No. 130242

IN THE SUPREME COURT OF
THE STATE OF ILLINOIS

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

Plaintiff-Appellee,

v.

INFRASTRUCTURE ENGINEERING, INC.,

Defendant-Appellant.

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

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

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

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INTRODUCTION

Plaintiff, Zurich American Insurance Company ("Zurich"), as subrogee of Community College District No. 508 d/b/a City Colleges of Chicago ("City Colleges") and CMO, a Joint Venture ("CMO"), brought a subrogation action against Defendant, Infrastructure Engineering, Inc. ("IEI"), and others, to recover payments made by Zurich under a builder's risk insurance policy (the "Builders Risk Policy") as a result of flood damage that occurred during construction of the new Malcolm X College at 1900 West Jackson Boulevard, in Chicago ("Malcolm X College"). Zurich asserted a single count of breach of contract against IEI on the grounds that its alleged subrogor, City Colleges, was a third-party beneficiary of a subcontract between IEI and the architect Moody Nolan, Inc. ("Moody Nolan"). Zurich did not allege any contractual relationship between its alleged subrogor, CMO, and IEI.

On October 5, 2022, the Circuit Court of Cook County granted summary judgment in favor of IEI and against Zurich on its breach of contract claim. The basis for the Circuit Court's ruling was that Zurich could not establish a right of subrogation because it failed to adduce any evidence that its subrogor, City Colleges, had: (1) sustained a loss; (2) claimed a loss; (3) authorized a claim to be made on its behalf under the Builders Risk Policy); or (4) received any payment of loss from Zurich. The Court found, on the contrary, that the undisputed evidence showed that City Colleges' general contractor, CMO, who had no contractual privity with IEI, was the party that submitted a claim for loss under the Builders Risk Policy and received all the payments from Zurich.

On October 24, 2023, the Illinois Appellate Court, First District reversed the judgment of the Circuit Court, finding that: (1) City Colleges suffered a "loss" because of

its "insurable interest" in property damaged by flooding and as a result of "delays occasioned by the flooding"; and (2) such "loss" gave rise to a right of subrogation by Zurich based on the contractual subrogation provision in the Builders Risk Policy.

This Court allowed IEI's petition for leave to appeal.

ISSUES PRESENTED FOR REVIEW

1. Whether City Colleges sustained a loss that was paid by Zurich under the Builders Risk Policy.
2. Whether Zurich can pursue a contractual subrogation claim as the subrogee of City Colleges based on a loss solely sustained by, claimed by, and paid to CMO, a different insured under the Builders Risk Policy.

STATEMENT OF JURISDICTION

The Illinois Appellate Court, First District originally entered judgment in a Rule 23 order dated September 19, 2023. Thereafter, on September 27, 2023, Zurich filed a timely motion to publish pursuant to Illinois Supreme Court Rule 23(f). On October 4, 2023, the Illinois Appellate Court, First District granted Zurich's motion to publish and withdrew its Rule 23 order dated September 19, 2023. The Illinois Appellate Court, First District subsequently entered its judgment in an opinion issued on October 24, 2023. Thereafter, IEI filed a timely petition for leave to appeal on November 27, 2023. This Court granted IEI's petition for leave to appeal on January 24, 2024. This Court thus has jurisdiction pursuant to Illinois Supreme Court Rule 315.

STATEMENT OF FACTS

I. Background

Zurich filed the instant subrogation lawsuit to recover payments made under a Builders Risk Policy as a result of flood damage that occurred during construction of the new Malcolm X College, at 1900 West Jackson Boulevard, in Chicago ("Malcolm X College"). (C. 77-78 V1). Zurich brought suit against Moody Nolan, IEI, Environmental Systems Design, Inc. ("ESD"), and Terracon Consultants, Inc. ("Terracon"). (C. 77 V1). Moody Nolan was the architect of record for the new Malcolm X College project. (C. 79, 102-211 V1). IEI was the civil engineer. (C. 80, 212-231 V1). ESD was the mechanical, electrical, and plumbing engineer. (C. 81, 236-262 V1). And Terracon was the geotechnical engineer. (C. 81, 263-275 V1).

The new Malcolm X College involved the development of: (1) an approximately 500,000 square-foot academic building (the "Academic Building") with one or more basement levels to house, among other things, mechanical and electrical equipment spaces; and (2) a parking garage with 1,250 spaces (the "Project"). (C. 79 V1). The Project also included the design and construction of a stormwater detention system to capture stormwater on the site and ultimately convey it into the city sewers. (C. 82 V1). Zurich's subrogation claim involves allegations that the stormwater detention system was defectively designed, causing flooding in the Academic Building basement while under construction, thereby requiring Zurich to make a loss payment to CMO, the general contractor, under the Builders Risk Policy. (C. 93-94 V1; C. 7809 V5 – 7815 V5, 10676 V7).

A. The Relevant Contracts

On April 4, 2013, City Colleges entered into a written contract with Defendant Moody Nolan to provide architectural and engineering services for the new Malcolm X College Project (the "Prime Agreement"). (C. 79, 102-211 V1). The services to be provided by Moody Nolan included the preparation and delivery of plans and specifications for the design of the Project. (C. 79, 110, 142-155 V1).

On April 17, 2013, Moody Nolan subcontracted the civil engineering work for the Project, including the design and specification of the stormwater detention system, to IEI pursuant to an AIA Standard Form of Agreement Between Architect and Consultant (the "IEI Subcontract"). (C. 83, 212, 214 V1). As pertinent here, Section 1.1 of the IEI Subcontract provided that "[a] copy of the Architect's agreement with the Owner, known as the Prime Agreement (from which compensation amounts may be deleted), is attached as Exhibit A and is made a part of this Agreement." (C. 214 V1). Section 1.3 of the IEI Subcontract also provided, in pertinent part, as follows:

> **§ 1.3** To the extent that the provisions of the Prime Agreement apply to This Portion of the Project, the Architect shall assume toward the Consultant [IEI] all obligations and responsibilities that the Owner [City Colleges] assumes toward the Architect, and the Consultant shall assume toward the Architect all obligations and responsibilities that the Architect assumes toward the Owner…Where a provision of the Prime Agreement is inconsistent with a provision of this Agreement, the Prime Agreement shall govern.

(C. 214 V1).

On January 8, 2014, City Colleges hired CMO as the general contractor for the Project. City Colleges and CMO entered into an AIA Standard Form of Agreement Between Owner and Contractor (the "CMO Contract"). (C. 9594 V6). The CMO Contract

required CMO to achieve substantial completion of the Malcolm X College buildings by December 31, 2015, and the phased occupancy of the Malcolm X College buildings starting on November 4, 2015. (C. 9594, 9596 V6). The CMO Contract also provided that CMO "shall perform the Work in accordance with the Contract Documents." (C. 9623 V6). Further, the CMO Contract provided:

> **§ 3.5 WARRANTY**
> The Contractor [CMO] warrants to the Owner [City Colleges] and Architect that materials and equipment furnished under the Contract will be of good quality and new unless the Contract Documents require or permit otherwise. The Contractor further warrants that the Work will conform to the requirements of the Contract Documents and will be free from defects, except for those inherent in the quality of the Work the Contract Documents require or permit. Work, materials, or equipment not conforming to these requirements may be considered defective. The Contractor's warranty excludes remedy for damage or defect caused by abuse, alterations to the Work not executed by the Contractor, improper or insufficient maintenance, improper operation, or normal wear and tear and normal usage. If required by the Architect, the Contractor shall furnish satisfactory evidence as to the kind and quality of materials and equipment.

(C. 9625 V6).

B. The Stormwater Detention System

The stormwater detention system designed by IEI for the new Malcolm X College Project relied on underground stormwater detention vaults called "Storm Traps" to collect and detain water from roofs and other surfaces for gradual conveyance to the city sewer. (C. 84 V1). The underground "Storm Trap" chambers are essentially concrete boxes with four walls, a top, and no bottom. (C. 82 V1). The original stormwater detention design submitted by IEI included concrete pads underneath the "Storm Trap" chambers. (C. 84 V1). However, due to value engineering requested by City Colleges and CMO, IEI approved an alternative design for the stormwater detention system that specified a stone

base of CA7 stone under the "Storm Trap" chambers, below which was compacted CA6 stone, a material with very low permeability. (C. 3347, 3358, 3546 V2).

C. The August 17, 2015 Flood

CMO subcontracted the installation of the stormwater detention system at MXC to its subcontractor. (C. 2209 V2). On August 17, 2015, the stormwater detention system was under construction and only partially installed. (C. 86 V1, 2155 V2). Various elements of the system had not yet been connected. For example, the pipes connecting two underground stormwater detention chambers, referred to as Storm Traps 1C and 1D, were not connected, and thus water could not travel from Storm Trap 1C to Storm Trap 1D. (C. 2157, 2159, 2198 V2). Storm Trap 1E, which collected water from Storm Traps 1C and 1D, was also not connected to the city sewer. (C. 2161 V2). Additionally, roof drains for the smaller canopies and offset roofs were not connected to the Storm Trap chambers. (C. 2162 V2). As a result, any water on those roofs simply went into the MXC building because the water had nowhere else to go. (C 2163-2164 V2). Under these conditions, there was a rainfall event at Malcolm X College on August 17, 2015, which resulted in flooding of the Academic Building basement where various electrical and mechanical equipment had been installed. (C. 86-87 V1).

D. The Builders Risk Policy

Zurich issued Builders Risk Policy No. IM 9441297-00 to CMO for the Policy Period January 20, 2014 – December 31, 2015 (the "Builders Risk Policy"). (C. 10575 V7). City Colleges was an additional named insured under the Builders Risk Policy. (C. 10579 V7). The Declarations of the Builders Risk Policy provided:

> The first Named Insured shown in A. above [CMO] shall be deemed the sole and irrevocable agent of each and every Insured hereunder for the

purpose of giving and receiving notices to/from the Company, giving instruction to or agreeing with the Company as respects Policy alteration, for making or receiving payments of premium or adjustments to premium, and as respects the payment for claims.

(C. 10579 V7). The Builders Risk Policy also contained the following subrogation provision:

12. SUBROGATION

If the Company pays a claim under this Policy, they will be subrogated, to the extent of such payment, to all the Insured's rights of recovery from other persons, organizations and entities. The Insured will execute and deliver instruments and papers and do whatever else is necessary to secure such rights.

The Company will have no rights of subrogation against:

A. Any person or entity, which is a Named Insured or an Additional Named Insured;

B. Any other person or entity, which the Insured has waived its rights of subrogation against in writing before the time of loss;

It is a condition of this Policy that the Company shall be subrogated to all the Insured's unwaived rights of recovery, if any, against any third party Architect or Engineer, whether named as an Insured or not, for any loss or damage arising out of the performance of professional services in their capacity as such and caused by any error, omission, deficiency or act of the third party Architect or Engineer, by any person employed by them or by any others for whose acts they are legally liable.
***

The Insured will act in concert with the Company and all other interest concerned in the exercise of such rights of recovery. The Insured will do nothing after a loss to prejudice such rights of subrogation.

***

(C. 10597 V7 – 10598 V7).

E. CMO Makes a Claim and Receives a Loss Payment

On August 19, 2015, CMO—the general contractor—submitted a claim under the Builders Risk Policy in connection with the August 17, 2015 flood event. (C. 9898 V6). Zurich investigated the claim and made a loss payment. (C. 88, 9892 V6). The loss payment was made solely to CMO. (C. 9944 V6 – 9945 V6). The deductible was paid solely by CMO. (C. 9999 V7).

City Colleges had no involvement whatsoever in the claim submitted to Zurich. City Colleges did not make a claim under the Builders Risk Policy; did not correspond with Zurich's claims adjuster during his investigation of the claim submitted by CMO; and did not receive any loss payment from Zurich in connection with the August 17, 2015 flood event. (C. 7809 V5 – 7815 V5, 10676 V7). David Sanders, the Deputy Chief Operating Officer for City Colleges and Interim President of Malcolm X College, testified that he had no knowledge of anyone at City Colleges assisting Zurich in determining the loss or the payout under the Builders Risk Policy; never reviewed or approved the payout by Zurich; and does not even know what Zurich paid. (C. 10037 V7, 10053 V7 – 10054 V7).

II. Relevant Procedural History

On December 29, 2016, Zurich filed a Complaint asserting claims of negligence and breach of contract against Defendants Moody Nolan, IEI, ESD, and Terracon under a third-party beneficiary theory. (C. 77, 81, 88-100 V1). Zurich non-suited the negligence counts brought against Defendants, leaving only breach of contract counts. (C. 796, 842 V1).

