("there is no evidence that the parties intended the landlord to bear the burden of losses suffered by third parties as a result of the tenant's negligence"). In fact, the Fifth District even further specified that according to every court to address the issue, the *third-party liability policy itself* must contain this "express agreement" to cover the tenants—a rule which "neither a rule of law nor a principle of equity" can change, and which is therefore true regardless of the particular "subrogation" framework that courts commonly employ. *Hacker*, 388 Ill. App. 3d at 394–95 (landlord not required "to defend a tenant against third-party liability claims when the *terms of the policy* do not require the insurance company to do so") ("Our research has not revealed any cases *under any approach* that have held that a tenant is a coinsured under a landlord's liability insurance policy where *the terms of the insurance policy* do not include the tenant as an insured") (emphasis added); *see* Opinion (A-7) ¶ 20, n.2 (discussing "three different approaches" to subrogation).

Here, as noted above, the Landlord Liability Policy does not provide (let alone "expressly") that the Shecklers are entitled to a defense against third-part liability claims, which should end the inquiry. *See Hacker*, 388 Ill. App. 3d at 394–95. In any event, there is no language *anywhere*—whether in the Dwelling Policy, the Landlord Liability Policy, or the Lease—exculpating the Shecklers from their liability to third parties, or suggesting that Mr. McIntosh would obtain such insurance for the Shecklers. Moreover, even if the Court were to look outside these written agreements, the evidence proves that the parties did not intend or expect this coverage. *See* C452–53. As the Fifth District recognized, the absence of such evidence is predictable: while landlords frequently obtain first-party dwelling insurance to protect their own property, and "[i]t is common" for tenants "to obtain their own renter's insurance policy to cover their liability for losses they cause to third parties," "[i]t is *not* common business practice for landlords to insure their tenants against liability to third parties arising out of the tenant's negligence," which means that tenants "cannot reasonably expect to be considered an insured under a landlord's liability insurance." *Hacker*, 388 Ill. App. 3d at 392–93 (emphasis added).

The mere payment of rent does not change this analysis. Even setting aside that (unlike in *Dix*) the Shecklers did not—and could not—contribute to the McIntoshs' premium payments, *see supra* p. 13, the fundamental distinction between the Landlord Liability Policy and the Dwelling Policy collapses *Dix*'s analysis regarding premium payments. As the Fifth District explained in *Hacker*:

> [T]he type of insurance at issue is also an important distinction between the present case and *Dix*. The *Dix* court held, "[T]he tenant, by payment of rent, has contributed to the payment of the insurance premium, thereby gaining the status of co[]insured under the insurance policy." The *Dix* court's analysis, however, involved fire insurance, which covered fire losses sustained by the landlord to the leased premises. The issue in the present

> case does not involve fire insurance. It involves liability insurance that does not cover losses to the leased premises but instead is "[a]n agreement to cover a loss resulting from the insured's liability to a third party ***. The insured's claim under the policy arises once the insured's liability to a third party has been asserted.--Also termed *third-party insurance; public-liability insurance."* The *Dix* court's analysis, which focused on the nature of fire insurance in landlord/tenant transactions, does not apply to liability insurance.

Hacker, 388 Ill. App. 3d at 392 (citations omitted) (emphasis in original).

As detailed above, by ignoring this distinction and giving the Shecklers indirectly (through the Dwelling Policy) what they plainly and admittedly cannot receive directly (through the Landlord Liability Policy), the Opinion obliterates not only the unambiguous terms to which the parties in this case agreed, but decades of insurance jurisprudence in Illinois—thereby causing serious problems for insureds and insurers alike. *See supra* p. 18. To the extent the Third District subtly invoked the Landlord Liability Policy, Auto-Owners respectfully requests that the Court simply enforce the Landlord Liability Policy as written.

B. Even If The Landlord Liability Policy Covered The Shecklers, It Expressly Excludes Coverage In This Case

Setting aside that the Landlord Liability Policy does not cover the Shecklers in the first place, it also expressly excludes coverage for "property damage to property occupied or used by any insured or rented to or in the care of any insured." C145. In other words, even assuming that the Shecklers are "insureds," the Landlord Liability Policy unequivocally denies the exact coverage that they now demand. *See supra* p. 8–9 (collecting Illinois authority that "[t]o determine whether an insurer has a duty to defend, the [C]ourt must look to the allegations of the underlying complaint and compare those to the relevant provisions of the insurance policy.").

Although this should have ended the analysis as a matter of law, the Opinion found this dispositive provision so "unavailing" that it declined to mention it altogether—thereby effectively deleting the provision entirely. *See Rich*, 226 Ill. 2d at 371 ("Because the court must assume that every provision was intended to serve a purpose, an insurance policy is to be construed as a whole, giving effect to every provision"). The Third District erred by not enforcing these plain terms to which the parties agreed.

CONCLUSION

The Court should reverse the judgment of the Third District, and affirm the judgment of the Circuit Court.

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), contains 24 pages..

