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.

REPLY BRIEF OF APPELLANT

KRYSTA K. GUMBINER
BRIAN J. TALCOTT
DINSMORE & SHOHL LLP
222 West Adams Street
Suite 3400
Chicago, Illinois 60606
(312) 372-6060
krysta.gumbiner@dinsmore.com
brian.talcott@dinsmore.com

KATHRYN W. BAYER
DINSMORE & SHOHL, LLP
255 East 5th Street
Suite 1900
Cincinnati, Ohio 45202
(513) 977-8200
kathryn.bayer@dinsmore.com

Counsel for Appellant
Auto-Owners Insurance Company

E-FILED
8/16/2022 10:08 AM
CYNTHIA A. GRANT
SUPREME COURT CLERK

ORAL ARGUMENT REQUESTED

INTRODUCTION

Notwithstanding the Shecklers' equitable buzzwords like "contribution" and "subrogation," there is no dispute that the only issue before the Court (and the only issue that the Third District decided) is Auto-Owners' purported duty to defend the Shecklers against third-party liability claims. According to this Court and every Illinois District Court of Appeals, this is a question of law governed by the unambiguous terms of the Dwelling Policy and the Landlord Liability Policy.

However, not only do the Shecklers decline to identify the particular coverage that purportedly entitles them to such a defense, the Shecklers go one step further than the Third District and insist that the Dwelling Policy and the Landlord Liability Policy *are actually the same*, and therefore it does not matter which coverage applies—a theory that contravenes not only the plain terms of both coverages, but basic insurance law. As Illinois courts have long recognized, first-party property (the Dwelling Policy) and third-party liability (the Landlord Liability Policy) are distinct coverages which, by their very nature, include fundamentally different rights and obligations. Even though the latter is the only coverage that actually offers a defense to third-party claims, the Shecklers concede that they are not entitled to coverage under the Landlord Liability Policy.

The Shecklers nonetheless hope to manufacture this exact coverage under the *Dwelling Policy*. Yet, even setting aside that the Dwelling Policy also does not cover the Shecklers, the Dwelling Policy—like any first-party property policy—does not include a duty to defend *anyone*. Thus, the Shecklers ask the Court to not only reject decades of its own jurisprudence and apply *equitable* principles to a *question of law*, but to do so under a policy that does not offer such coverage in the first place.

ARGUMENT

I. The Sole Issue Is Auto-Owners' Purported Duty To Defend The Shecklers Against Third-Party Liability Claims, Which Is A Question Of Law Governed By The Policy

A. The Lone Issue Before The Court Is Auto-Owners' Purported Duty To Defend

The Shecklers, Auto-Owners, and the Third District itself all agree that the lone remaining issue in this case is whether Auto-Owners had a duty to defend the Shecklers against claims by a third party, which alleged that the Shecklers' negligence damaged the Property. *See* Opinion, ¶ 6 ("After Auto-Owners twice refused to defend them [against the third-party complaint], the Shecklers filed an independent declaratory judgment action in the circuit court"); *see also* Appellees' Brief, 8 ("Shecklers tendered defense of the third-party claim to Auto-Owners"). The Circuit Court held that Auto-Owners "does not owe a duty to defend [the] Sheckler[s]." R95. Accordingly, on appeal, the Third District's only charge was to "decide whether an insurer's duty to defend extends" to these third-party claims.[1] Opinion, ¶ 1; *see id.* at ¶ 25 ("We now turn to the main argument presented for our consideration, whether Auto-Owners owes the Shecklers a duty to defend"). Ultimately, the Third District answered this question in the affirmative (although incorrect). *See id.* at ¶ 1 ("We hold that the duty to defend does extend to the tenants under these specific circumstances").