On February 15, 2021, Zurich responded to Requests for Admission, objecting to requests seeking admissions that: (1) CMO, not City Colleges, submitted a claim to Zurich related to the August 17, 2015 flood; (2) CMO, not City Colleges, paid the premium for

the Builders Risk Policy; (3) Zurich corresponded with CMO's representatives, not City College's representatives, during its investigation of the August 17, 2015 flood; and (4) Zurich issued its loss payment to CMO, not City Colleges. (C. 7809 V5 – 7815 V5). On August 31, 2022, the Court overruled Zurich's objections and deemed the foregoing facts admitted. (C. 7809 V5 – 7815 V5, 10676 V7).

On July 20, 2022, IEI filed a Motion for Summary Judgment, arguing that summary judgment should be granted on Zurich's breach of contract claim because, *inter alia*, Zurich could not establish the necessary elements giving rise to a right of subrogation on behalf of City Colleges and CMO where (a) there was no contractual relationship between CMO and IEI, and (b) there was no loss sustained by or paid to City Colleges. (C. 9085 V6, 9090 V6 – 9096 V6). During oral argument on IEI's motion, Zurich acknowledged there is no contractual relationship between CMO and IEI that would permit a subrogation claim based on a breach of contract theory. (R. 17).

On October 5, 2022, the Circuit Court granted IEI's Motion for Summary Judgment. (C. 10713 V7 – 10716 V7). The Court concluded that Zurich failed to demonstrate the prerequisites for a subrogation claim on behalf of City Colleges where there was no evidence that: (1) City Colleges sustained a loss; (2) City Colleges claimed any loss; (3) City Colleges authorized a claim to be made on its behalf under the Builders Risk Policy; or (4) City Colleges received any payment of loss from Zurich. (C. 10713 V7 – 10716 V7). The Court subsequently denied Zurich's Motion to Reconsider. (C. 10888 V7 – 10889 V7).

On January 17, 2023, Zurich filed its Notice of Appeal. (C. 10890 V7).

On October 24, 2023, the Illinois Appellate Court, First District issued its Opinion in this matter without hearing oral argument. *Zurich American Insurance Co. v. Infrastructure Engineering, Inc.*, 2023 IL App (1st) 230147. The Appellate Court rejected IEI's forfeiture and invited error arguments and concluded that Zurich's right of subrogation should be measured solely by the terms of the contractual subrogation provision in the Builders Risk Policy. *Id.* at ¶¶ 24-25, 27-28. The Appellate Court, in reaching this conclusion, disavowed its prior holdings in *Trogub v. Robinson*, 366 Ill. App. 3d 838, 842 (1st Dist. 2006), *Econ. Premier Assurance Co. v. Country Mut. Ins. Co.*, 2021 IL App (1st) 192364-U, ¶ 65[1], *SwedishAmerican Hosp. Ass'n of Rockford v. Illinois State Med. Inter-Ins. Exch.*, 395 Ill. App. 3d 80, 105 (2d Dist. 2009), and *State Farm Mut. Auto. Ins. Co. v. Easterling*, 2014 IL App (1st) 133225, ¶ 21, to the extent those cases "hold that the three general prerequisites for equitable subrogation control over the express terms of a subrogation clause in a contract." *Id.* at ¶ 36.

Additionally, the Appellate Court rejected IEI's argument that the contractual subrogation provision in the Builders Risk Policy could only be read to extend a right of subrogation with respect to the insured who sustained a loss and received a loss payment. *Id.* at ¶¶ 42-43. Instead, the Court concluded that the subrogation provision in the Builders Risk Policy extended a right of subrogation with respect to each and every "insured" under the Builders Risk Policy. *Id.*

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

The Appellate Court then went on to conclude that City Colleges had an "insurable interest" in Malcolm X College and therefore sustained a "loss" as a result of the flood damage to the Academic Building. In this regard, the Appellate Court stated as follows:

> …The purpose of the builder's risk policy was to provide insurance coverage for the property during the period of the construction. Both City Colleges and CMO had insurable interests that were protected by the builder's risk policy. As the owner of the property under construction, City Colleges had a tangible, insurable interest in the insured property at all times and it suffered a "loss" due to the flooding damage. City Colleges suffered a further loss as a result of the delays occasioned by the flooding. CMO purchased the insurance policy for the benefit of City Colleges, and City Colleges reimbursed CMO for the payment of its share of the premiums, as CMO was required to be the party to make the premium payments as the agent of City Colleges. As the agent for all the additional insureds, CMO was also required to communicate with Zurich on City Colleges' behalf, and CMO was required to be the party to receive the claim payments. City Colleges is an "insured" under the builder's risk policy and, under the policy's subrogation provision, Zurich acquired City Colleges' rights to recover against third parties for the loss. According to the unambiguous language of the builder's risk policy at issue in this case Zurich has the right to subrogate for City Colleges under the circumstances presented.

Id. at ¶ 45. The Appellate Court also rejected IEI and the Circuit Court's reliance on *New York Bd. of Fire Underwriters v. Trans Urban Constr. Co.*, 91 A.D.2d 115 (N.Y. App. Div. 1983), *aff'd on other grounds*, 60 N.Y.2d 912 (1983), as persuasive authority for the proposition that Zurich was not entitled to subrogate on behalf of City Colleges where City Colleges did not submit the claim for loss, suffer the loss, or receive any claim payment for the loss. *Id.* at ¶ 50. The Appellate Court thus reversed the Circuit Court's order granting summary judgment to IEI. *Id.* at ¶ 56.

On January 24, 2024, this Court granted IEI's petition for leave to appeal.

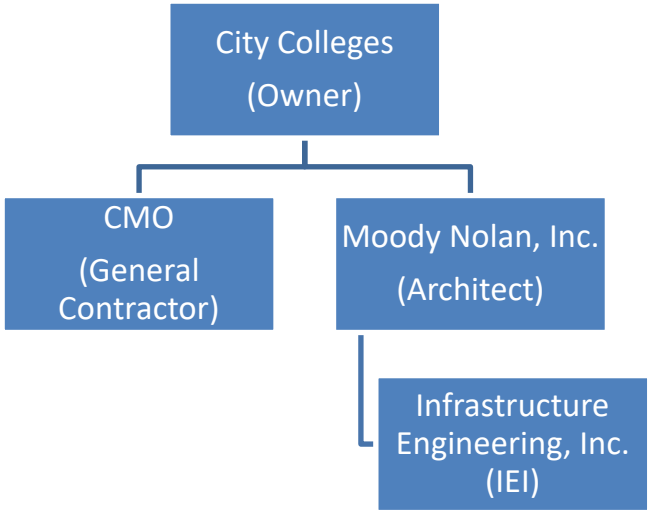
ARGUMENT

I. Standard of Review

Summary judgment is appropriate where the pleadings, depositions, admissions, and affidavits on file, when viewed in the light most favorable to the non-moving party, show there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Pepper Constr. Co. v. Palmolive Tower Condos., LLC*, 2016 IL App (1st) 142754, ¶ 63. This Court reviews the Circuit Court's ruling on a motion for summary judgment *de novo*. *Id.*

II. Zurich Is Unable to Pursue Subrogation on Behalf of CMO Due to a Lack of Contractual Privity with IEI, and Therefore Has Manufactured a Subrogation Claim on Behalf of City Colleges Because of Its Contractual Privity with IEI.

Zurich brings this subrogation action as the subrogee of both City Colleges and CMO. (C. 77 V1). However, Zurich has acknowledged that there is no contractual relationship between CMO and IEI that would permit a subrogation claim based on a breach of contract theory. (R. 17). Indeed, the chain of contractual privity between City Colleges, CMO, and IEI breaks down as follows:



The lack of contractual privity between CMO and IEI presents Zurich with a practical problem in this case. As detailed herein, the undisputed evidence shows that CMO was the only party to sustain a loss in connection with the August 17, 2015 flood event at Malcolm X College. It also shows that CMO submitted the subject claim under the Builders Risk Policy, paid the policy deductible out of its own pocket, and received all payment of loss from Zurich. (C. 9999 V7, 7809 V5 – 7815 V5, 10676 V7). However, Zurich, as a subrogee, must step into the shoes of its subrogor and is limited to asserting only the claims that its subrogor has against third-parties. Consequently, Zurich has no basis to recover any loss sustained by and paid to CMO from IEI because of the lack of contractual privity between those parties.

Zurich devised a solution to this conundrum: allege that the loss suffered by CMO involved damages sustained by CMO *and* another insured, City Colleges, and sue as the subrogee of both. (C. 92 V1). These allegations survived the pleading stage. However, when the facts adduced in discovery showed that City Colleges did not sustain any loss or receive any loss payment in connection with the August 17, 2015 flood event, IEI moved for summary judgment. At that point, Zurich devised a new theory: because City Colleges had an "insurable interest" in Malcolm X College, it necessarily sustained a loss as a result of the damage caused during construction by the August 17, 2015 flooding. The Circuit Court correctly rejected this argument on the basis that Zurich failed to establish any evidence of an *actual* loss sustained by City Colleges. However, the Appellate Court subsequently reversed, adopting Zurich's argument that City Colleges' "insurable interest" in property damaged by flooding was the equivalent of a loss and that City Colleges also

suffered a loss as a result of "delays occasioned by the flooding." *Zurich*, 2023 IL App (1st) 230147, at ¶ 45.

As discussed herein, the Appellate Court's Opinion should be reversed. The Appellate Court has erroneously concluded that an "insurable interest," standing alone, is the functional equivalent of a "loss," creating a direct conflict with Illinois decisional law dating back to the 1940s. Further, the Appellate Court has erroneously concluded that City Colleges sustained a "loss" due to "delays occasioned by the flooding" when there was no evidence of such delays adduced in discovery, delays were expressly excluded by Zurich's own policy, and Zurich failed to cite any record evidence of delays in its reply brief, where this contention was raised for the first time. Simply put, Zurich should not be permitted to subrogate on behalf of one insured (City Colleges) based on a loss sustained by, claimed by, and paid to a different insured (CMO) in view of fundamental principles of Illinois subrogation law and the potential consequences of allowing subrogation under such circumstances.

III. The Undisputed Evidence Shows that City Colleges Did Not Sustain a Loss, Claim a Loss, or Receive Any Loss Payment under the Builders Risk Policy as a Result of the August 17, 2015 Flood Event at Malcolm X College.

It is axiomatic that an insurer pursuing a subrogation claim must demonstrate that its subrogor sustained a "loss" for which the insurer is entitled to recover as subrogee against a third-party. *See Sheckler v. Auto-Owners Ins. Co.*, 2022 IL 128012, ¶ 39. Here, however, the undisputed evidence shows that Zurich's subrogor, City Colleges, neither sustained a loss, claimed a loss, nor received any loss payment in connection with the August 17, 2015 flood event at Malcolm X College. On the contrary, the undisputed evidence shows that any loss sustained as a result of the August 17, 2015 flood event was

loss sustained solely by CMO, the general contractor—another of Zurich's insureds under the Builders Risk Policy. Under the CMO Contract, CMO was the party with the contractual responsibility to furnish the Malcolm X College project by the substantial completion deadline of December 31, 2015 in accordance with the Contract Documents. (C. 9596 V6, 9623 V6, 9625 V6). It was thus CMO—not City Colleges—that was obligated to repair any damage to construction as a result of the August 17, 2015 flood event because CMO needed to meet *its* contractual obligation to furnish a substantially complete Malcolm X College by December 31, 2015. City Colleges, on the other hand, did not sustain any loss as a result of the August 17, 2015 flood event because the Malcolm X College project was still under construction at the time, and the deadline for CMO to furnish a substantially completed project had not yet arrived.

The fact that CMO was the only party to sustain a loss in connection with the August 17, 2015 flood event is manifest from the submission and handling of the subject claim. The undisputed evidence shows that CMO (not City Colleges) submitted a claim for loss under the Zurich policy; that CMO (not City Colleges) paid the deductible under the Zurich policy; and that CMO (not City Colleges) received 100% of the loss payment from Zurich. (C. 9898 V6, 9944 V6, 9999 V7). The undisputed evidence also shows that City Colleges had no involvement whatsoever in the claim submitted under the Builders Risk Policy; did not make a claim under the Builders Risk Policy; did not correspond with Zurich's claims adjuster regarding the claim; and did not receive any loss payment from Zurich. (C. 7809 V5 – 7815 V5, 10676 V7).

City Colleges' lack of involvement with the August 17, 2015 flood damage claim was further confirmed by David Sanders, the Deputy Chief Operating Officer of City

Colleges and Interim President of Malcolm X College, who testified that he has no knowledge of City Colleges assisting Zurich in determining the loss or payout under the Builders Risk Policy, that he never reviewed or approved the payout by Zurich, and that he does not even know what Zurich paid. (C. 10037 V7, 10053 V7 – 10054 V7). Simply put, there is no evidence in the record that the claim submitted by and paid to CMO was authorized by, assisted by, or directed by City Colleges. On the contrary, the undisputed evidence shows that CMO submitted a claim at its own election and received the full benefit of a loss payment by Zurich under the Builders Risk Policy to allow CMO to meet *its* contractual obligation to furnish the Malcolm X College project by the substantial completion deadline of December 31, 2015 in accordance with the Contract Documents.