/s/ Krysta K. Gumbiner
Krysta K. Gumbiner

APPENDIX

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2021 IL App (3d) 190500

Opinion filed October 22, 2021

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2021

MONROE SHECKLER and DOROTHY SHECKLER, Plaintiffs-Appellants, v. AUTO-OWNERS INSURANCE COMPANY, RONALD McINTOSH and WAYNE WORKMAN, Defendants (Auto-Owners Insurance Company, Defendant-Appellee).	)	Appeal from the Circuit Court of the 10th Judicial Circuit, Tazewell County, Illinois. Appeal No. 3-19-0500 Circuit No. 18-MR-149 Honorable Michael D. Risinger, Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.
Justice Holdridge specially concurred, with opinion.
Presiding Justice McDade dissented, with opinion.

OPINION

¶ 1 In this insurance coverage dispute, we must decide whether an insurer's duty to defend extends to the tenants of the insured property against a third-party negligence contribution claim when the tenants are not identified as persons insured under the policy. We hold that the duty to defend does extend to the tenants under these specific circumstances.

¶ 2 I. BACKGROUND

¶ 3 Monroe[1] and Dorothy Sheckler rented an apartment in Pekin, Illinois from Ronald McIntosh. Prior to renting the apartment to the Shecklers, McIntosh paid the annual premium on the insurance policy covering the apartment from amounts collected from his other rental properties. The lease agreement for the apartment explicitly provided that McIntosh "shall maintain fire and other hazard insurance on the premises only" and that the Shecklers would be "responsible for any insurance they desire on their possessions contained in the leased premises." An indemnification clause further exculpated McIntosh from any damages or injury occurring on the premises.

¶ 4 In compliance with the lease, McIntosh obtained an insurance policy from Auto-Owners Insurance Company (Auto-Owners), which provided replacement cost coverage, rental loss protection, and liability protection. The policy declarations listed McIntosh and his wife Rita Kay McIntosh as the only named insureds.

¶ 5 The rental apartment had a traditional gas stove and range. Under the lease, McIntosh was responsible for appliance maintenance and repairs. When the Shecklers notified him that the oven and a burner on the stove were not working, he placed a service call with Wayne Workman. Workman met with the Shecklers, removed the knob from the burner, but left to find additional replacement parts. The Shecklers began smelling gas and tried masking the odor with Febreze. The Febreze proved to be inadequate at obscuring the smell. Undeterred, Monroe Sheckler turned on the stove. The stove burst into flames setting the apartment ablaze. The apartment sustained severe fire damage.

¶ 6 Auto-Owners paid McIntosh's claim for the damage to the apartment and then filed a subrogation action in McIntosh's name against Workman to recoup payment for the fire damage.

[1]Monroe Sheckler died during this litigation.

Auto-Owners alleged Workman's repair work was the proximate cause of the fire. Following depositions, and discussion with Auto-Owners, Workman filed a third-party complaint for contribution against the Shecklers. Workman's complaint alleged that the Shecklers were negligent for, among other reasons, failing to advise Workman that they smelled gas, trying to mask the odor with Febreze, and lighting the oven despite the strong odor of gas. The Shecklers tendered their defense against the contribution claim to Auto-Owners. After Auto-Owners twice refused to defend them, the Shecklers filed an independent declaratory judgment action in the circuit court naming Auto-Owners, Workman, and McIntosh as defendants. Workman filed an answer with a counterclaim against Auto-Owners seeking coverage for the Shecklers. Citing our supreme court's decision in *Dix Mutual Insurance Co. v. LaFrambroise*, 149 Ill. 2d 314 (1992), Workman argued the Shecklers were coinsured under the Auto-Owners policy. Ergo, Auto-Owners had a duty to defend them against the third-party contribution claim.

¶ 7 The parties filed cross-motions for summary judgment. On May 20, 2019, the circuit court held a hearing where the parties presented their arguments. On behalf of both himself and the Shecklers, Workman argued that the policy issued to McIntosh also covered the Shecklers for damages alleged in his third-party contribution suit, claiming that Auto-Owners' duties also included indemnification. The trial court stated the key issue as whether "as a matter of law *** tenants are always the co-insureds for insuring the [rental] property." The Shecklers contended that because McIntosh intended to use the rental payments to pay for the policy premium, they acquired coinsured status; Auto-Owners argued that the duty to defend had to be based on language of the policy. McIntosh presented an affidavit to the court averring that he never intended to provide liability coverage to the Shecklers.

¶ 8 On August 2, 2019, the circuit court ruled on the key issue as previously framed, stating:

> "I find that reading Dix carefully, that as it applies to this case, Auto Owners does not owe a duty to defend Sheckler. Sheckler is not being subrogated against. Sheckler is essentially being sued by the third party for negligence.
>
> Sheckler is not being sued for property damage, so I don't find that—and I'm not sure if that grants a summary judgment or denies a summary judgment. You guys need to figure that out for me based upon my notes here and what I'm, ruling."

On August 7, 2019, the court entered summary judgment in favor of Auto-Owners and against both the Shecklers and Workman.

¶ 9 On August 19, 2019, Workman filed a notice of appeal; on August 23, 2019, the Shecklers filed a separate notice of appeal. Upon the parties' request, this court entered an order consolidating those appeals on September 10, 2019. While this appeal was pending, a jury returned a verdict in favor of Workman in Auto-Owners' subrogation action against him. Workman subsequently filed a motion to voluntarily dismiss his appeal in this case, which we granted. We now address the Shecklers' appeal and reverse the circuit court's judgment.