[1] Before the Opinion, any potential indemnification issue disappeared after a jury found in favor of the third party (Mr. Workman), which meant that the Shecklers would not actually be liable on the third-party claims. *See* Opinion at ¶ 9. As a result, the only issue before the Third District was the "costs and attorney fees" that the Shecklers incurred "to defend themselves" against the third-party complaint. *Id.* at ¶ 33. In fact, as the *Shecklers'* only damages, the opposition brief—authored by the same attorney—reveals that "[t]he attorney who successfully defended the third-party contribution claim [in the third-party complaint] has gone uncompensated." Appellees' Brief, 5, 18.

Although the Shecklers admit that their exclusive demand—and the lone issue before the Court—is Auto-Owners' purported *duty to defend* against the third-party liability claims, the Shecklers nonetheless assign this case various misleading titles, such as a "subrogation" or a "contribution" action, even going as far as to suggest that "[h]ere we deal with Auto-Owners' subrogation rights and responsibilities." *See* Appellees' Brief, 13. The goal is obvious: the Shecklers concede that *Dix* "applies to subrogation claims, which are equitable in nature," *see id*. at 9, yet recognize that under well-established Illinois law, the duty to defend is not "equitable in nature" at all, but instead a question of law governed by the plain policy terms—terms which, in this case, collapse the Shecklers' demand. *See infra* p. 3, 6 (collecting Illinois authority). Thus, the Shecklers are left to invoke equitable buzzwords like "subrogation" and "contribution" in the hopes that the Court will ignore (a) the express relief that the Shecklers seek and (b) the only issue that the Third District (and the Circuit Court) actually decided: Auto-Owners' purported duty to defend. Because the parties and the lower courts all agree that this is the lone issue for this Court to decide, the Shecklers' insistence on assigning these "titles" is a meaningless (and misleading) endeavor.

B. Under Well-Established Illinois Law, The Plain Policy Terms Govern An Insurer's Duty To Defend

This Court—and every Illinois District Court of Appeals—could not be any clearer that "[t]he insurer's duty to defend its insured arises from the undertaking to defend *as stated in the contract of insurance*." *Zurich Ins. Co. v. Raymark Indus., Inc.*, 118 Ill. 2d 23, 48 (Ill. 1987) (emphasis added); *see Valley Forge Ins. Co. v. Swiderski Electr., Inc*., 223 Ill. 2d 352, 363 (Ill. 2006) (to determine duty to defend, "a court must compare the facts alleged in the underlying complaint to the *relevant provisions of the insurance policy*.")

(emphasis added); 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."); *see also 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); *Hacker v. Shelter Ins. Co.*, 388 Ill. App. 3d 386, 393 (5th Dist. 2009).

Here, as detailed below and in Auto-Owners' opening brief, both the Dwelling Policy and the Landlord Liability Policy make clear that Auto-Owners does not have a duty to defend the Shecklers against third-party liability claims. *See infra* p. 9–15. As a result, the Shecklers have no choice but to ditch this rule altogether and declare that despite this Court's repeated directives, the insurance policy no longer governs the duty to defend. *See* Appellees' Brief, 19. Having set the stage with misleading "titles" for this case, the Shecklers' first attempt is to suggest that the nature of the *underlying third-party claims* somehow dictates whether the duty to defend itself remains a legal question. In other words, if an individual seeks a defense for equitable claims (*e.g.*, unjust enrichment) rather than legal claims (*e.g.*, breach of contract), the duty to defend suddenly becomes an equitable question—a theory that not only collapses under well-established Illinois law, but actually makes no practical sense.

When this Court unequivocally states that "the relevant provisions of the insurance policy" control the duty to defend, it has never added, "unless the underlying third-party claims are 'equitable in nature.'" *See Swiderski Electr.*, 223 Ill. 2d at 363. In fact, Illinois courts (even after *Dix*) have repeatedly enforced this rule in cases where the insured sought

a defense *against equitable claims*, including based on nearly identical facts. *See Hacker*, 388 Ill. App. 3d at 393 (third-party claims for contribution against tenant); *see also Canulli*, 2020 IL App (1st) 190142, ¶ 21 (third-party complaint seeking injunctive relief); *Perry*, 2015 IL App (2d) 150168, ¶ 12 (same). This should be no surprise: if Person A sues Person B, and Person B then seeks a defense from an insurer, it is legally meaningless whether Person A's third-party liability claims are for, say, breach of contract (a legal claim), unjust enrichment (an equitable claim), or both. In either case, the question is still whether the insurer has a duty to defend against those third-party claims.[2]