Lest there be any doubt that CMO was the party that sustained the loss in connection with the August 17, 2015 flood event and that received the loss payment from Zurich, one need only to look at the Complaint filed in this matter to see that is the case. *To this day*, Zurich is still pursuing a subrogation claim against IEI as a subrogee of both City Colleges *and* CMO, even though Zurich has expressly acknowledged that there is no contractual relationship between CMO and IEI. (C. 77 V1; R. 17). Why must Zurich do this? In light of the facts adduced during discovery, the answer is clear: CMO sustained the subject loss and received the loss payment from Zurich, but Zurich looks to use the existence of the contract between IEI and City Colleges as a basis to recover its loss payment to CMO. However, this does not change the fact that CMO was the only party to suffer a loss, claim a loss, or receive a loss payment from Zurich.

In the Circuit Court and the Appellate Court, Zurich did not dispute any of the above-cited evidence. Instead, Zurich argued that, because City Colleges had an "insurable

interest" in Malcolm X College, Zurich was entitled to pursue a subrogation claim on behalf of City Colleges pursuant to the contractual subrogation provision in the Builders Risk Policy. Additionally, Zurich argued for the first time in its reply brief on appeal, and without *any* record citation, that "the August 2015 flooding incident (i.e. the loss) led to considerable construction delays." (Zurich Appellate Reply, p. 12).

The Appellate Court, in its Opinion, agreed with Zurich's contentions, concluding that: (1) City Colleges sustained a "loss" in connection with the August 17, 2015 flood event because City Colleges, as an owner, had an "insurable interest" in Malcolm X College; and (2) City Colleges sustained a further "loss" because it suffered purported "delays" as a result of the flooding. *Zurich*, 2023 IL App (1st) 230147, at ¶ 35. Also, the Appellate Court went on to suggest, for reasons that are unclear, that the Builders Risk Policy was purchased for the benefit of City Colleges and that CMO was the "agent for all the additional insureds" under the Builders Risk Policy, including with respect to receipt of claim payments. *Id.* IEI maintains that the Appellate Court's ruling was incorrect as a matter of both fact and law.

First, contrary to the Appellate Court's reasoning, the question of whether an "insurable interest" exists and whether there has been a "loss" represent two separate and distinct inquiries. *See e.g. State Farm Mut. Auto. Ins. Co. v. Rodriguez*, 2013 IL App (1st) 121388, ¶¶ 12-14, 30 (analyzing whether defendants had an insurable interest in property before addressing the question of whether defendants had sustained a "loss"); *Beman v. Springfield Fire & Marine Ins. Co.*, 303 Ill. App. 554, 555, 562-63 (1st Dist. 1940) (concluding that, despite fire damage to property in which plaintiffs had an insurable interest, the plaintiff had not sustained a "loss").

In *Beman*, both the plaintiffs and the Chicago Title & Trust Company had insurable interests in a residential property: plaintiffs, as the holders of an option for the purchase of the property, and Chicago Title & Trust Company, as trustee in possession of the title to the property. *Beman*, 303 Ill. App. at 555-56. A fire caused damage to the property, and Chicago Title & Trust Company repaired the damage and received reimbursement from its insurance company. *Id.* Thereafter, plaintiffs repurchased the property and also claimed a loss under their insurance policy for the fire damage. *Id.* at 556. The defendant insurer denied coverage to the plaintiffs on the grounds that they had not sustained a "loss." *Id.* The trial court initially found against the defendant insurer and entered judgment in favor of the plaintiffs. *Id.* at 557. However, the Appellate Court reversed, finding that plaintiffs "ha[d] sustained no loss under the policy" because the repair of the fire damage was completed without any cost or expense to the plaintiffs. *Id.* at 562-63.

Here, similar to *Beman*, there are two parties with an insurable interest in Malcolm X College: City Colleges and CMO. Only one party, CMO, sustained a "loss" and received payment for a "loss" as a result of the August 17, 2015 flood event at Malcolm X College. However, another party—Zurich, as subrogee of City Colleges—is seeking to recover that loss sustained by and paid to CMO on the basis that City Colleges had an "insurable interest" in Malcolm X College. The Court in *Beman* made clear, however, that the existence of an insurable interest in property, standing alone, is not the equivalent of a "loss." The Appellate Court's Opinion nonetheless turns the holding in *Beman* on its head by reaching the exact opposite conclusion: that the mere existence of an "insurable interest" in damaged property is the equivalent of a "loss." In reaching this conclusion, the Appellate Court's Opinion not only creates a direct conflict with long-standing Illinois case

law dating back to the 1940s, it also produces the illogical and inequitable result that an insurer (*i.e.*, Zurich) can step into the shoes of a party (*i.e.* City Colleges), who has suffered no actual loss and who did not receive payment for any loss, to pursue a subrogation claim against a third-party.[2] This Court should reject such an outcome and affirm the long-standing holding of *Beman*.

Second, the Appellate Court's conclusion that City Colleges suffered a "loss" "as a result of delays occasioned by flooding" is unfounded. The grounds for the Appellate Court's finding of alleged "delay" damages on the part of City Colleges appears to have been Zurich's unsupported assertion, made for the first time *in its reply brief* in the Appellate Court, that "the August 2015 flooding incident (i.e. the loss) led to considerable construction delays." (Zurich Appellate Reply, p. 12). However, Zurich failed to cite any record evidence in support of its assertion of "delays," or any evidence that such alleged "delays" caused a "loss" to City Colleges. The Appellate Court simply turned Zurich's unsupported assertion of "delays" in its reply brief into a new category of purported "loss" sustained by City Colleges despite the lack of any evidence in the record of such. This was wholly improper. There is no evidence that Zurich ever paid CMO or City Colleges for "delays." In fact, the record shows that *delays were expressly excluded under the Builders Risk Policy*. (C. 10584 V7). The Appellate Court thus effectively found a right of

[2] IEI argued in its Appellee Brief that Zurich's claim that an "insurable interest" was the equivalent of a "loss" was a red herring and was unsupported by any case law. (IEI Appellate Response Brief, p. 27). Further, IEI argued, as here, that it was fundamental to a subrogation claim that Zurich's insured sustained a loss for which Zurich made payment. (IEI Appellate Response Brief, p. 27). *Togrub v. Robinson*, 366 Ill. App. 3d 838, 842 (1st Dist. 2006); *Village of Crainville v. Argonaut Ins. Co.*, 81 Ill. 2d 399, 404 (1980). The Appellate Court, however, did not address this argument directly.

subrogation on an element of purported "loss" that was never proved and that was not even covered by Zurich in the first place.

Third, the Appellate Court's conclusion that Zurich was entitled to pursue a subrogation claim against IEI because the Builders Risk Policy was purchased "for the benefit of City Colleges" rests on a faulty premise. *Zurich*, 2023 IL App (1st) 230147, at ¶ 45. Although the Appellate Court's reasoning is not entirely clear, the Court appears to have been suggesting that any claims made and/or paid under the Builders Risk Policy were necessarily claims made by and paid to City Colleges, since the Builders Risk Policy was purchased for its benefit. However, the Appellate Court failed to take note that the Builders Risk Policy was purchased to protect the interests of multiple different parties, not just City Colleges. As acknowledged by Zurich in its appellate reply brief, when CMO and City Colleges entered into the CMO Contract, they "agreed to protect *their separate interests* under a single builder's risk policy." (Emphasis added.) (Zurich Reply, p. 11). In other words, even Zurich acknowledges that: (a) CMO and City Colleges have *separate interests*; and (b) the Builders Risk Policy was purchased to protect both parties' *separate interests*. Indeed, the different interests that the Builders Risk Policy was meant to protect are expressly outlined in the CMO Contract, which requires CMO to purchase a Builders Risk Policy to protect the "interests of the Owner, the Contractor [CMO], Subcontractors and Sub-subcontractors in the Project." (C. 9643-9644 V6).

The Appellate Court therefore engaged in flawed reasoning to the extent it was suggesting that, because City Colleges was an "insured" under the Builders Risk Policy, then any claim paid under the Builders Risk Policy necessarily represented a loss and corresponding payment to City Colleges. Taken to its conclusion, this would mean that,

whenever a claim is paid under an insurance policy, every single insured or additional insured under the policy would be deemed to have sustained a "loss" and deemed to have received an insurance payment from the carrier, even if the insured in fact had no loss and received no benefit whatsoever. Such a fiction cannot be countenanced. The only reason for allowing such a fiction to proceed is to enable insurers to manufacture subrogation claims on behalf of parties who have suffered no actual loss and who have received no actual insurance payments, as Zurich does here. However, this is guaranteed to land future parties in the bizarre position IEI is in here, where it is defending a claim brought on behalf of one party but predicated entirely on a loss sustained by, claimed by, and paid to a different party who has no valid cause of action against IEI (*i.e.*, CMO).

Lastly, the Appellate Court erroneously concluded that Zurich was entitled to pursue a subrogation claim against IEI based on a provision in the Builders Risk Policy, stating that CMO "shall be deemed the sole and irrevocable agent of each and every Insured hereunder for the purpose of giving and receiving notices to/from the Company, giving instruction to or agreeing with the Company as respects Policy alteration, for making or receiving payments of premium or adjustments to premium, and as respects the payment for claims." (C. 10579 V7). Presumably, the Appellate Court was suggesting, consistent with Zurich's argument, that CMO was acting as the agent of City Colleges in submitting a claim and receiving a claim payment under the Builders Risk Policy in connection with the August 17, 2015 flood incident. However, there are no facts demonstrating that CMO was, in fact, acting as the agent of City Colleges when pursuing its claim under the Builders Risk Policy. The undisputed evidence shows, on the contrary, that City Colleges had no involvement in the submission of the subject claim; no involvement in the determination

of the loss or payout; and never received any claim payment from Zurich. (C. 7809 V5 – 7815 V5, 10037 V7, 10053 V7 – 10054 V7, 10676 V7). CMO was therefore acting for itself when it submitted a claim for *its own* loss and obtained payment from Zurich for same.

Zurich's entire basis for arguing that CMO was acting as an "agent" of City Colleges is the above-cited provision of the Builders Risk Policy, designating CMO as the agent for all insureds with respect to the giving and receiving of notices and for the receipt of payment of claims. (C. 10579 V7). However, these provisions are commonly included in insurance contracts so carriers have a single point of contact, instead of having to interface with every single insured who may have a claim under an insurance policy. These provisions do not, however, mean that the named insured is necessarily acting as the "agent" of every potential insured under an insurance policy each and every time a claim is submitted or paid. Such an interpretation would be illogical. If that were the case, every time a named insured submitted a claim under an insurance policy, it would be acting as the *de facto* "agent" of every other potential insured under the policy (which could number in the hundreds or thousands, depending on the policy definition of an "insured"), even if such potential insureds have suffered no loss, have no knowledge of a loss, have no claim, are not seeking payment of any loss, have received no payment of loss, and have not provided any consent for the named insured to act on their behalf. Such an interpretation is absurd. *See United States Fire Ins. Co. v. Hartford Ins. Co.*, 312 Ill. App. 3d 153, 155 (1st Dist. 2000) (noting that courts will not adopt an unreasonable construction of an insurance policy or a construction that would lead to an absurd result). Why would a party be acting as the agent of an insured who has sustained no loss when it submits and receives

payment of its own claim for loss under an insurance policy? Also, here, if CMO had been acting as the agent for City Colleges, why would it have paid the policy deductible out of its own pocket instead of using funds of its purported principle, City Colleges? The answer is that CMO was *not* acting as the agent of City Colleges in submitting a claim and receiving a claim payment from Zurich; CMO was acting solely for its own benefit.

In sum, the Circuit Court was correct when it concluded that Zurich failed to adduce any evidence that City Colleges had sustained a loss, claimed a loss, authorized a claim to be made on its behalf under the Builders Risk Policy, or received any payment of loss from Zurich in connection with the August 17, 2015 flood event at Malcolm X College. (C. 10713 V7 – 10716 V7). The Appellate Court's findings to the contrary were erroneous.

IV. The Circuit Court Correctly Concluded that Zurich Could Not Pursue Contractual Subrogation on Behalf of an Insured (City Colleges) Who Has Sustained No Loss, Claimed No Loss, and Received No Loss Payment.