¶ 10 II. ANALYSIS

¶ 11 Summary judgment is proper when "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Internal quotation marks omitted.) *Bremer v. City of Rockford*, 2016 IL 119889, ¶ 20. When, as here, the parties file cross-motions for summary judgment, they agree that only questions of law are involved and invite the court to decide the issues based on the record. *Id.* Appellate review of summary judgment is *de novo*. *Home Insurance Co. v. Cincinnati Insurance Co.*, 213 Ill. 2d 307, 315 (2004).

¶ 12 The Shecklers argue that under *Dix*, 149 Ill. 2d 314, they are coinsured, as a matter of law, under the policy agreement executed by McIntosh and Auto-Owners. Because they are coinsured and thus indemnified, they could not be held liable for any damages to the insured property. In addition, the Shecklers assert that Auto-Owners had a duty to defend them from Workman's third-party contribution claim arising from the fire damage, as there is no reasonable basis for differentiating between a situation where a claim is made directly against a coinsured and where a claim is being made for contribution against a coinsured.

¶ 13 Auto-Owners argues that the Shecklers are not coinsured under the fire policy because McIntosh paid the premium before receiving their rent. The insurance company also asserts that the language of the insurance policy controls in this situation, not the lease. Auto-Owners also contends that *Dix* is inapplicable in this case and, instead, this court should follow the holding of *Hacker v. Shelter Insurance Co.*, 388 Ill. App. 3d 386 (2009).

¶ 14 In *Dix*, the landlord maintained fire insurance on residential property leased to a tenant. *Dix*, 149 Ill. 2d at 317-18. The tenant, while removing exterior paint from the property with a power stripper, caused fire damage to the property. *Id.* at 318. The fire insurance company paid the landlord's claim for the fire damage, then in a subrogation claim sought to recoup payments from the tenant for negligently causing the fire damage. *Id.*

¶ 15 On appeal to the Illinois Supreme Court, the insurer argued that the tenant was liable for the negligently caused fire damage because the lease did not contain a provision expressly relieving the tenant of liability. *Id.* at 320. The court examined whether the insurance company had the right to subrogate against the tenant, noting that subrogation is an "equitable right and remedy which rests on the principle that substantial justice should be attained by placing ultimate responsibility for the loss upon the one against whom in good conscience it ought to fall." *Id.* at 319.

¶ 16 In rejecting the insurer's argument, the court found that "a tenant is generally liable for fire damage caused to the leased premises by his negligence" but that the parties to the lease may agree to exonerate the tenant from liability under the terms of the lease. *Id.* Examining the terms of the lease as a whole, the spirit of the agreement, and the reasonable expectations of the parties, the court found the parties intended to exculpate the tenant from negligently caused fire damage. *Id.* at 319-20. This conclusion rested on the finding that under the language of the lease, the tenant assumed the risk for his personal property while the landlord was exonerated from liability for damage to that personal property in the event of a fire. Absent from the lease was a provision addressing liability for damage to the premises in the event of a fire. *Id.* at 321-22.

¶ 17 Instead, the only language in the lease addressing the issue of fire damage provided: " '(E) The [t]enant will assume their [*sic*] own risk for their [*sic*] personal property and [l]andlord *** will not be responsible for fire, wind or water damage.' " *Id.* at 321.

¶ 18 Interpreting the language of the lease, the court inferred that the parties intended for each to be individually responsible for any fire damage to his own property. *Id.* at 321-22. Significantly, the lease expressly provided for damage to the tenant's personal property but failed to do so regarding the leased premises. *Id.* at 322. Buttressing this interpretation was the fact that the landlord obtained a fire insurance policy on the premises. Ultimately, the court found that the language of the lease did not intend to hold the tenant responsible for fire damage to the premises. *Id.*

¶ 19 The court further opined that it was "well settled" that an insurer may not subrogate against its own insured or any entity that has coinsured status under the policy. *Id.* at 323. Practical realities dictated that the cost of insurance was factored into the rent and that the tenant paid the premiums of the fire insurance. *Id.* By payment of rent, the tenant contributed toward the payment of the

insurance premium, thereby, gaining the status of coinsured. *Id.* The court then limited the application of its holding, narrowing its ruling to "the particular facts of this case." *Id.*

¶ 20 In sum, our supreme court found it would be inequitable to allow an insurance company to subrogate against the named insured's tenant based on "the provisions of the lease as a whole, the reasonable expectations of the parties, and the principles of equity and good conscience." *Id.*[2]

¶ 21 Initially, we dispose of Auto-Owners' argument that the Shecklers are not coinsured owing to the fact that McIntosh paid the premium for the insurance policy before the Shecklers moved into the apartment. The Shecklers have coined this argument the "rich landlord defense to coverage" and assert there is no reasonable basis for differentiating this situation from *Dix*.