The same is true here: while Mr. Workman was originally sued for "subrogation," and Mr. Workman then asserted third-party negligence claims against the Shecklers in the form of "contribution," the lone issue before the Court *does not include any equitable claims*. That is, the Shecklers have not asked this Court to decide *anything* about subrogation, contribution, or any other cause of action that is "equitable in nature," nor did the Third District do so.[3] Instead, the only issue before the Court is whether Auto-Owners had a duty to defend the Shecklers against third-party liability claims. Again, according to this Court and every District Court of Appeals, this is a question of law governed by the plain terms of the relevant policy.

As their second attempt to disregard this longstanding rule, the Shecklers insist that *Dix* "expressly addressed" this issue. Of course, *Dix* (a subrogation case) had nothing to do

[2] If, as the Shecklers theorize, the nature of the underlying third-party claims transformed the duty to defend from a legal question into an equitable question, it is entirely unclear what would happen when the third-party complaint includes both equitable claims (unjust enrichment) and legal claims (breach of contract).

[3] Because the only issue before the Court is the duty to defend, the Shecklers' various theories and calculations regarding contribution miss the point. *See* Appellees' Brief, 18.

with the duty to defend, let alone "expressly address[ing]" it—which the Shecklers themselves occasionally acknowledge. *See* Appellees' Brief, 9 (*Dix* "applies to subrogation claims, which are equitable in nature"). Instead, the Court merely held that because subrogation is an *equitable* remedy, *equitable* principles prohibit the insurer from affirmatively subrogating against its own coinsured. *See Dix Mut. Ins. Co. v. LaFramboise*, 2d 314, 319 (Ill. 1992) (right to subrogation "depends upon the equities of each particular case"); *see also* Appellees' Brief, 8 (under *Dix*, tenants are "immune from a direct subrogation suit by the landlord or the landlord's insurer").

Accordingly, as every other Illinois court has explained, *Dix* and its equitable principles are irrelevant to—and cannot provide a basis for—an insurer's duty to defend, which is instead a question of law. *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 Co. v. Delivery Network, Inc.*, 384 Ill. App. 3d 451, 456 (5th Dist. 2008) (*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* 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.").

As their final attempt, the Shecklers claim that in 2010, this Court (silently and without actually addressing the issue) erased decades of its own jurisprudence and held that the duty to defend is no longer "limited to comparing . . . the insurance policy and the

complaint"—*i.e.*, the express opposite of what every Illinois court has enforced. *See* Appellees' Brief, 19. As their lone support, the Shecklers cling to *Pekin Ins. Co. v. Wilson*, which did not abandon, but actually just applied longstanding Illinois law: the policy itself governs the duty to defend. 237 Ill. 2d 446, 461 (Ill. 2010) ("in light of the broad scope of this type of policy, and the clear language of the self-defense exception, the policy requires the defense of the insured"). While the Court held that it could compare the policy to other allegations (in a counterclaim, not just the main complaint), the first part of that equation remained the same: regardless of which particular allegations a court may consider, Illinois law still requires the court to compare those allegations *to the policy itself*. *Id*. Indeed, this Court (among others) have continued to reiterate this rule long after *Pekin*. *See West Bend Mut. Ins. Co. v. Krishna Schaumburg Tan, Inc*., 2021 IL 125978, ¶ 48 (lll. 2021) ("Having construed the terms in [the insurer's] policies, we next determine whether the allegations in [the underlying] complaint fall within or potentially within [the] policies' coverage"); *Joseph T. Ryerson & Son, Inc. v. Travelers Indemn. Co. of Am.*, 2020 IL App (1st) 182491, ¶ 33 (1st Dist. 2020); *Perry*, 2015 IL App (2d) 150168, ¶ 12.