Zurich contends that it is entitled to pursue a contractual subrogation claim on behalf of City Colleges based on a loss claimed by and paid to CMO. In support of this argument, Zurich cites the subrogation provision in the Builders Risk Policy and claims that such provision allows Zurich to pursue a subrogation claim on behalf of *any* insured to the extent Zurich has made a claim payment under the Builders Risk Policy. This Court should reject Zurich's argument.

First, Zurich has failed to establish the three traditional prerequisites of subrogation. Second, even if this Court finds that such prerequisites do not apply, a plain reading of the subrogation provision in the Builders Risk Policy does not permit Zurich to subrogate on behalf of an insured who has sustained no loss, claimed no loss, and received no loss payment based on a loss sustained by, claimed by, and paid to a different insured. Lastly,

even if the Court finds that the subrogation provision in the Builders Risk Policy allows such a result, this Court should hold that fundamental principles of subrogation law prevent Zurich from manufacturing a subrogation claim on behalf of one insured based on a loss sustained by and paid to a different insured.

A. The Appellate Court Erroneously Concluded that Zurich Was Not Required to Establish the Three Prerequisites of Subrogation Where the Builders Risk Policy Contained a Subrogation Provision.

This Court has recognized that the concept of "subrogation" involves substituting one person for another regarding a legal right or claim. *Sheckler*, 2022 IL 128012, ¶ 39 (quoting Black's Law Dictionary 1727 (11th ed. 2019)). "When put into context, subrogation is defined as '[t]he principle under which an insurer that has paid a loss under an insurance policy is entitled to all rights and remedies belonging to the insured against a third party with respect to any loss covered by the policy.' " *Id.* (quoting Black's Law Dictionary 1727 (11th ed. 2019)).

Here, IEI argued, and the Circuit Court agreed, that Zurich was required to establish three prerequisites to subrogation: namely, that (1) a third party was primarily liable to the insured for the loss; (2) the insurer was secondarily liable to the insured for loss under an insurance policy; and (3) the insurer paid the insured under that policy, thereby extinguishing the debt of the third party. *Trogub v. Robinson*, 366 Ill. App. 3d 838, 842 (1st Dist. 2006).[3]

[3] Notably, Zurich agreed that these three prerequisites applied to its contractual subrogation claim. (C. 10095 V7). However, it later changed positions and argued that these prerequisites did not apply. (C. 10698 V7). The Appellate Court rejected IEI's claims of forfeiture and invited error based on Zurich's drastically inconsistent positions. *Zurich*, 2023 IL App (1st) 230147, at ¶ 19-28.

On appeal, however, the Appellate Court concluded that these three prerequisites to subrogation do not "strictly control a party's right to subrogation when the party meets all the contractual requirements for subrogation in the controlling contract." *Zurich Am. Ins. Co. v. Infrastructure Eng'g, Inc.*, 2023 IL App (1st) 230147, ¶ 35. In so concluding, the Court disavowed prior statements to the contrary in *Trogub*, *Econ. Premier Assurance Co. v. Country Mut. Ins. Co.*, 2021 IL App (1st) 192364-U, ¶ 65, *SwedishAmerican Hospital Ass'n of Rockford v. Illinois State Med. Inter-Ins. Exchange*, 395 Ill. App. 3d 80, 105 (2d Dist. 2009), and *State Farm Mut. Auto. Ins. Co. v. Easterling*, 2014 IL App (1st) 133225, ¶ 21.

In lieu of applying the traditional prerequisites to subrogation, the Appellate Court cited *American Family Mut. Ins. Co. v. Northern Heritage Builders, L.L.C.*, 404 Ill. App. 3d 584, 588 (1st Dist. 2010) and *American Family Mut. Ins. Co. v. Plunkett*, 2014 IL App (1st) 131631, ¶ 20, for the principle that "[w]here the right of subrogation is created by the terms of an enforceable contract, the contract terms control, rather than common law or equitable principles." *Zurich*, 2023 IL App (1st) 230147, ¶ 33. The Appellate Court then concluded that "the proper focus in this case is whether Zurich is entitled to subrogate based on the express terms of the builder's risk policy it issued." *Id.*

IEI maintains that the Appellate Court's disavowal of the three prerequisites to subrogation was in error. The Appellate Court appeared to view the three perquisites to subrogation as solely relevant to a claim for equitable (as opposed to contractual) subrogation. However, the traditional prerequisites to subrogation are not solely equitable in nature: they define the concept of subrogation in the first instance. Specifically, the first and second prerequisites—that a third party must be primarily liable to the insured for the

loss and that the insurer must be secondarily liable to the insured for such loss—are nothing more than a restatement of this Court's own definition of subrogation, *i.e.*, '[t]he principle under which an insurer that has paid a loss under an insurance policy is entitled to all rights and remedies belonging to the insured against a third party with respect to any loss covered by the policy.' " *Sheckler*, 2022 IL 128012, ¶ 39. Similarly, the third element—that the insurer must have paid the insured under the insurance policy, thereby extinguishing the debt of the third party—is a restatement of the "fundamental principle of Illinois subrogation law…that an insurance carrier may not exercise its right to subrogation until it has paid the insured's damages under the policy giving rise to the subrogation rights"—a principle that has been expressly found to apply to contractual subrogation. *Benge v. State Farm Mut. Auto. Ins. Co.*, 297 Ill. App. 3d 1062, 1072 (1st Dist. 1998); *see also Johnson v. State Farm Fire & Casualty Co.*, 151 Ill. App. 3d 672, 674 (3rd Dist. 1987). While the concept of subrogation undoubtedly developed out of equitable principles, "subrogation" has been understood for decades, if not longer, to allow "one who has indemnified another in pursuance of his obligation to do so … the means of redress held by *the party indemnified* against the individual causing the loss." *Dworak v. Tempel*, 17 Ill. 2d 181, 189 (1959). Thus, the three prerequisites of subrogation are fully consistent with this Court's long-standing view of what constitutes "subrogation."

At Zurich's urging, the Appellate Court elevated form over substance and dispensed with the prerequisites to subrogation (which define what constitutes a subrogation claim in the first instance) in favor of deferring to an interpretation of the subrogation provision in the Builders Risk Policy that in no way comports with the concept of subrogation recognized by Illinois courts for decades. There is no valid purpose,

however, in dispensing of the three prerequisites to subrogation in the context of contractual subrogation. Not only do such prerequisites define the concept of subrogation itself, such prerequisites also serve an important purpose in the context of contractual subrogation: namely, as a check on insurers seeking to recoup losses paid under an insurance policy.

In this regard, the prerequisites to subrogation ensure that purported subrogation claims being pursued by insurers are, in fact, grounded in true subrogation. Consider for example a liability policy issued to a company that also provides coverage for the company's employees. Under Zurich's proposed extension of the law, the insurer could write a subrogation provision that allows the insurer to subrogate on behalf of any company employee whenever a loss is sustained by and paid to the company under the policy, regardless of whether the employee has sustained any loss himself or herself. In Zurich's view, Illinois courts would be bound to follow such a subrogation provision to the letter without regard to the prerequisites set forth in *Trogub* and other Illinois cases, which require, *inter alia*, that: (a) there at least be some relationship between the insured and the loss; and (b) payment by the insurer to the insured on whose behalf the insurer is subrogating. It is thus not inconceivable that under the "Zurich rule" a company employee could wake up one day to learn that an insurer has usurped his or her unrelated claim against a third-party in order to recoup its payment of a loss sustained by and paid to the company, even though the company's employee did not sustain the loss, did not receive payment for the loss, had no connection to the loss, and never submitted any claim for a loss. Such a result is absurd on its face, not to mention extremely concerning. Yet, taking Zurich's argument to its logical conclusion, a court would be powerless to stop a subrogation suit

with these facts because the court would not be able to require the insurer to satisfy the traditional prerequisites to a subrogation claim and would be bound to enforce the "subrogation" clause contained in the insurer's policy to the letter, regardless of any absurd outcome that may ensue and regardless of the fact that the "subrogation" claim being pursued by the insurer bears none of the hallmarks of subrogation as defined by Illinois law.

This case is an example of the overbreadth of Zurich's argument. Here, Zurich is pursuing a subrogation claim on behalf of one insured (City Colleges) based on a loss sustained by, claimed by, and paid to another insured (CMO). Despite numerous opportunities, Zurich has not cited a single case where a court has permitted subrogation under such facts. This is telling, as subrogation is not a new concept to American (or Illinois) jurisprudence.

In this case, the Circuit Court recognized the novelty of Zurich's position and wisely ordered the parties to provide supplemental case law addressing the scenario where there are multiple insureds under an insurance policy and payment was made to an insured who was not the ultimate subrogor. (R. 18). Zurich could not find any case law supporting its position. (C. 10698 V7 – 10700 V7). IEI, however, cited the analogous case of *New York Bd. of Fire Underwriters v. Trans Urban Constr. Co.*, 91 A.D.2d 115 (N.Y. App. Div. 1983), *aff'd on other grounds*, 60 N.Y.2d 912 (1983). (C. 10703 V7 – 10710 V7).

In *Trans Urban*, the New York Board of Fire Underwriters ("Underwriters"), who represented eight designated insurance companies as subrogee of the State of New York (the "State"), filed a subrogation action against a general contractor to recover payments made for a windstorm loss during construction of a building owned by the State. Each of

the eight insurers had issued an "all-risk" (builder's risk) policy to the State, as the named insured, and to the general contractor and certain subcontractors, as named additional insureds. *Id.* at 116.

Following the subject windstorm, the general contractor made repairs to the building and submitted claims to all eight insurers for its costs. *Id.* at 118. A negotiated payment was reached and each carrier paid its *pro rata* share of the loss payment by checks made payable to both the State and the general contractor. *Id.* The State, "apparently recognizing that it suffered no loss since the repairs had been wholly borne by appellant and the other contractors," endorsed each of the checks and transmitted full payment to the contractors. *Id.*

Thereafter, Underwriters, as subrogee of the State, brought a subrogation action against the general contractor. The general contractor moved for summary judgment, arguing that no right of subrogation existed since the State had suffered no loss. *Id.* On appeal, the New York Appellate Division agreed that Underwriters had no right to subrogate on behalf of the State. *Id.* at 122-23. The Court explained that, under the terms of the construction contract, all risk of loss was borne by the general contractor, and since the contractor made the repairs and incurred the costs of the damage to the building, the State had sustained no loss. *Id.* at 122. The Court noted that the loss payments by the carriers had been negotiated by the State and made payable to the general contractor to cover the costs incurred in repairing the building, further demonstrating that there was no loss to the State and no claim to be pursued against the general contractor. *Id.* at 123.

Here, as in *Trans Urban*, there was likewise no loss sustained by or paid to Zurich's insured, City Colleges, in connection with the August 17, 2015 flood event. Rather, as

noted above, the general contractor, CMO, had the sole contractual responsibility for delivering the Malcolm X College project to City Colleges in conformance with the Contract Documents by the project delivery date. (C. 9596 V6, 9623 V6, 9625 V6). And, consistent with that allocation of responsibility, the only party to claim a loss or receive any loss payment under the Builders Risk Policy was CMO. (C. 7809 V5 – 7815 V5, 10676 V7). This Court should therefore find, like the Circuit Court, that Zurich has no right to bring a subrogation claim on behalf of City Colleges based on a loss sustained by, claimed by, and paid to a different party, CMO. *See Trans Urban*, 91 A.D.2d at 122-23.

The Appellate Court, in rejecting IEI and the Circuit Court's reliance on *Trans Urban*, concluded that *Trans Urban* was factually distinguishable in that: (1) the court found the insurer was not entitled to subrogate based on the general rule that "there is no right of subrogation in favor of the insurer against its own insured"; and (2) the general contractor in *Trans Urban* had agreed to bear all risk of loss unlike IEI. *Zurich*, 2023 IL App (1st) 230147, ¶¶ 49-50. The Appellate Court's focus on these factual distinctions misses the forest for the trees. The fundamental principle upon which both IEI and the Circuit Court relied is that an insurer cannot pursue a subrogation claim on behalf of an insured that has not sustained any loss. *Trans Urban* stands for this principle.

This Court should therefore reject Zurich's argument that subrogation is permitted under the circumstances of this case; apply the established traditional prerequisites to subrogation to Zurich's subrogation claim; and conclude that Zurich is not entitled to pursue subrogation on behalf of City Colleges, a party who has sustained no loss, claimed no loss, and received no loss payment under Zurich's Builders Risk Policy.

B. Even if this Court Finds that the Prerequisites to Subrogation Do Not Apply, the Subrogation Provision in the Builders Risk Policy Does Not Provide Zurich with the Right to Subrogate on Behalf of City Colleges Where the Undisputed Evidence Shows that City Colleges Did Not Sustain a Loss, Claim a Loss, or Receive Payment for a Loss.