¶ 22 We agree with the Shecklers. In *Dix*, the majority looked to *Cerny-Pickas & Co. v. C.R. Jahn Co.*, 7 Ill. 2d 393 (1955), reiterating:

> " ' "The ancient law has been acquiesced in, and consciously or unconsciously, the cost of insurance to the landlord, or the value of the risk enters into the amount of rent.' *** 'They necessarily consciously figured on the rentals to be paid by the tenant as the source of the fire insurance premiums and intended that the cost of insurance was to come from the

[2]As subsequent rulings in other courts make clear, there are generally three different approaches used across the country in addressing landlords' insurers' subrogation claims against negligent tenants:

> "(1) the no-subrogation (or implied co-insured) approach (i.e., the '*Sutton* rule'), in which, absent an express agreement to the contrary, a landlord's insurer is precluded from filing a subrogation claim against a negligent tenant because the tenant is presumed to be a co-insured under the landlord's insurance policy; (2) the pro-subrogation approach, in which, absent an express term to the contrary, a landlord's insurer is allowed to bring a subrogation claim against a negligent tenant; and (3) the case-by-case approach, in which courts determine the availability of subrogation based on the reasonable expectations of the parties under the facts of each case." (Internal quotation marks omitted.) *Hoosier Insurance Co. v. Riggs*, 92 N.E.3d 685, 688 (Ind. Ct. App. 2018); see also *Tri-Par Investments, L.L.C. v. Sousa*, 680 N.W.2d 190, 197-98 (Neb. 2004). *Dix* falls into the case-by-case approach category.

tenants. In practical effect the tenant paid the cost of the fire insurance." ' "

Dix, 149 Ill. 2d at 322-23 (quoting *Cerny-Pickas*, 7 Ill. 2d at 398).

After acknowledging this statement, the court found that under the facts of the case, the tenant gained status as coinsured by payment of rent. *Id.*

¶ 23 Justice Freeman, in his concurrence, disagreed that the payment of rent alone was sufficient for the tenant to attain the status of a coinsured. *Id.* at 325 (Freeman, J., concurring). Instead, Justice Freeman asserted the better reasoned approach required an examination of the landlord and tenant's agreement as to the allocation of the burden in obtaining insurance. *Id.*

¶ 24 In this case, whether it be from the proposition espoused by the majority in *Dix* or that from Justice Freeman in his concurrence, the Shecklers are coinsured under the fire policy. The Shecklers paid rent to McIntosh. As a practical reality, the rent amount also accounts for the amount paid for insurance and serves as reimbursement for the landlord. Further, the lease states McIntosh would obtain fire insurance on the premises while exculpating himself from liability for damage to the personal property of the tenants. Per *Dix*, and the facts of this case, the Shecklers are coinsured under the fire policy regardless of the policy language. See also *Stein v. Yarnall-Todd Chevrolet, Inc.*, 41 Ill. 2d 32, 33-40 (1968); *American National Bank & Trust Co. v. Edgeworth*, 249 Ill. App. 3d 52, 54-56 (1993); *Towne Realty, Inc. v. Shaffer*, 331 Ill. App. 3d 531, 540 (2002); *Cincinnati Insurance Co. v. DuPlessis*, 364 Ill. App. 3d 984, 986-87 (2006); *Auto Owners Insurance Co. v. Callaghan*, 2011 IL App (3d) 100530, ¶ 11.

¶ 25 We now turn to the main argument presented for our consideration, whether Auto-Owners owes the Shecklers a duty to defend. Based on *Dix*, the insurer in this case could not sustain a subrogation action against the Shecklers. Counsel for Auto-Owners admitted as much during oral arguments. The question presented here though is whether an equitable extension of *Dix* under

these particular facts requires Auto-Owners to defend the Shecklers against the contribution claim. We answer that question in the affirmative. An examination of *Dix* leads to the inescapable conclusion that we must find Auto-Owners owes a duty to defend in this case as an equitable extension of *Dix* in order to prevent a subversion of its holding.

¶ 26 Since at least August 1992, case law has put insurance companies operating in Illinois on notice that when issuing a fire policy for a rental property, given certain terms *in the lease*, the company is also insuring against the negligent acts of the tenants that result in fire damage to the structure. See *Dix*, 149 Ill. 2d at 323 ("Under the particular facts of this case, the tenant, by payment of rent, has contributed to the payment of the insurance premium, thereby gaining the status of co-insured under the insurance policy.").

¶ 27 This is a subrogation action grounded in equity. The dissent questions whether the case at bar concerns a subrogation action (*infra* ¶ 57), but counsel for Auto-Owners, the Shecklers, and Workman acknowledged as much during oral arguments. Absent Auto-Owners' subrogation action, the Shecklers would not face the contribution claim, which is also equitable in nature. See *Antonicelli v. Rodriguez*, 2018 IL 121943, ¶ 13. In this subrogation action, the insurer is attempting to recoup payments made under the landlord's fire policy. The lease explicitly tells the Shecklers that McIntosh will insure the premises against fire damage, ergo, the tenants need not obtain the same insurance for the leased premises.

¶ 28 There was only an implication in *Dix* that the landlord would supply fire insurance, while exonerating himself from damage to personal property in the event of a fire. Here, the lease explicitly states that McIntosh "shall maintain fire and other hazard insurance on the premises only" and that the Shecklers would be "responsible for any insurance they desire on their

possessions contained in the leased premises." The reasonable expectations of the parties to the lease were that the landlord would look to the policy for fire damage to the premises.

¶ 29 In light of *Dix* and the terms of the lease, it would be an absurd outcome if the Shecklers are held liable for fire damage to the premises based on a claim grounded in equity to recover payments under a policy that they are coinsured. See *Dix*, 149 Ill. 2d at 323 ("Both the landlord and tenant intended that the policy would cover any fire damage to the premises no matter who caused it, and to conclude otherwise would defeat the reasonable expectations of the parties."); see also *Continental Casualty Co. v. Polk Brothers, Inc.*, 120 Ill. App. 3d 395, 401-02 (1983) (finding that where the lease terms expressly or impliedly indicate the landlord is to obtain fire insurance, the tenant will normally not be held liable for fire damage caused by his or her own negligence, unless the parties' intent is clearly to the contrary). This outcome is particularly absurd considering that if the insurance company had attempted to directly subrogate against the Shecklers, no recovery would be available as counsel conceded.