Accordingly, even if the Shecklers introduce other allegations—"the terms of the McIntosh-Sheckler lease," "the fact that [Auto-Owners] was writing a fire insurance policy," "the pleadings and deposition testimony in 17-L-49"—those allegations are legally meaningless when neither the Dwelling Policy nor the Landlord Liability Policy even suggest, let alone expressly impose a duty to defend the Shecklers against third-party liability claims. Appellees' Brief, 19.

II. Under Basic Insurance Law, The Dwelling Policy And The Landlord Liability Policy Are Distinct Coverages That Call For Different Rights And Obligations

In its opening brief, Auto-Owners showed that not only does the Opinion fail to address "the relevant provisions of the insurance policy," it only tacitly identifies the particular coverage (the Dwelling Policy) that purportedly affords this coverage in the first place. Instead, the Opinion jumps back and forth between the Dwelling Policy and the Landlord Liability Policy, thereby obliterating the distinction between fundamentally different coverages. *See* Opinion, ¶ 1 (Third District must decide whether duty to defend exists under "the policy").

The Shecklers likewise fail to identify the particular coverage that allegedly affords them a defense to third-party party claims, instead simply arguing that the Shecklers are "co-insured[s] under *Auto-Owners' policy* and thus entitled to protection." Appellees' Brief, 2 (emphasis added). In fact, the Shecklers actually go one step further to argue that despite this Court's clear directives that "the relevant provisions of the insurance policy" control the duty to defend, and although the Dwelling Policy and the Landlord Liability Policy contain entirely different "provisions" and obligations, it actually does not matter which coverage applies. In the Shecklers' minds, "there were not two landlord policies – one for the property and another for liability." *Id*. at 5.

Yet, under basic insurance law, that is exactly the case. Nearly all insurance policies contain multiple different coverages that—by their very design—include fundamentally different rights and obligations. The overarching policy in this case is a useful example: it includes a long list of distinct coverages that range from Personal Property, to Medical Payments, to Mine Subsidence, to Terrorism. *See* C132. No one would suggest that these profoundly different coverages contain the same rights and obligations, even if the

overarching policy does have "one policy number," or "one set of policy declarations." *See* Appellees' Brief, 5.

The same applies to the Dwelling Policy and the Landlord Liability Policy, which the Shecklers themselves occasionally admit. *See id.* at 12 (policy included "several coverages," and specifically that "there were *separate property and liability policies* issued by Auto-Owners.") (emphasis added). First, like with any first-party property insurance, the Dwelling Policy entitles the insureds 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 a duty to defend *anyone* (named insureds, co-insureds, or otherwise) against third-party liability claims. *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; *see Hacker,* 388 Ill. App. 3d at 392 (while first-party dwelling policies "cover[] losses to the leased property," liability insurance "covers losses resulting from an individual's liability to third parties"); *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").

In short, Illinois law requires the Shecklers to identify "the relevant provisions of the insurance policy" that entitles them to coverage—a standard which they certainly cannot satisfy by declining to identify the particular coverage altogether.

III. 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

A. The Dwelling Policy Does Not Cover The Shecklers

As Auto-Owners detailed in its opening brief, the Shecklers are not covered insureds under the Dwelling Policy's unambiguous terms, *see* C132–34, nor are they implied coinsureds under *Dix*. As every subsequent court has recognized, *Dix* was an admittedly "narrow" holding which simply reinforced that a tenant is not a covered insured unless the record overcomes that presumption and proves that the parties "intended to exculpate the tenant" from their own liability.[4] *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); *Pekin Ins. Co. v. Murphy*, 2014 IL App (2d) 140020-U, ¶ 14 (2nd Dist. 2014) (same). The Shecklers seek to turn this rule on its head, but as support, cite a case that held the exact opposite. *Contrast Reich v. Tharp*, 167 Ill. App. 3d 496, 501 (5th Dist. 1987) ("*Where the insured is required by contract or lease to carry insurance for the benefit of another*, the other party may attain the status of a coinsured") (emphasis added) *with* Appellant's Brief, 15 ("*absent express contrary provisions in a residential lease*, tenants are considered additional insureds . . . under the landlord' policy.").