Zurich argues that it was entitled to bring a subrogation claim against IEI on behalf of City Colleges pursuant to the subrogation provision in the Builders Risk Policy. However, contrary to Zurich's claim, the subrogation provision in the Builders Risk Policy cannot be reasonably interpreted to allow for such a result.

In interpreting an insurance policy, a court's primary function is to ascertain and give effect to the intention of the parties, as expressed by the policy language. *Cont'l Cas. Co. v. Hennessy Indus., Inc.*, 2019 IL App (1st) 180183, ¶ 19. If the language is unambiguous, the policy will be applied as written in the absence of public policy concerns. *Id.* An insurance policy must be construed as a whole, giving words their plain, ordinary, and popular meaning, while also striving to fulfill the intent of the parties. *United States Fire Ins.*, 312 Ill. App. 3d at 155. Courts will not adopt a strained, forced, unnatural, or unreasonable construction, or one which would lead to an absurd result. *Id.*

Here, Section 12 of the Builders Risk Policy provides, in relevant part, as follows:

> **12. SUBROGATION**
>
> If the Company pays a claim under this Policy, they will be subrogated, to the extent of such payment, to all the Insured's rights of recovery from other persons, organizations and entities. The Insured will execute and deliver instruments and papers and do whatever else is necessary to secure such rights.
> ***
>
> It is a condition of this Policy that the Company shall be subrogated to all the Insured's unwaived rights of recovery, if any, against any third party Architect or Engineer, whether named as an Insured or not, for any loss or damage arising out of the performance of professional services in their capacity as such and caused by any

> error, omission, deficiency or act of the third party Architect or Engineer, by any person employed by them or by any others for whose acts they are legally liable.
> ***
>
> The Insured will act in concert with the Company and all other interest concerned in the exercise of such rights of recovery. The Insured will do nothing after a loss to prejudice such rights of subrogation.
>
> If any amount is recovered as a result of such proceedings, the net amount recovered after deducting the costs of recovery, will accrue first to the Company up to the amount of loss paid. Any excess of this amount will be remitted to the Insured. If there is no recovery, the interests instituting the proceedings will bear the expense of the proceedings proportionately.

(C. 10597 V7 – 10598 V7).

The plain language of the foregoing subrogation provision does not provide Zurich with the right to subrogate on behalf of one insured (City Colleges) based on a loss sustained by, claimed by, and paid to another insured (CMO). Section 12 of the Builders Risk Policy only allows Zurich to subrogate on behalf of "the Insured" who has claimed a loss and received a loss payment from Zurich. The parties' intention in this regard is manifested in the first sentence of Section 12, which limits Zurich's right of subrogation "to the extent of such payment" and only to "the Insured's rights of recovery"—a phrasing that involves the definite article "the" and the singular form of "Insured." (Emphasis in underscore added.) (C. 10597 V7). Had the parties to the Builders Risk Policy intended to give Zurich the right to subrogate on behalf of every or any "Insured" under the Builders Risk Policy whenever Zurich made a claim payment, Section 12 of the Builders Risk Policy would have been drafted to reflect that Zurich was subrogated to "each Insured's rights of recovery" or to "all Insureds' rights of recovery." At a minimum, Section 12 would have

provided some indication that Zurich would be subrogated to the rights of recovery of any and all "Insureds" under the Builders Risk Policy to the extent of any claim payment. Instead, however, Section 12 uses the definite article "the" and the singular "Insured" to manifest the parties' intention that Zurich is only entitled to subrogate on behalf of a single insured's rights of recovery—"the Insured" who has sustained a loss, claimed a loss, and on whose behalf Zurich has made a claim payment, *i.e.* CMO.

The fact that Zurich cannot subrogate to just any "Insured's" rights is made plain by the last paragraph of Section 12, which requires Zurich to remit any excess amount recovered in a subrogation proceeding to "the Insured" referenced throughout Section 12. If Zurich could pursue subrogation on behalf of an "Insured" who has neither sustained a loss, submitted a claim for loss, nor received a loss payment, the last paragraph of Section 12 would make no sense, as such "Insured" would be entitled to a remittance of any excess recovery by Zurich, instead of the "Insured" who actually sustained a loss, claimed a loss, and received payment for a loss. This result would be absurd. *See United States Fire Ins.*, 312 Ill. App. 3d at 155.

Nevertheless, the Appellate Court, in its Opinion, concluded that Zurich was entitled to pursue subrogation on behalf of City Colleges because the term "Insured" under the Builders Risk Policy "collectively refers to the 'Named Insured' and all 'Additional Named Insured(s)'" *Zurich*, 2023 IL App (1st) 230147, ¶ 43. However, contrary to both the Appellate Court's conclusion and Zurich's argument, the term "Insured" is not a defined term in the Builders Risk Policy. Thus, there is nothing in the Zurich Policy that establishes that each time the word "Insured" is used it is collectively referring to both the Named Insured and all Additional Named Insured(s) regardless of the circumstances. In

fact, if this were the case, it would exacerbate the internal inconsistency noted above with respect to the distribution of excess recoveries under the subrogation provision in Section 12 of the Builders Risk Policy. Specifically, instead of requiring Zurich to return any excess subrogation recovery to "the Insured" that has sustained a loss, Zurich would have to distribute a *pro rata* allocation of any excess recovery to the Named Insured and to each and every entity and/or person that constitutes an "Additional Named Insured" under the Builders Risk Policy since, as Zurich and the Appellate Court have concluded, the term "Insured" refers to them collectively in all circumstances. Again, this result would be absurd. Why would numerous "Insureds" with no loss, no claim for loss, and no recovery of loss from Zurich be entitled to receive an excess recovery based on a loss sustained by and paid to a single "Insured" among them? There is no logical answer to this question, which highlights why Zurich and the Appellate Court's interpretation of Section 12 of the Builders Risk Policy should be rejected.

In sum, this Court should conclude that Zurich was not entitled to subrogate on behalf of City Colleges under Section 12 of the Builders Risk Policy. The evidence shows that the only "Insured" who sustained a loss, claimed a loss, and received a loss payment from Zurich was CMO, a party that Zurich does not dispute had no contractual relationship with IEI and who therefore cannot pursue a breach of contract claim against IEI. (R. 17). It is worth noting that Zurich had every right under the Builders Risk Policy to cause "[t]he Insured [to] execute and deliver instruments and papers and do whatever else is necessary to secure [Zurich's subrogation] rights." (C. 10597 V7). However, Zurich adduced no evidence in the Circuit Court that City Colleges sustained a loss, authorized CMO to submit a claim for loss under the Builders Risk Policy, received payment of any loss from Zurich,

or executed any assignment in favor of Zurich. The Appellate Court's judgment should therefore be reversed, and this Court should affirm the Circuit Court's order granting summary judgment in favor of IEI.

C. Even Assuming, *arguendo*, This Court Finds the Subrogation Provision of the Builders Risk Policy Permits Zurich to Pursue Subrogation on Behalf of One Insured Based on a Loss Sustained By, Claimed By, and Paid to a Different Insured, This Court Should Restrict Zurich from Subrogating on Behalf of City Colleges Based on General Principles of Subrogation Law.

As discussed in Sections I and II above, the Appellate Court's Opinion directly conflicts with prior Illinois decisions holding that: (1) an insurable interest is not the equivalent of a "loss"; and (2) an insurer must have paid an insured's loss before it is entitled to subrogate on behalf of its insured. The Appellate Court's deviation from these well-established principles opens the door for insurers state-wide (and maybe nation-wide) to pay one insured's loss and then pursue subrogation on behalf of a different insured who has sustained no loss, claimed no loss, and has been paid nothing. Such a result is inconsistent with numerous principles of subrogation law and should be prohibited by this Court.

First, as noted in Section II.A. above, it is a bedrock principle of Illinois subrogation law that "an insurance carrier may not exercise its right to subrogation until it has paid the insured's damages under the policy giving rise to the subrogation rights." *Benge*, 297 Ill. App. 3d at 1072; *see also Johnson*, 151 Ill. App. 3d at 674. Neither in the Circuit Court nor in the Appellate Court has Zurich cited any case law authority where a court has expanded this principle to allow an insurer to pay one insured's "damages" (*i.e.*, CMO's damages) and then pursue subrogation rights on behalf of an entirely different insured with no damages (*i.e.*, City Colleges). Nevertheless, the Appellate Court's Opinion allows this

result, which is a sea-change in the law of subrogation. In effect, the Appellate Court's Opinion has given insurers leave to subrogate on behalf of any insured under a policy as long as one insured has suffered and been paid for a loss under the policy. This opens the door to just the type of gamesmanship that occurred here, where Zurich recognized it paid a loss sustained by one insured who has no valid cause of action against IEI (*i.e.*, CMO) and then brought suit to recover that loss via a subrogation claim brought on behalf of a different insured who has contractual privity with IEI (*i.e.*, City Colleges). Such procedural legerdemain should not be permitted.

Second, "[i]t is well settled that a subrogee can have no greater right than the subrogor and can enforce only such rights as a subrogor could enforce." *Lobo IV, LLC v. V Land Chicago Canal, LLC*, 2019 IL App (1st) 170955, ¶ 118. Stated another way, "one cannot acquire by subrogation what another, whose rights he or she claims, did not have." Couch on Insurance 3d, 222:5 (3d ed. 2005). Here, the Appellate Court's Opinion turns this basic concept of subrogation law on its head. Despite a lack of evidence that City Colleges sustained a loss in connection with the August 17, 2015 flood event at Malcolm X College, the Appellate Court has permitted Zurich to pursue a subrogation claim on behalf of City Colleges that is entirely predicated on loss sustained by another party, CMO. In allowing such a claim to go forward, the Appellate Court has approved a legal fiction that, so long as one insured under a policy has sustained a loss, such loss can be imputed to any other insured under the policy for purposes of allowing a subrogation claim. This legal fiction, however, is entirely inconsistent with the principle that "a subrogee can have no greater right than the subrogor and can enforce only such rights as a subrogor could enforce." It is also a complete manipulation of the concept of "damages," allowing actual

damages sustained by one party to be imputed to another who has no damages. This Court should not allow such a legal fiction to be perpetuated, as it will only encourage insurers to pursue baseless subrogation claims on behalf of insureds with no actual damages.

Lastly, it is generally recognized that "the right of subrogation is purely derivative, and the insurer succeeds only to the rights of the insured, no new cause of action is created." Couch on Insurance 3d, 222:14 (3d ed. 2005). Here, however, the Appellate Court's Opinion effectively creates a new cause of action, applicable only in the context of subrogation, where a party can sue for breach of contract on the basis of a loss sustained by a different party, effectively turning City Colleges into nothing more than a "straw man" for CMO, and consequently, Zurich. This new hybrid of a claim implicitly recognized by the Appellate Court essentially melds contractual duties owed to one party with causation and damage issues related to another party. However, there is no precedent, or need, to expand Illinois law to create such a cause of action for purposes of subrogation. On the contrary, in issuing the Builders Risk Policy, Zurich was necessarily aware of the risk that it would be required to pay a loss for which it could not recover from a third-party. It was therefore incumbent upon Zurich to charge an appropriate premium to account for this risk, and more likely than not, Zurich did in fact charge such a premium. Zurich therefore cannot be heard to complain now that it cannot manipulate the law and pursue a previously unrecognized claim in order to minimize its losses when Zurich was in the best position to adjust for the risk it took by charging an appropriate premium for the Builders Risk Policy. Stated another way, it is not unfair to Zurich that it cannot manufacture a new cause of action to recoup its loss payment in connection with the August 17, 2015 flood event

because this is the risk that Zurich bargained for and received compensation for in the form of policy premium.

The idea that Zurich could pursue a subrogation claim for one insured based on a loss sustained by, claimed by, and paid to a different insured is offensive to both logic and the law. In order to allow a subrogation claim under the facts of this case, this Court would have to: (1) reverse prior established law that an "insurable interest" is not the equivalent of a loss; (2) interpret the Builders Risk Policy in a manner that creates an internal inconsistency; (3) discard the fundamental principle that an insurer pursuing subrogation must have paid its insured's damages giving rise to the subrogation rights; (4) provide Zurich with a greater right than that of its subrogor (City Colleges) in violation of prior, well-settled law; and (5) effectively authorize a new cause of action in the subrogation context whereby an insurer can sue under a contract belonging to one insured in order to recover loss sustained by a different insured that has no privity. This is a tall ask. Respectfully, IEI maintains that none of these changes to existing Illinois law are warranted here and that this Court should follow established Illinois law to affirm the judgment of the Circuit Court granting summary judgment in favor of IEI.

CONCLUSION

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

Respectfully submitted,

By: */s/ Douglas R. Garmager*
One of the Attorneys for Defendant-Appellant Infrastructure Engineering, Inc.

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 41 pages.