¶ 30 Absent our finding of a duty to defend, the result of these circumstances is such that in the event of a favorable verdict for Auto-Owners in the subrogation action followed by equitable apportionment of damages, Auto-Owners would likely recoup the majority of its payment for fire damage to the structure from a coinsured. Contextually, without the finding of a duty to defend there would be no duty to indemnify. *Crum & Forster Managers Corp. v. Resolution Trust Corp.*, 156 Ill. 2d 384, 398 (1993). This result is entirely inequitable and in contravention of the principles laid out in *Dix*.

¶ 31 This is especially true on these facts. It is apparent that all of the blame for the fire rests with the Shecklers. Smelling gas, Monroe Sheckler thought it prudent to light the stove. Kaboom! When Auto-Owners filed its subrogation complaint against Workman, it was obvious that

Workman would third-party in the Shecklers. The result might be different if Workman had any real exposure in this case. However, such is not the case here. Since it was clear that the Shecklers were coinsured with respect to fire damage to the structure, they would see no need to buy insurance to cover defense costs in the event they were sued for fire damage to the building. Again, it is hard to imagine any reasonable lawyer not knowing that a suit against Workman would result in Workman filing a third-party action against the Shecklers.

¶ 32 Prior to trial in the subrogation case, Workman filed a motion to amend his answer in order to include a contribution claim against the Shecklers. Workman proposed that Auto-Owners take a damage reduction in lieu of the contribution claim against the Shecklers. Auto-Owners declined the offer to take a damage reduction, instead consenting to Workman's motion to amend and the contribution claim against the Shecklers in an agreed order. This appears to be an attempt by the insurance company to accomplish through the backdoor what it is barred from accomplishing through the front—recovering from a coinsured in a subrogation action.

¶ 33 Adding insult to injury, the Shecklers have to pay costs and attorney fees to defend themselves in a suit initially brought by their insurer to recover damages under a policy which they are coinsureds. Again, this defeats the parties' reasonable expectations under the lease and turns equity on its head. See *Dix*, 149 Ill. 2d at 323. Finding that Auto-Owners has a duty to defend its coinsured is the only reasonable mitigation against this absurdity under these facts.

¶ 34 Auto-Owners points to the indemnification clause in the lease arguing that the Shecklers agreed to hold McIntosh harmless from any claims for damage *no matter how caused*. We fail to see how this clause defeats the Shecklers' argument. In fact, the clause only stands to strengthen their argument as it further shows McIntosh's attempt to exempt himself from liability in the event of damage to a tenant's personal property. The clause bars the recovery of compensation from loss

by the Shecklers against McIntosh for damage or injury to themselves, any other person, or to any of their property upon the premises.

¶ 35 The Shecklers are not seeking compensation from McIntosh, nor was the damage in the subrogation suit to the tenant, another individual other than McIntosh, or the tenant's personal property. This simply cannot be emphasized enough; the damage in this case is *fire damage* to the rental property. The indemnification clause offers Auto-Owners no relief.

¶ 36 Auto-Owners, as well as the dissent, relies on *Hacker*, 388 Ill. App. 3d at 388, to support the assertion there is no duty to defend the Shecklers. While *Hacker* also dealt with an insurer's duty to defend and the tenant in that case similarly relied on *Dix*, the facts are in stark contrast to this case, and *Dix*.

¶ 37 In *Hacker*, the injury complained of resulted from a guest's fall down a flight of stairs, not fire damage to the structure. *Id.* at 388-89. The tenant in that case argued she was a coinsured under the landlord's liability policy, not the fire policy. *Id.* at 392. The only similarity between this case and *Hacker* is that the tenant was third-partied into the suit via a contribution claim.

¶ 38 This case does not involve damages resulting from a fall down a flight of stairs or more specifically an injury to a third party. The injury at issue is the result of fire damage to the leased premises. The Shecklers are coinsured under the landlord's fire policy for the leased premises. It is inequitable to find that there is no duty to defend in this case in light of our supreme court's previous ruling. On the facts of this case, finding that the insurer has a duty to defend its coinsured is a natural and necessary extension of *Dix* to prevent a subversion of its ruling.

¶ 39 In the alternative, Auto-Owners argues that even if we expand the holding of *Dix*□which we do□Auto-Owners has no duty to defend or indemnify the Shecklers even if they are coinsured because of the plain language of the policy. This argument is unavailing. We assume our supreme

court meant what it said in *Dix*: a tenant is a coinsured with respect to fire damage to the insured premises given certain circumstances that are present here. Since 1992 insurance companies insuring rental properties in this state know that a tenant is an implied coinsured with respect to fire damage to the insured premises.

¶ 40 If a tenant is a coinsured, then the insurer owes that coinsured a duty to defend and indemnify the tenant with respect to a claim for negligently caused fire damage to the insured premises. To hold otherwise would be contrary to the accepted understanding of an insurer's duty to its insured or coinsured.