Here, the record contains no 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. Instead, the Lease

[4] To this end, the *Dix* Court (or any court for that matter) did not "expressly reject[] looking to the insurance policy to see who is named." Appellant's Brief, 21. In fact, the policy is where the analysis *begins*, and if an individual is not a named insured, other evidence may overcome the policy terms and prove that the individual is an implied coinsured. *See Dix*, 149 Ill. 2d at 319.

kept the Shecklers' liability with the Shecklers themselves, unambiguously providing 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. The Shecklers rely on the fact that Mr. McIntosh explained that he would obtain first-party dwelling insurance for *his* Property, but again, this only begs the question: the mere existence of the Dwelling Policy itself is not proof that Mr. McIntosh intended the Dwelling Policy to also cover the Shecklers, especially for third-party liability claims.[5] *See Dix,* 149 Ill. 2d at 325, J. Freeman, Concurring ("The better reasoned view, rather, requires that we base our decision not on the mere existence of insurance, but on the parties' agreement as to the allocation of that burden").

As a result, the Shecklers can only point to their rent, *expressly* arguing what the Third District *implicitly* held: if tenants pay rent, they are implied coinsureds—*i.e.*, a *per se* rule that anoints *all tenants* as coinsureds unless evidence proves otherwise. *Contrast* Appellant's Brief, 8 ("tenants are implied insureds . . . when their rent pays for the insurance") *with Dix,* 149 Ill. 2d at 319; *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).

[5] Moreover, as detailed below, even if the Lease required Mr. McIntosh to obtain first-party dwelling insurance, neither the Lease nor the Dwelling Policy even mention *third-party liability insurance*, let alone require Mr. McIntosh to obtain such insurance on behalf of the Shecklers in particular. *See* Appellant's Brief, 14 (the Lease "required the landlord to provide *fire insurance on the property*."), 15 ("Ironically, the [Lease] expressly allocated the *fire insurance burden* to the landlord.") (emphasis added).

Moreover, the Shecklers do not even attempt to reconcile *Dix's* narrow "contribution" rationale with the fact that the McIntoshs 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. In fact, the Shecklers actually double-down on this fact, and concede that *other people* paid these premiums. *See* Appellant's Brief, 8 (Mr. McIntosh "used rental payments from his 21 properties to pay for insurance premiums as each policy became due"). Undeterred, the Shecklers proclaim that their rent was "intended to pay for [the Shecklers'] fire and hazard insurance coverage"—which pursuant to their prior concessions, is *impossible*. *Id*. at 18. The Third District erred when, in the face of this evidence, it overruled the Circuit Court's findings and appointed the Shecklers as covered insureds 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

As detailed above, because the Shecklers believe that there is no difference between the Dwelling Policy and the Landlord Liability Policy, they never grapple with the basic fact that the Dwelling Policy—like any first-party property coverage—is, by its very nature, not a liability policy at all, and instead only reimburses the insureds for "accidental direct physical loss" to the Property itself.[6] *See* C28–29; *see also Hacker*, 388 Ill. App. 3d at 392; *Ill. Tool Works*, 2011 IL App (1st) 093084, ¶ 37. Accordingly, like the Opinion, the Shecklers subtly inject a duty to defend into the Dwelling Policy, and then apply *Dix*'s equitable principles to this new hybrid first-party property/third-party liability policy.

[6] Again, the Shecklers seemingly recognized this limitation when they tendered their claim under the Landlord Liability Policy. *See* C158–72.