By: /s/ *Douglas R. Garmager*
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CERTIFICATE OF SERVICE

I certify that I served, or caused to be served, the Brief and Argument of Defendant-Appellant Infrastructure Engineering, Inc., to each party of record listed below, at their designated address, via electronic mail and via the Court's electronic filing system, from 200 S. Wacker Drive, Suite 2550, Chicago, Illinois 60606 on February 28, 2024.

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

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

APPENDIX

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2023 IL App (1st) 230147

FIRST DISTRICT
SECOND DIVISION
October 24, 2023

No. 1-23-0147

ZURICH AMERICAN INSURANCE COMPANY, Subrogee of Community College District No. 508, d/b/a City Colleges of Chicago and CMO, a Joint Venture, Plaintiff-Appellant, v. INFRASTRUCTURE ENGINEERING, INC., Defendant-Appellee.	Appeal from the Circuit Court of Cook County. No. 16 L 12712 Honorable Patrick J. Sherlock, Judge Presiding

PRESIDING JUSTICE HOWSE delivered the judgment of the court, with opinion. Justices McBride and Ellis concurred in the judgment and opinion.

OPINION

¶ 1 Plaintiff, Zurich American Insurance Company (Zurich), issued a builder's risk insurance policy to insure a building during its construction. Defendant Infrastructure Engineering, Inc. (Infrastructure Engineering), was a subcontractor on the construction project who was hired to install a system for collecting rainwater. A rainstorm occurred while the building was still under construction, and the basement of the building flooded, causing significant damage. Plaintiff paid out a claim to CMO, the general contractor, in accordance with the policy it issued. Plaintiff, as subrogee of CMO and the owner, a community college, then sued defendant, alleging defendant caused the water damage. Defendant moved for summary judgment, arguing that plaintiff was not entitled to subrogate for the building owner. The trial court agreed, and it granted judgment

in defendant's favor. Plaintiff now appeals, arguing that the insurance policy entitles it to a right of subrogation. For the following reasons, we reverse and remand for further proceedings.

¶ 2 BACKGROUND

¶ 3 City Colleges of Chicago (City Colleges) owns and operates Malcom X College. When City Colleges decided to construct a new academic building at Malcom X College, it contracted with a general contractor, CMO. CMO agreed to serve as the general contractor for the construction of the new academic building, providing all necessary labor, material, and equipment to complete the project. The contract between CMO and City Colleges required CMO to purchase and maintain a builder's risk property insurance policy during the period of construction.

¶ 4 CMO purchased the builder's risk policy from plaintiff Zurich. The "named insured" in the policy is CMO, and City Colleges is named as an "additional named insured." Under the policy, CMO was deemed to be the agent for all the other entities insured thereunder.

> "[CMO] shall be deemed the sole and irrevocable agent of each and every Insured hereunder for the purpose of giving and receiving notices to/from the Company, giving instruction to or agreeing with the Company as respects Policy alteration, for making or receiving payments of premium or adjustments to premium, and as respects the payment for claims."

The insurance policy also gives Zurich, as the insurer, a right of subrogation for any claims it might pay under the policy.

> "If [Zurich] pays a claim under this Policy, they will be subrogated, to the extent of such payment, to all the Insured's rights of recovery from other persons, organizations and entities.

* * *

> It is a condition of this Policy that [Zurich] shall be subrogated to all the Insured's unwaived rights of recovery, if any, against any third party Architect or Engineer, whether named as an Insured or not, for any loss or damage arising out of the performance of professional services in their capacity as such and caused by any error, omission, deficiency or act of the third party Architect or Engineer, by any person employed by them or by any others for whose acts they are legally liable."

¶ 5 On August 17, 2015, while the construction project was ongoing, there was a rainstorm. The stormwater detention system designed by Infrastructure Engineering was not fully installed at the time of the storm. The basement of the academic building flooded. There was damage to the building itself and to its electrical and mechanical equipment. CMO submitted a claim to Zurich for the damage that resulted from the flooding. Zurich made claim payments to CMO totaling $2,998,929.35.

¶ 6 Zurich filed this case against Infrastructure Engineering, as subrogee of City Colleges and CMO. Zurich alleges that Infrastructure Engineering designed a defective stormwater management system which caused the loss at the construction site. Zurich contends that it is entitled to stand in the shoes of City Colleges as a result of making the claim payments under the builder's risk policy.

¶ 7 Infrastructure Engineering filed an initial motion for summary judgment that was denied and is not at issue in this appeal. Infrastructure Engineering subsequently filed a second motion for summary judgment, which is the matter at issue in this appeal. In its second motion for summary judgment, Infrastructure Engineering argued that it was entitled to a judgment of no liability because neither of Zurich's alleged subrogors, CMO or City Colleges, were third-party

beneficiaries of the subcontract between Infrastructure Engineering and Moody Nolan. Infrastructure Engineering argued that while the contract between Moody Nolan and City Colleges provides that City Colleges is a third-party beneficiary of any subcontract between Moody Nolan and its subcontractors, the subcontract between Moody Nolan and Infrastructure Engineering provides that "Nothing contained in this Agreement shall create a contractual relationship with, or a cause of action in favor of, a third party against either the [Moody Nolan] or [Infrastructure Engineering]."

¶ 8 Infrastructure Engineering further argued in support of its second motion for summary judgment that Zurich could not establish the necessary elements to entitle it to a right of subrogation because there was no contractual relationship between CMO and Infrastructure Engineering and because City Colleges suffered no loss and received no loss payment under the insurance policy. Infrastructure Engineering cited *State Farm General Insurance Co. v. Stewart*, 288 Ill. App. 3d 678, 686-87 (1997) to point out that

> "the prerequisites to a subrogation claim are: (1) a third party must be primarily liable to the insured for the loss; (2) the insurer must be secondarily liable to the insured for loss under an insurance policy; and (3) the insurer must have paid the insured under that policy, thereby extinguishing the debt of the third party."

Infrastructure Engineering argued that Zurich "cannot establish the third element of a subrogation claim: namely, that it paid City Colleges under the Builders Risk Policy."

¶ 9 Zurich responded to the motion for summary judgment and acknowledged it was required to show that City Colleges was a third-party beneficiary of the contract between Moody Nolan and Infrastructure Engineering. Zurich also acknowledged that it was required to show that "it is subrogated to City Colleges' rights of recovery." Zurich maintained in its response to the

summary judgment motion that City Colleges was a third-party beneficiary of the subcontract based on the language used in the relevant contracts. Zurich further maintained in its response that "the unambiguous subrogation provision in [its] policy shows that [Zurich] is contractually subrogated to City Colleges' rights of recovery."

¶ 10 In connection with its argument that it was entitled to stand in the shoes of City Colleges, Zurich cited our decision in *Trogub v. Robinson*, 366 Ill. App. 3d 838, 842 (2006), and stated that

> "[t]he prerequisites to subrogation are: (1) a third party must be primarily liable to the insured for the loss; (2) the insurer must be secondarily liable to the insured for the loss under an insurance policy; and (3) the insurer must have paid the insured under that policy, thereby extinguishing the debt of the third party."

Zurich went on to cite authority for the proposition that the policy provisions should control the right to subrogation and the black-letter law explaining the objective of contract interpretation. Zurich then quoted the subrogation provision from the applicable policy and stated that "[b]ased on that provision, [Zurich] is subrogated to City Colleges' rights of recovery." Zurich contended that Infrastructure Engineering was improperly focusing on whether City Colleges received any claim payments under the policy instead of analyzing the subrogation provision in the policy itself. Zurich concluded that, "[u]nder the unambiguous terms of the Policy, [Zurich], to the extent of its claim payments, is subrogated to City Colleges' rights of recovery because City Colleges is an insured under the Policy."

¶ 11 The trial court held a hearing on Infrastructure Engineering's second motion for summary judgment. During the hearing, the trial court asked the parties whether they were aware of any case law addressing the scenario where there are multiple insureds under an insurance policy and

payment was made to an insured who was not the ultimate subrogor in the lawsuit. Neither party was aware of such authority, so the trial court ordered the parties to provide supplemental briefing on the issue.

¶ 12 Infrastructure Engineering submitted its supplemental briefing, alerting the trial court to a case from New York which it argued supported its position on the motion for summary judgment. Zurich, however, used the opportunity to draw a clear distinction between contractual or conventional subrogation and equitable subrogation. Zurich argued in its supplemental briefing that it was not required to establish the requirements for equitable subrogation because the contracts in the case controlled the issue. Zurich provided the trial court with authority in support of its contractual or conventional subrogation argument.

¶ 13 The trial court granted Infrastructure Engineering's motion for summary judgment. In a written order, the trial court found that City Colleges was a third-party beneficiary of the subcontract between Moody Nolan and Infrastructure Engineering. However, the trial court found that Zurich had "not shown it is subrogated to [City Colleges'] rights of recovery." The trial court set forth the same three prerequisites for subrogation that Zurich set out in its response brief and found that Zurich "fails to satisfy the elements of subrogation." The trial court expressly noted that the requirements it recited came from "the case cited by [Zurich]." The trial court explained that City Colleges suffered no loss. The court also explained that it found the supplemental authority submitted by Infrastructure Engineering, the case law from New York, to be persuasive. The trial court concluded that City Colleges "simply sustained no loss and was not paid by the insurer; two requirements for there to be subrogation."

¶ 14 Zurich filed a motion to reconsider the trial court's grant of summary judgment in Infrastructure Engineering's favor. Zurich argued that the trial court failed to consider the

subrogation provision in the applicable insurance policy. Zurich maintained that it was not required to satisfy the traditional three prerequisites for subrogation because its right to subrogate was derived from and controlled by the terms of the insurance policy. The trial court reiterated that it relied on the language of a case cited by Zurich to find that the three prerequisites applied. The trial court also cited a line of cases that it found to reaffirm its decision to grant the motion, authority which stated that the three prerequisites at issue were required for "a claim for equitable *or contractual subrogation*" (emphasis in original). The trial court denied Zurich's motion to reconsider, and Zurich filed this appeal.

¶ 15 ANALYSIS

¶ 16 Zurich argues that the trial court erred when it granted Infrastructure Engineering's motion for summary judgment by applying the requirements of equitable subrogation when the court should have determined contractual subrogation applied instead. Infrastructure Engineering argues Zurich forfeited its argument that contractual subrogation applied and that the elements of equitable subrogation are not present.

¶ 17 Summary judgment is appropriate when the pleadings, depositions, admissions, and affidavits, viewed in a light most favorable to the nonmovant, fail to establish that a genuine issue of material fact exists, thereby entitling the moving party to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2022); *Fox v. Seiden*, 2016 IL App (1st) 141984, ¶ 12. If disputes as to material facts exist or if reasonable minds may differ with respect to the inferences drawn from the evidence, summary judgment may not be granted. *Associated Underwriters of America Agency, Inc. v. McCarthy*, 356 Ill. App. 3d 1010, 1016-17 (2005). Summary judgment is encouraged as an expeditious manner of disposing of a lawsuit, but it should only be utilized when a party's right to a judgment is clear and free from doubt. *Adams v. Northern Illinois Gas*

Co., 211 Ill. 2d 32, 43 (2004). We review a trial court's decision to grant summary judgment *de novo*. *Illinois Tool Works Inc. v. Travelers Casualty & Surety Co.*, 2015 IL App (1st) 132350, ¶ 8.

¶ 18 Forfeiture of Contractual Subrogation

¶ 19 Infrastructure Engineering argues, as an initial matter, that Zurich has forfeited its argument that it need not meet the prerequisites for equitable subrogation as set forth in our decision in *Trogub*, 366 Ill. App. 3d at 842, because contractual subrogation applied.

¶ 20 Infrastructure Engineering's forfeiture argument is based on the timing and the point in the proceedings at which Zurich first raised the argument that the general prerequisites for subrogation should not apply. Arguments raised for the first time in a motion to reconsider are generally forfeited for purposes of appeal. *Evanston Insurance Co. v. Riseborough*, 2014 IL 114271, ¶ 36. However, as described below, Zurich raised its contractual subrogation argument before the court entered its judgment and before a motion for rehearing was filed.

¶ 21 After the parties submitted their initial briefs on the summary judgment motion, Zurich raised the issue at the hearing on the motion for summary judgment. Subsequently, the trial court requested supplemental briefing. In its supplemental briefing, Zurich argued that contractual subrogation standards should apply instead of the equitable subrogation standard argued by Infrastructure Engineering.

¶ 22 We note that Zurich raised the argument that contractual prerequisites should apply instead of equitable prerequisites when the parties were still in the briefing phase of the motion, at a time before the trial court made its decision. Zurich clearly and forcefully raised the issue in the supplemental briefing for the motion for summary judgment that was ordered by the court. As Infrastructure Engineering acknowledges in its brief on appeal, the trial court "recognized and

disregarded" Zurich's apparent change in positions when the court ruled on the motion for summary judgment. In its order disposing of the motion for summary judgment, the trial court expressly relied on a New York case provided by Infrastructure Engineering in its supplemental briefing, so it is clear that the supplemental briefing was taken into consideration by the trial court before summary judgment was entered.