¶ 41 So, to make a long story even longer, this is the bottom line. In situations such as this, the insurance company owes its coinsured not just a duty to refrain from suing it but also a duty to defend and, if appropriate, indemnify when someone else sues the coinsured to recover for fire damage to the insured structure.

¶ 42 Imagine, if you will, that McIntosh decided not to turn this claim into the insurance company but, rather, sue his tenants. It seems clear in that event the Shecklers could tender the suit to Auto-Owners to adjust and pay the claim or defend the lawsuit. As *Dix* makes clear with respect to fire damage to the premises, the Shecklers were coinsured.

¶ 43 Accordingly, we reverse the lower court's grant of summary judgment and remand for the court to enter summary judgment in favor of the Shecklers and for a determination of costs and attorney fees owed to the Shecklers.

¶ 44 III. CONCLUSION

¶ 45 For the foregoing reasons, we reverse the judgment of the circuit court of Tazewell County and remand with directions.

¶ 46 Reversed and remanded with directions.

¶ 47 JUSTICE HOLDRIDGE, specially concurring:

¶ 48 I agree that an equitable extension of *Dix* under the facts of this case requires Auto-Owners to defend the Shecklers against the contribution claim. However, I disagree with *Dix* for the reasons set forth in Justice Heiple's dissent. *Dix*, 149 Ill. 2d at 326-30 (Heiple, J., dissenting).

¶ 49 PRESIDING JUSTICE McDADE, dissenting:

¶ 50 The majority holds that, under *Dix* and in the specific circumstances of this case, Auto-Owners owes the Shecklers a duty to defend regardless of the policy language. I disagree and respectfully dissent. The majority's conclusion and holding are premised on a reading of *Dix* that goes well beyond the case's narrow holding and are, therefore, misplaced. In fact, *Dix* has nothing to do with the issue before us.

¶ 51 In *Dix*, the insurance company brought a subrogation claim against the tenant of an insured property to recover the payment made to the landlord on his policy. *Dix Mutual Insurance Co.*, 149 Ill. 2d at 317. The court stated the legal principle at issue in that case as follows:

> "One who asserts a right of subrogation must step into the shoes of, or be substituted for, the one whose claim or debt he has paid and can only enforce those rights which the latter could enforce. [Citation.] Consequently, in the case at bar, the insurance company may assert a right of subrogation against the tenant for the fire damage if: (1) the landlord could maintain a cause of action against the tenant and (2) it would be equitable to allow the insurance company to enforce a right of subrogation against the tenant." *Id.* at 319.

I find that there are three aspects included within the *Dix* opinion that implicate its applicability to the instant case.

¶ 52 First, the court reaffirmed the traditional common law rule that a "tenant is generally liable for fire damage caused to the leased premises by his negligence" unless the lease, when construed as whole, reveals that the parties "intended to exculpate the tenant" from this responsibility. *Id.* It then found that the lease, when read as a whole, did "not reflect any intent that, ***, the tenant would be responsible for any fire damage to the [property]." *Id.* at 321. It also noted that this lack of intent was "supported by the landlord's conduct in taking out a fire insurance policy to cover the leased premises." *Id.* at 322. Having found the landlord could not sue the tenant under the lease and the first prong satisfied, the court moved to the second prong—whether allowing the insurer to subrogate the tenant would be equitable. Its discussion encompasses the two remaining matters that speak to *Dix*'s applicability to the instant case.

¶ 53 Second, relying on its own "ancient law" that landlords "intended that the cost of insurance was to come from the tenants," the court found that "[*i*]*n practical effect* the tenant paid the cost of the fire insurance." (Emphasis added and internal quotation marks omitted.) *Cerny-Pickas*, 7 Ill. 2d at 398.

¶ 54 Third, the court held that "an insurer may not subrogate against its own insured *or any person or entity who has the status of a co-insured under the insurance policy*." (Emphasis added.) *Dix*, 149 Ill. 2d at 323 (citing *Reich v. Tharp*, 167 Ill. App. 3d 496, 501(1987)). The court concluded that, under *Dix*'s "particular facts***, the tenant, by payment of rent, has contributed to the payment of the insurance premium, thereby gaining *the status of* co-insured under the insurance policy." (Emphasis added.) *Id.* Stated differently, the *Dix* court found the tenant had the status of a coinsured not as a matter of law but as a construction of equity because he was deemed

to have paid part of the premium. *Id.* Relying on this judicial fiction, the *Dix* court held that the insurance company could not subrogate against the tenant. *Id.*