But again, this is not what the Dwelling Policy (or any first-party property policy) does,[7] and the duty to defend is not a creature of "equity" at all. *See supra* p. 6. Thus, "[t]he *Dix* court's analysis of the equities of subrogation is not relevant in determining an insurance company's duty to defend." *Hacker*, 388 Ill. App. 3d at 392. Instead, the proper analysis begins and ends with the unambiguous language to which the insurer and insured agreed. *See supra* p. 3, 6. Accordingly, prior to the Opinion, "[n]o reported cases in Illinois [had] expanded the *Dix* decision" to an insurer's defense of third-party liability claims,[8] "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."[9] *Hacker*, 388 Ill. App. 3d at 392–93; *ESL Delivery Services*, 384 Ill. App. 3d at 456 ("there is no evidence that the

[7] Contrary to the Shecklers' assertion, the entire purpose of first-party property insurance is not "fine print." Appellant's Brief, 21.

[8] The Fifth District's explanation directly undermines the Shecklers' claim that *Dix* "has never been considered in the context of a contribution claim against the tenant." Appellant's Brief, 16. Again, the Shecklers have not presented a "contribution claim" at all, but instead assert a purported *duty to defend*. And, contrary to the Shecklers' suggestion, the Fifth District itself *did* consider this exact demand, and expressly rejected it. *See Hacker*, 388 Ill. App. 3d at 393 (third-party claims for contribution against tenant). In any event, the Shecklers cannot argue that this is a matter of first impression (it is not), and then simultaneously claim that if the Court rejects its demand, it will be changing *Dix* "retroactively." Appellant's Brief, 22. Indeed, decisions like *Hacker* prove the opposite.

[9] To this end, the Shecklers offer a meaningless distinction that *Hacker* involved personal injury coverage (rather than property insurance), which "could have been insured by the tenant under a tenant policy." Appellant's Brief, 20. As the Fifth District recognized, not only does the same apply to third-party liability coverage, it is actually *most common* for tenants to obtain their own liability insurance. Moreover, unlike here, *Hacker* at least addressed a liability policy, which (unlike a property policy) actually includes a duty to defend against third-party claims, and the court *still* found that the insurer had no such a duty. In any event, even if the Shecklers could inject a duty to defend into a first-party property insurance, that duty is still a question of law governed by the plain policy terms—whether for personal injury or fire damage.

parties intended the landlord to bear the burden of losses suffered by third parties as a result of the tenant's negligence"). Thus, the Shecklers miss the point by claiming that "[i]t is doubtful that [they] had an insurance interest *in the premises*": as the Fifth District recognized, tenants "common[ly] . . . obtain their own renter's insurance policy to cover their liability for losses they cause to third parties." *Hacker*, 388 Ill. App. 3d at 392–93; *see* Appellant's Brief, 14.

Here, even with Mr. McIntosh's explanation that he would obtain first-party dwelling insurance, neither the Dwelling Policy nor the Lease contain *any* language establishing a duty to defend *anyone* against third-party claims. *See* C118–27; C132–34; *see also Hacker*, 388 Ill. App. 3d at 393 (even if the parties "might have intended that [the tenants] would not be liable for any fire damage to the leased premises, there is no language in the lease [or the property policy] to indicate that [the tenants] would not be liable to third parties for losses [they] cause[] through [their] own negligence."); *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). The Third District erred by manufacturing such a duty under the Dwelling Policy.

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

A. The Landlord Liability Policy Does Not Cover The Shecklers

As Auto-Owners detailed in its opening brief, the Shecklers are not covered insureds under the Landlord Liability Policy's unambiguous terms, *see* C144, and because the duty to defend is a question of law governed by the parties' express agreement, "[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 (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") (emphasis added); *see 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").

For this reason, neither the Third District nor the Shecklers have even suggested that the Shecklers are entitled to a defense under the Landlord Liability Policy, which does not mention the Shecklers. *See Hacker*, 388 Ill. App. 3d at 392–93 ("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). Moreover, even setting aside the Fifth District's holding that the *policy itself* must contain this "express agreement," such an agreement also does not appear anywhere else: the Dwelling Policy, the Landlord Liability Policy, the Lease, or otherwise. To this end, when the Shecklers urge that "[i]t is the intent of the underlying lease that controls," they decline to add that the Lease says nothing about third-party liability or a defense to such claims. The Third District erred by nonetheless manufacturing this exact coverage under *the Dwelling Policy*.