¶ 23 Zurich thereafter raised the argument in a motion to reconsider, giving the trial court a second opportunity to address the issue. In ruling on the motion to reconsider, the trial court observed that Zurich presented the argument that "it was error for the Court to require it to prove the three elements of subrogation because its case sought contractual subrogation (not equitable subrogation)." The trial court addressed the issue both during summary judgment proceedings and in a motion to reconsider, and it ruled against Zurich on the merits both times.

¶ 24 Perhaps more importantly, Zurich's response to the motion for summary judgment is replete with arguments that the contract should be what controls its right to subrogation. Zurich provided authority for the proposition that the policy provisions should control the right to subrogation, and it urged the court to interpret the plain language of the contract without resort to external sources or rules of construction. Zurich quoted the subrogation provision from the applicable policy and stated that "[b]ased on that provision, [Zurich] is subrogated to City Colleges' rights of recovery." Zurich argued that " '[w]here the right of an insurer to subrogation is expressly provided for in the policy, its right must be measured by, and depend solely on, the terms of such provisions' " (quoting *American Family Mutual Insurance Co. v. Northern Heritage Builders, L.L.C.*, 404 Ill. App. 3d 584, 588 (2010)). Zurich further contended in its response to the motion that Infrastructure Engineering's position in its motion for summary judgment was flawed because it was improperly focused on whether City Colleges received any

claim payments under the policy, instead of being focused on an analysis of the subrogation provision in the policy itself. Zurich concluded in its response that, "[u]nder the unambiguous terms of the Policy, [Zurich], to the extent of its claim payments, is subrogated to City Colleges' rights of recovery because City Colleges is an insured under the Policy." Although Zurich's citation to the prerequisites for subrogation in *Trogub* was misguided, Zurich saved itself from forfeiture by correcting course before it was too late and by making other arguments in its response to the summary judgment motion stressing the determinativeness of the contractual subrogation provision.

¶ 25 Infrastructure Engineering relies on *Evanston Insurance* to argue that "arguments not raised in response to a motion and/or raised for the first time in a motion for reconsideration are forfeited on appeal." Infrastructure Engineering insinuates that an argument is forfeited simply by virtue of the argument not being raised in the initial written response to a motion. However, the authority it relies upon does not stand for such a proposition. In *Evanston Insurance*, our supreme court found an argument forfeited when it was raised for the first time in a motion to reconsider. *Evanston Insurance*, 2014 IL 114271, ¶ 36. The same is true in the other case Infrastructure Engineering relies upon in support of its forfeiture argument. See *Caywood v. Gossett*, 382 Ill. App. 3d 124, 133-34 (2008) (argument made for the first time in a motion to reconsider is forfeited). Those cases recite the general and well-settled rule that a party cannot raise an issue for the first time in a motion to reconsider, but Zurich raised its argument while the summary judgment proceedings were ongoing. Therefore, we reject the argument that Zurich has forfeited the argument it raises here.

¶ 26 Infrastructure Engineering's invited error argument is based on the fact that Zurich itself made the statement that the general prerequisites for subrogation applied here when it responded

to the motion for summary judgment. The doctrine of invited error is a form of procedural default that prohibits a party from complaining of error which that party induced the court to make or to which that party consented. *In re Detention of Swope*, 213 Ill. 2d 210, 217 (2004). The rationale behind the rule is that "it would be manifestly unfair to allow a party a second trial upon the basis of error which that party injected into the proceedings." *Id.* For the same reasons that we reject Infrastructure Engineering's forfeiture argument, we reject its invited error argument.

¶ 27 Before summary judgment was entered, Zurich made clear it was pursuing the path of arguing that the contractual subrogation provision should control, to the exclusion of the general prerequisites for subrogation. The trial court and the opposing party were well aware of Zurich's position at a point before summary judgment was entered. Zurich was not moving the goalposts or engaged in gamesmanship to manipulate the proceedings. There is no basis for finding Zurich to have invited an error, nor is there any basis to find Zurich to be estopped from taking the position on appeal that it took during the summary judgment proceedings.

¶ 28 Moreover, the doctrine of forfeiture is a limitation on the parties, not on the court. *Walworth Investments-LG, LLC v. Mu Sigma, Inc.*, 2022 IL 127177, ¶ 94; see also *Sakellariadis v. Campbell*, 391 Ill. App. 3d 795, 800 (2009). We may consider arguments by a party that were not timely raised in the interests of achieving a just result and maintaining a uniform body of precedent (*Golden Rule Insurance Co. v. Schwartz*, 203 Ill. 2d 456, 463 (2003)), especially where the issue is one of law and is fully briefed by the parties on appeal (*Committee for Educational Rights v. Edgar*, 174 Ill. 2d 1, 11 (1996)). According to the above standard, the issue in this case is well-suited to being addressed on the merits because it is an issue of law fully briefed by the parties.

¶ 29 Contractual Subrogation Applies

¶ 30 Turning to the merits of the parties' arguments, this appeal asks us to decide whether the general prerequisites for equitable subrogation that we have applied in *Trogub* and other cases should be applied when an insurer bases its right to subrogate on an express contractual subrogation provision. Zurich argues that the prerequisites set forth in *Trogub* only apply for equitable subrogation and should not apply to Zurich in this case because it is asserting its right to contractual subrogation. Infrastructure Engineering argues that the prerequisites set forth in *Trogub* apply to any subrogation case, regardless of the basis for the right to subrogate.

¶ 31 To subrogate means to substitute one person for another regarding a legal right or claim. *Sheckler v. Auto-Owners Insurance Co.*, 2022 IL 128012, ¶ 39 (citing Black's Law Dictionary 1726 (11th ed. 2019)). A party that has the right of subrogation is allowed to stand in the shoes of another and assert that person's rights against a third party. *CNA Insurance Co. v. DiPaulo*, 342 Ill. App. 3d 440, 442 (2003). In the insurance context, subrogation typically arises when an insurer pays out a claim to its insured and then seeks to pursue claims against a third party on the basis that the third party is the one who caused the loss to the insured. See *Sheckler*, 2022 IL 128012, ¶ 39; *Benge v. State Farm Mutual Automobile Insurance Co.*, 297 Ill. App. 3d 1062, 1067 (1998). The doctrine rests on the principle that ultimate responsibility for the loss should be placed on the one who deserves to bear the burden of the loss. *CNA Insurance*, 342 Ill. App. 3d at 442.

¶ 32 Based on our review of the authority submitted by the parties, we conclude that the requirements set forth in the insurance policy control Zurich's right to subrogation. Our supreme court has explained that "[t]here are two broad categories of subrogation rights: contractual or conventional rights and common law or equitable rights." *Schultz v. Gotlund*, 138 Ill. 2d 171,

173 (1990). "Contractual rights are those expressly provided for in the insurance policy or other instrument." *Id.* "The other class of right to subrogation, equitable subrogation, is implied to have been intended where necessary to avoid an inequitable and unfair result." *Id.* In this case, we are dealing with Zurich's contractual rights, as it bases its right to subrogation on an express contractual provision in the insurance policy.

¶ 33 Where the right of subrogation is created by the terms of an enforceable contract, the contract terms control, rather than common law or equitable principles. *Northern Heritage*, 404 Ill. App. 3d at 588; see also *American Family Mutual Insurance Co. v. Plunkett*, 2014 IL App (1st) 131631, ¶ 20. In fact, the existence of the unambiguous subrogation contract provision bars the application of the common law doctrine. 34 Ill. L. and Prac. *Subrogation* § 6 (2015) (citing *Evangelical Benefit Trust v. Lloyd's Underwriters Syndicate Nos. 2987, 1607, 1183 & 2001*, No. 09 C 4004, 2012 WL 379632, at *10 (N.D. Ill. Feb. 3, 2012)).

¶ 34 The *Northern Heritage* court approvingly quoted Couch on Insurance to explain that " 'where the right of an insurer to subrogation is expressly provided for in the policy, its right must be measured by, and *depend solely on*, the terms of such provisions.' " (Emphasis added.) *Northern Heritage*, 404 Ill. App. 3d at 588 (quoting 16 Couch on Insurance 3d § 222:23 (2000)). And, as the court observed in *Plunkett*, "since there was a subrogation clause in the insurance policy, established law provide[s] that the policy's contractual terms *** apply, rather than common law or equitable principles." *Plunkett*, 2014 IL App (1st) 131631, ¶ 36. We agree with Zurich that the proper focus in this case is whether Zurich is entitled to subrogate based on the express terms of the builder's risk policy it issued.

¶ 35 Infrastructure Engineering argues, and the trial court found, that regardless of the language of the policy, Zurich was required to show three elements to be entitled to subrogate:

(1) a third party must be primarily liable to the insured for the loss, (2) the insurer must be secondarily liable to the insured for the loss under an insurance policy, and (3) the insurer must have paid the insured under that policy, thereby extinguishing the debt of the third party (citing *Trogub*, 366 Ill. App. 3d at 842). We find those requirements do not strictly control a party's right to subrogation when the party meets all the contractual requirements for subrogation in the controlling contract.

¶ 36 As Infrastructure Engineering points out, some decisions from this court have applied these common law prerequisites in contractual subrogation cases. See *id.*; *State Farm Mutual Automobile Insurance Co. v. Easterling*, 2014 IL App (1st) 133225, ¶ 21; *SwedishAmerican Hospital Ass'n of Rockford v. Illinois State Medical Inter-Insurance Exchange*, 395 Ill. App. 3d 80, 105 (2009); *Economy Premier Assurance Co. v. Country Mutual Insurance Co.*, 2021 IL App (1st) 192364-U, ¶ 65. None of the cases Infrastructure Engineering relies upon really examined the distinction between contractual and equitable subrogation. And none of those cases provides strong or convincing reasoning for applying the requirements for equitable subrogation in the face of an express contractual subrogation provision. Insofar as those cases hold that the three general prerequisites for equitable subrogation control over the express terms of a subrogation clause in a contract, we disagree with their holdings.

¶ 37 The terms of an unambiguous insurance policy should be enforced as written. *King v. Allstate Insurance Co.*, 269 Ill. App. 3d 190, 192 (1994). Where the terms of a contract are clear and unambiguous, they must be enforced as written, and courts cannot rewrite a contract. *Illinois Union Insurance Co. v. Medline Industries, Inc.*, 2022 IL App (2d) 210175, ¶ 68. When the terms of an insurance policy are clear, we do not look to external sources for determining the terms of the agreement; we look to the contract itself. *Plunkett*, 2014 IL App (1st) 131631, ¶ 36;

see *Owens v. McDermott, Will & Emery*, 316 Ill. App. 3d 340, 344 (2000) (if the language in the contract is clear and unambiguous, courts must determine the intention of the parties solely from the plain language of the contract and may not consider extrinsic evidence outside the four corners of the document itself).

¶ 38 The federal district court for the Northern District of Illinois recently examined this issue at some length. In *James River Insurance Co. v. Canal Insurance Co.*, 534 F. Supp. 3d 962, 967-69 (N.D. Ill. 2021), the court was presented with arguments from the parties similar to those presented here. The *James River* court was tasked with deciding whether the elements for equitable subrogation needed to be established when a party was pursuing subrogation based on a contract. *Id.* at 968. The district court examined much of the case law discussed above and discussed by the parties in their briefs here, and it concluded that the contractual subrogation clause was controlling so that the court did not need to take into account the elements of equitable subrogation. *Id.* at 969. We find the *James River* court's analysis to be persuasive on this point.

¶ 39 In this case, we have no need to look to the common law or equitable principles that generally apply to subrogation claims based in equity. We have express contractual terms that define the right to subrogation and the scope of that right. See *Northern Heritage*, 404 Ill. App. 3d at 588. Where the right to subrogation is created by an enforceable subrogation clause in a contract, the contract terms, rather than common law or equitable principles, control. *Plunkett*, 2014 IL App (1st) 131631, ¶ 36. Accordingly, we find that the trial court erred when it required Zurich to show compliance with principles outside the contract in order to be able to enforce its right to subrogation.

¶ 40 Having decided that the terms of the contract control whether Zurich is entitled to subrogate, we turn to the language of the builder's risk policy to determine if Zurich is entitled to subrogate for City Colleges. As both parties recognize, this case involves a review of multiple contracts and an insurance policy. An insurance policy is construed like any contract, so the determination of the parties' rights and obligations thereunder is a question of law. *Cook v. AAA Life Insurance Co.*, 2014 IL App (1st) 123700, ¶ 24. The primary goal of contract interpretation is to give effect to the parties' intent. *Palm v. 2800 Lake Shore Drive Condominium Ass'n*, 2014 IL App (1st) 111290, ¶ 75. A contract must be interpreted as a whole, and the plain and ordinary meaning must be ascribed to unambiguous terms. *Id.* The terms of an unambiguous insurance policy should be enforced as written. *King*, 269 Ill. App. 3d at 192.