¶ 55 The *Dix* court expressly limited its holding to "the particular facts of [the] case" before it, which included the lease's provision that the tenant would not be liable for any fire damage and the assumption that a portion of the rent would be used to purchase fire insurance. *Id.*; see also *ESL Delivery Services Co. v. Delivery Network, Inc.*, 384 Ill. App. 3d 451, 456 (2008) ("The language of the *Dix* decision limits its application."). There is nothing in the *Dix* court's reasoning that asserts a general rule that whenever tenants pay rent and their landlords insure the leased premises that the tenants are automatically coinsured under the insurance policy as a matter of law. It is the concurrence and the dissent that announced and then attempted to counter a far broader result than the one the majority had reached, suggesting the existence of the more expansive interpretation of the *Dix* decision on which the Shecklers—and the majority—rely. See *Dix*, 149 Ill. 2d at 324-25 (Freeman, J., concurring); *id.* at 326 (Heiple, J., dissenting). The *Dix* majority reaffirmed the traditional common law rule holding tenants responsible for damages to the leased premises caused by their negligence. *Id.* at 319 (majority opinion). It also confirmed that this rule would govern the case unless the lease, when read as a whole, expressed the parties' contrary intent. *Id. Dix* merely established that where a case is grounded in the equitable doctrine of subrogation and even where the lease expresses the parties' intent to make the landlord solely responsible for fire damages to the premises, the tenant may be treated as a coinsured under the landlord's fire insurance policy to defeat, on equitable grounds, the insurer's attempt to recoup from the tenant the payments it made as the landlord's insurer. *Id.* at 323; see also *Callaghan*, 2011 IL App (3d) 100530, ¶ 23 (Holdridge, J., dissenting).

¶ 56 Moreover, even if *Dix* had announced a new and different general rule regarding the status of tenants *vis-à-vis* their landlords' insurance policies, the decision expressly limited its application to the equitable right of subrogation. *Dix*, 149 Ill. 2d at 323. It offers no authorization to apply such a rule when determining an insurer's duties to defend or to indemnify. Whether Auto-Owners has a duty to defend is the specific issue in the instant case, and it presents a question of law, not equity, to be answered based on the specific language of the insurance contract, not the lease. *Dix* does not apply to inform that decision. In other words, *Dix* has nothing to do with this case.

¶ 57 The majority asserts that the case before us "is a subrogation action grounded in equity," contending that "Auto-Owners paid McIntosh's claim for the damage to the apartment and then filed a subrogation action in McIntosh's name against Workman to recoup payment for the fire damage." However, the record suggests the majority misinterprets the nature of the case before us. I am, therefore, not as sure as my fellow panelists that this is a subrogation case. And, indeed, the trial court found that it was not. At the hearing on the motion for summary judgment, the court asked the parties to set out the uncontroverted facts and Workman's attorney asserted that McIntosh had brought the claim against Workman as a subrogation action on behalf of Auto-Owners. McIntosh's attorney disagreed, stating the action was brought as an action for damages to recover "the deductible on the property claim," an amount paid by McIntosh, not Auto-Owners. The complaint in the underlying case (McIntosh v. Workman, No. 17-L-49 (Cir. Ct. Tazewell County)) has not been included in the record on appeal, leaving nothing in the record other than Workman's disputed allegation that supports the majority's finding that McIntosh filed an action for subrogation on behalf of Auto-Owners.

¶ 58 The *Dix* court also inferred a coinsured status for the tenant based on a *presumption* that the landlord intended to use a portion of his tenant's rent to pay the premium for the property

damage insurance. Based on the facts of this case, which are significantly different in this regard from those of *Dix*, such an inference would be totally unwarranted. Here, Mcintosh purchased the policy and paid the entire premium *prior to* leasing the property to the Shecklers. There is no rational basis under the specific facts of this case for an inference that the Shecklers should be deemed coinsured on McIntosh's policy. For the foregoing reasons, there is no basis for implying a duty of Auto-Owners created by *Dix* to either defend or indemnify them.

¶ 59 "There is neither a rule of law nor a principle of equity that requires the landlord's liability insurance company to defend a tenant against third-party liability claims when the terms of the policy do not require the insurance company to do so." *Hacker*, 388 Ill. App. 3d at 394.

> "It is well established that, in a declaratory judgment action such as the case at bar, where the issue is whether the insurer has a contractual duty to defend pursuant to an insurance policy, a court ordinarily looks first to the allegations in the underlying complaint and compares those allegations to the relevant provisions of the insurance policy." *Pekin Insurance Co. v. United Contractors Midwest, Inc.*, 2013 IL App (3d) 120803, ¶ 21 (citing *Pekin Insurance Co. v. Wilson*, 237 Ill. 2d 446, 455 (2010)).

If the facts alleged in the underlying complaint fall within, or potentially within, the policy's coverage, the insurer's duty to defend arises. *Id.*

¶ 60 In *Hacker*, the appellate court examined, as we are asked do here, whether a policy agreement between an insurer and a landlord created for the insurer "a duty to defend a tenant in a suit brought by a third party seeking damages for injuries allegedly caused by the tenant's negligence." *Hacker*, 388 Ill. App. 3d at 387. The *Hacker* court ruled that, in such circumstance, the *Dix* decision was distinguishable and inapplicable. *Id.* at 389. First, although crucial in limiting

an insurance company's right to subrogate against a tenant, the *Hacker* court found the "*Dix* court's analysis of the equities of subrogation [was] not relevant in determining an insurance company's duty to defend." *Id.* at 391. And second, unlike in subrogation claims by an insurer, "[a] tenant *** cannot reasonably expect to be considered an insured under a landlord's liability insurance, particularly when there is no evidence of that intent in the parties' lease agreement or in the language of the insurance policy." *Id.* at 392-93. Focusing on a very practical consequence, the court concluded:

> "To hold that a tenant is an additional insured under her landlord's liability insurance as a matter of law would require owners of large multiunit leased structures to secure adequate liability insurance not only for themselves but for perhaps hundreds or thousands of tenants, depending on the size of the building. The premium for that liability insurance coverage would likely be cost-prohibitive considering the magnitude of the potential risk covered by the policy. *Dix* is limited to 'the particular facts of [that] case' ***. " *Id.* at 393.