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"—*i.e.*, the exact coverage

that the Shecklers now demand. C145. And, the Shecklers cannot acquire "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, ¶ 32. Although this exclusion unambiguously bars the Shecklers' claim, the Opinion does not address it at all, and the Shecklers only do so in passing.

First, without offering the relevant excerpt or even a citation, the Shecklers argue that *Dix* "expressly rejected looking to the insurance policy to see . . . which coverages are excluded"—a theory that would not only obliterate basic insurance law, but contract law writ large. Appellant's Brief, 21. When this Court "narrowly" held that a tenant may become an implied coinsured under the landlord's property policy when the parties agree to such an arrangement, it certainly did not hold that the tenant's new coinsured status also fundamentally transforms *the coverage itself*. In other words, the implied coinsured (like the named insured) acquires the policy's rights and obligations, but adding a new covered insured (or co-insured) does not somehow eradicate unambiguous exclusions to which the contracting parties agreed. Indeed, the Shecklers' theory leaves two options: (a) the original named insured (like the implied coinsured) also becomes immune from the express exclusions, which are therefore toothless words that apply to no one, or (b) the original named insured (*unlike* the implied coinsured) remains subject to these exclusions, thereby (again) manufacturing *more* rights for implied coinsured tenants than the named insureds themselves.

The Shecklers' last-ditch procedural argument is equally unavailing. At various points throughout their brief, and without further explanation, the Shecklers vaguely suggest that Auto-Owners "waived" this unequivocal exclusion under Illinois' doctrine of

estoppel. The Shecklers misconstrue and misunderstand this doctrine. Illinois law is clear that when the policy itself does not impose a duty to defend, as is the case here, estoppel *cannot* "create coverage where coverage otherwise never existed." *Nationwide Mut. Ins. Co. v. Filos,* 285 Ill. App.3d 528, 534 (1st Dist. 1996). The Shecklers' "estoppel" theory not only manufactures a duty that "never existed," it actually handcuffs the Court from considering this legal question in the first place. This theory is self-fulfilling, and makes no sense: the insured believes that the policy imposes a duty to defend, and therefore the insurer "waived" (and the Court cannot consider) the policy terms that unambiguously establish the opposite. Again, neither the Dwelling Policy nor the Landlord Liability Policy create a duty to defend, and in fact, the Landlord Liability Policy expressly excludes it. Under well-established Illinois law, this ends the inquiry.

CONCLUSION

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

Respectfully submitted,

/s/ Krysta K. Gumbiner
Krysta K. Gumbiner
Brian J. Talcott
DINSMORE & SHOHL LLP
222 W. Adams Street, Suite 3400
Chicago, Illinois 60606
(312) 428-6060
krysta.gumbiner@dinsmore.com
brian.talcott@dinsmore.com

Kathryn W. Bayer
DINSMORE & SHOHL LLP
255 East 5th Street, Suite 1900
Cincinnati, Ohio 45202
(513) 977-8200
kathryn.bayer@dinsmore.com

Attorneys for Auto-Owners Insurance Company

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(c) certificate of compliance and the certificate of service, contains 17 pages.

/s/ Krysta K. Gumbiner
Krysta K. Gumbiner

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 August 16, 2022, there was electronically filed and served upon the Clerk of the above court the Reply Brief of Defendant-Appellant. On August 16, 2022, service of the Reply will be accomplished electronically through the filing manager, Odyssey EfileIL, to the following counsel of record:

Mark E. Wertz
Law Office of Mark Wertz, P.C.
mwertz@markwertzlaw.com

Bradley M. Arnold
Kolb Clare & Arnold, P.C.
barnold@kcalegal.com

John W. Robertson
Statham & Long, LLC
jwr@galesburglaw.com

Peter J. Wenker
Brian T. Fairfield
Brooks Law Firm, P.C.
pjw@brookslawfirmpc.com
btf@brookslawfirmpc.com

Within five days of acceptance by the Court, the undersigned states that thirteen copies of the Reply 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