¶ 61 Like the *Hacker* court, I find nothing in the insurance policy or the lease agreement evidencing the parties' intent to extend McIntosh's liability coverage to the Shecklers. The Shecklers are not named in the policy declaration, which only names McIntosh and his wife, nor do they fit within the definition of an "insured" for liability coverage. Moreover, under the lease agreement the parties agreed that McIntosh was not liable to the Shecklers for any damage or injuries. The agreement required each party to cover his own property against damages and makes no reference to extending protection from McIntosh to the Shecklers or vice versa.

¶ 62 The majority accepts Workman's contention that *Dix* applies because McIntosh filed the complaint against him because he knew he could not bring the claim against the Shecklers under *Dix*. This contention is unpersuasive. First, it is at least as likely that McIntosh did not sue the Shecklers because he knew the lease, which was prepared by or for him, provided no legal basis for such an action. Moreover, whether McIntosh could not have sued the Shecklers directly in the negligence complaint is irrelevant to our analysis. See *id.* at 389 ("This analysis requires us to construe the language contained in the insurance policy.").

¶ 63 I conclude, as the appellate court did in *Hacker*, that an insurer's duty to defend does not extend to the tenants of the insured property against a third-party negligence contribution claim when the tenants are not identified—or identifiable—as persons insured under the policy. *Id.* at 394. "Liability to a third party must affirmatively appear from the contract's language and from the circumstances surrounding the parties at the time of its execution ***." (Internal quotation marks omitted.) *Id.* There is nothing in either the lease agreement or the insurance policy that supports the imposition of a duty on Auto-Owners to defend the Shecklers.

No. 3-19-0500

Cite as:	*Sheckler v. Auto-Owners Insurance Co.*, 2021 IL App (3d) 190500
Decision Under Review:	Appeal from the Circuit Court of Tazewell County, No. 18-MR-149; the Hon. Michael D. Risinger, Judge, presiding.
Attorneys for Appellant:	Mark E. Wertz, of Law Office of Mark Wertz, P.C., of Pekin, and John W. Robertson, of Statham & Long, LLC, of Galesburg, for appellants.
Attorneys for Appellee:	Peter J. Wenker and Brian T. Fairfield, of Brooks Law Firm, P.C., of Rock Island, for appellee.

APPEAL TO THE APPELLATE COURT OF ILLINOIS
THIRD JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT
TAZEWELL COUNTY, ILLINOIS

SHECKLER, MONROE ET AL
Plaintiff/Petitioner

Appellate Court No: 3-19-0487
Circuit Court No: 2018MR149
Trial Judge: Michael Risinger

v

E-FILED
Transaction ID: 3-19-0487
File Date: 10/23/2019 3:42 PM
Barbara Trumbo, Clerk of the Court
APPELLATE COURT 3RD DISTRICT

AUTO-OWNERS INSURANCE COMPANY ET AL
Defendant/Respondent

CERTIFICATION OF RECORD

The record has been prepared and certified in the form required for transmission to the reviewing court. It consists of:

1 Volume(s) of the Common Law Record, containing 581 pages.

1 Volumes(s) of the Report of Proceedings, containing 105 pages.

0 Volume(s) of the Exhibits, containing 0 pages.

I do further certify that this certification of the record pursuant to Supreme Court Rule 324, issued out of my office this 14th DAY OF October, 2019

LINCOLN C HOBSON, Clerk of the Circuit Court

C 1

APPEAL TO THE APPELLATE COURT OF ILLINOIS
THIRD JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT
TAZEWELL COUNTY, ILLINOIS

SHECKLER, MONROE ET AL	)	
Plaintiff/Petitioner	)	Appellate Court No: 3-19-0487
	)	Circuit Court No: 2018MR149
	)	Trial Judge: Michael Risinger
v	)	
	)	
	)	
AUTO-OWNERS INSURANCE COMPANY ET AL	)	
Defendant/Respondent	)	

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	)	
AUTO-OWNERS INSURANCE COMPANY ET AL	)	
Defendant/Respondent	)	

REPORT OF PROCEEDINGS - TABLE OF CONTENTS

NOTICE OF FILING and PROOF OF SERVICE

In the Supreme Court of Illinois

MONROE SHECKLER, et al.,	)	
	)	
Plaintiffs-Appellees,	)	
v.	)	No. 128012
	)	
AUTO-OWNERS INSURANCE COMPANY,	)	
	)	
Defendant-Appellant,	)	
	)	
RONALD McINTOSH,	)	
	)	
Defendant,	)	
	)	
WAYNE WORKMAN,	)	
	)	
Defendant-Appellee.	)	

The undersigned, being first duly sworn, deposes and states that on June 29, 2022, there was electronically filed and served upon the Clerk of the above court the Brief and Appendix of Defendant-Appellant. On June 29, 2022, service of the Brief will be accomplished electronically through the filing manager, Odyssey EfileIL, to the following counsel of record:

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Within five days of acceptance by the Court, the undersigned states that thirteen copies of the Brief bearing the court's file-stamp will be sent to the above court.

/s/ Krysta K. Gumbiner
Krysta K. Gumbiner

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

/s/ Krysta K. Gumbiner
Krysta K. Gumbiner