¶ 41 The policy expressly provides Zurich with a right of subrogation to the extent of its claim payments.

> "If [Zurich] pays a claim under this Policy, [it] will be subrogated, to the extent of such payment, to all the Insured's rights of recovery from other persons, organizations and entities. ***
>
> * * *
>
> It is a condition of this Policy that [Zurich] shall be subrogated to all the Insured's unwaived rights of recovery, if any, against any third party Architect or Engineer, whether named as an Insured or not, for any loss or damage arising out of the performance of professional services in their capacity as such and caused by any error, omission, deficiency or act of the third party Architect or Engineer, by any person employed by them or by any others for whose acts they are legally liable."

¶ 42 Infrastructure Engineering argues that City Colleges is not "the Insured" for purposes of the subrogation provision. Infrastructure Engineering contends that the subrogation provision "does not provide Zurich with the right to subrogate on behalf of one insured (City Colleges) based on a loss sustained by, claimed by, and paid to another insured (CMO)." It, therefore, argues that Zurich is not entitled to subrogate for City Colleges based on the terms of the contractual subrogation provision. It contends that

> "[h]ad the parties to the Builders Risk Policy intended to give Zurich the right to subrogate on behalf of every 'Insured' under the Builders Risk Policy whenever Zurich made a claim payment, [the subrogation provision] would have been drafted to reflect that Zurich was subrogated to 'each Insured's rights of recovery' or to 'all Insureds' rights of recovery.' "

¶ 43 The builder's risk policy at issue here identifies CMO as the "Named Insured." The policy identifies the City Colleges as an "Additional Named Insured." The policy designates CMO to be the agent for all the Additional Named Insureds for purposes of paying policy premiums, communicating with Zurich, and receiving claim payments.

> "[CMO] shall be deemed the sole and irrevocable agent of each and every Insured hereunder for the purpose of giving and receiving notices to/from [Zurich], giving instruction to or agreeing with [Zurich] as respects Policy alteration, for making or receiving payments of premium or adjustments to premium, and as respects the payment for claims."

The policy expressly defines the terms "named insured" and "additional named insured." "Named Insured" is:

> "the sole and irrevocable agent of each and every Insured hereunder for the purpose of giving and receiving notices to/from the Company, giving instruction to or agreeing with the Company as respects Policy alteration, for making or receiving payments of premium or adjustments to premium, and as respects the payment for claims."

"Additional Named Insured[ ]" is:

> "All owners, all contractors and subcontractors of every tier, and tenants at the project location, except as named in A. above, as required by any contract, subcontract or oral agreement for the *INSURED PROJECT**, and then only as their respective interests may appear are recognized as Additional Named Insureds hereunder. As respects architects, engineers, manufacturers and suppliers, their interest is limited to their site activities only."

Finally, under the policy "Insured" collectively refers to the "Named Insured" and all "Additional Named Insured(s)." Thus, the term "Insured" refers to each of the entities insured under the builder's risk policy. The subrogation provision is not limited to the "Named Insured," but instead is extended to the right to subrogate for "the Insured." In other parts of the policy where CMO is addressed directly, the policy uses "Named Insured." As we have recognized, "an 'insured' in a policy is not limited to the named insured but includes anyone insured under the policy." *Chubb Insurance Co. v. DeChambre*, 349 Ill. App. 3d 56, 63 (2004). City Colleges meets the policy's definition of an insured because City Colleges was "required by contract" to be insured under the policy, and City Colleges had an insurable interest in the project.

¶ 44 Infrastructure Engineering contends we should conclude that the subrogation provision in the insurance policy does not provide Zurich with the right to subrogate on behalf of City

Colleges because the undisputed evidence shows that City Colleges did not sustain a loss, claim a loss, or receive payment for a loss. It contends that CMO is the party who sustained the loss, made the claim, and received the claim payment.

¶ 45 The general rule in construction cases is that both the owner and the general contractor have insurable interests in the property until construction is complete. *Intergovernmental Risk Management v. O'Donnell, Wicklund, Pigozzi & Peterson Architects, Inc.*, 295 Ill. App. 3d 784, 791 (1998); see also 11 Couch on Insurance 3d § 155:42 (June 2023 Update) (builder's risk insurance protects the property owner, the contractor, and others with an interest in the project against certain risks of loss to the construction project). The purpose of the builder's risk policy was to provide insurance coverage for the property during the period of the construction. Both City Colleges and CMO had insurable interests that were protected by the builder's risk policy. As the owner of the property under construction, City Colleges had a tangible, insurable interest in the insured property at all times and it suffered a "loss" due to the flooding damage. City Colleges suffered a further loss as a result of the delays occasioned by the flooding. CMO purchased the insurance policy for the benefit of City Colleges, and City Colleges reimbursed CMO for the payment of its share of the premiums, as CMO was required to be the party to make the premium payments as the agent of City Colleges. As the agent for all the additional insureds, CMO was also required to communicate with Zurich on City Colleges' behalf, and CMO was required to be the party to receive the claim payments. City Colleges is an "insured" under the builder's risk policy and, under the policy's subrogation provision, Zurich acquired City Colleges' rights to recovery against third parties for the loss. According to the unambiguous language of the builder's risk policy at issue in this case, Zurich has the right to subrogate for City Colleges under the circumstances presented.

¶ 46 Infrastructure Engineering relies on *New York Board of Fire Underwriters v. Trans Urban Construction Co.*, 91 A.D. 2d 115 (N.Y. App. Div. 1983), in support of its arguments on appeal, and the trial court found the case to be persuasive in its determination that summary judgment was warranted. The trial court explained that *Trans Urban* was persuasive because it showed that Zurich was not entitled to subrogate for City Colleges where City Colleges did not submit the claim for the loss, was not the party that suffered the loss, and did not receive any claim payments for the loss. We find *Trans Urban* to be distinguishable and not suited for application to the particular circumstances presented here.

¶ 47 In *Trans Urban*, the contract between the owner and the general contractor imposed " 'full responsibility' " for the loss on the general contractor. *Id.* at 116-17. The owner was the party who was required to purchase insurance to cover the property during construction. *Id.* at 117. The general contractor was named as one of the additional insureds. *Id.* Following the loss event, the general contractor fully assumed the loss by repairing the damage to the building. *Id.* at 118. The general contractor submitted a claim to the insurer for the repair costs, and checks were issued by the insurer made payable to the owner. *Id.* The owner endorsed the checks over to the general contractor to cover the cost of the repairs it performed. *Id.*

¶ 48 Subsequently, the insurer in *Trans Urban* filed an action against the general contractor for the loss. The insurer alleged that the general contractor was liable for the loss because it performed improper construction before the loss event which allowed the loss to occur. *Id.* The insurer contended that it was entitled to subrogate to the owner's rights against the general contractor. *Id.* at 119. The general contractor moved for summary judgment arguing that no right of subrogation existed because the owner suffered no loss since the general contractor had fully

assumed the risk of loss and then repaired all the damage to the building following the loss event. *Id.* at 118-19.

¶ 49 The court in *Trans Urban* explained that the insurer was not entitled to subrogation based on the general rule that "there is no right of subrogation in favor of the insurer against its own insured" which also includes "that there may be no right of subrogation against a party named as an additional assured in the policy." *Id.* at 120 (citing 16 Couch on Insurance 2d §§ 61:136-61:137 (1983)). In *Trans Urban*, the general contractor was an additional insured under the policy and was not a third party, which is a requirement for subrogation. *Id.* Such is not the situation in this case. Here, Zurich is asserting a claim against a third party, Infrastructure Engineering, who has no rights as an insured under the applicable contract of insurance.

¶ 50 The court in *Trans Urban* also found that the insurer was not entitled to subrogation because the owner, for whom the insurer sought to subrogate, had no claim against the general contractor because the general contractor had borne all the risk of loss in the case and had made all the necessary repairs following the loss event. *Id.* at 122-23. The court explained that since the owner had no cause of action against the general contractor, the insurer similarly would have no action against the general contractor in subrogation. *Id.* at 123. Here, however, Infrastructure Engineering did not agree to bear all the risk of loss, nor has it paid for all the repairs to bear the loss it allegedly caused. The insureds in this case suffered a loss that they are responsible for bearing unless they prove a third party is liable. As explained above, City Colleges suffered a loss and Zurich is entitled to subrogate to City Colleges' rights under the contract of insurance. Accordingly, *Trans Urban* is distinguishable and does not demonstrate that Infrastructure Engineering is entitled to judgment as a matter of law.

¶ 51 Finally, Infrastructure Engineering argues that Zurich is not entitled to pursue its claim because neither City Colleges nor CMO is a third-party beneficiary of the subcontract between Infrastructure Engineering and Moody Nelson. Infrastructure Engineering relies principally on the clause in the subcontract that states "Nothing contained in this Agreement shall create a contractual relationship with, or a cause of action in favor of, a third party against either the Architect or [Infrastructure Engineering]." The trial court rejected Infrastructure Engineering's argument on this point even though the court ruled in its favor on the other grounds presented. We agree with the trial court that City Colleges is a third-party beneficiary of the applicable subcontract.

¶ 52 To determine whether a party is a third-party beneficiary, courts look to the contract to determine the intent of the parties. *Ball Corp. v. Bohlin Building Corp.*, 187 Ill. App. 3d 175, 177 (1989). A third party is a direct beneficiary when the contracting parties have manifested an intent to confer a benefit upon the third party. *Id.* In this case, whether City Colleges is a third-party beneficiary depends on an interpretation of the contracts at issue and presents a question of law which we review *de novo*. See *Marque Medicos Fullerton, LLC v. Zurich American Insurance Co.*, 2017 IL App (1st) 160756, ¶ 46 (the construction, interpretation, or legal effect of a contract is a matter to be determined by the court as a question of law and is reviewed *de novo*). Whether someone is a third-party beneficiary depends on the intent of the contracting parties, as evidenced by the contract language. *Id.*

¶ 53 The contract between City Colleges and Moody Nelson expressly required City Colleges to be a third-party beneficiary of any subcontracts Moody Nelson entered into with its subcontractors.

> "In addition, each subcontract for the performance of the Services must provide that [City Colleges] is a third-party beneficiary to the subcontract and may enforce any of the subcontract terms including, those pertaining to standard of performance, indemnity and insurance."

The subcontract between Moody Nelson and Infrastructure Engineering expressly states that any discrepancies between the subcontract and the prime contract between City Colleges and Moody Nelson would be controlled by the prime contract. The terms of the prime contract were incorporated into and became part of the subcontract between Infrastructure Engineering and Moody Nolan. Accordingly, the term from the prime contract making City Colleges a third-party beneficiary must be deemed to be a term of the subcontract. To the extent the prime contract and the subcontract conflict on this point, the prime contract provision would control.

¶ 54 As the trial court correctly found, City Colleges is a third-party beneficiary of the Moody Nelson-Infrastructure Engineering subcontract. The trial court explained that "the subcontract at issue fully incorporates the terms of the Prime Agreement" and the prime agreement "unambiguously demonstrates an intention that [City Colleges] is a third-party beneficiary of the subcontract." When the terms of the prime contract and subcontract are considered together as a whole, it is clear that the parties intended City Colleges to be a third-party beneficiary of the subcontract.

¶ 55 CONCLUSION

¶ 56 Based on the foregoing, we reverse and remand for further proceedings.

¶ 57 Reversed and remanded.

1-23-0147

Zurich American Insurance Co. v. Infrastructure Engineering, Inc.,
2023 IL App (1st) 230147

Decision Under Review:	Appeal from the Circuit Court of Cook County, No. 16-L-12712; the Hon. Patrick J. Sherlock, Judge, presiding.
Attorneys for Appellant:	Patrick C. Hess and Jenna L. Mahoney, of Nielsen, Zehe & Antas, P.C., of Chicago, for appellant.
Attorneys for Appellee:	Newton C. Marshall and Douglas R. Garmager, of Karbal, Cohen, Economou, Silk & Dunne, LLC, of Chicago, for appellee.

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

ZURICH AMERICAN INSURANCE COMPANY, As subrogee of Community College District No. 508 d/b/a City College of Chicago and CMO, A Joint Venture,	)	
Plaintiff,	)	
v.	)	No. 16 L 12712
MOODY NOLAN, INC., INFRASTRUCTURE ENGINEERING, INC., ENVIRONMENTAL SYSTEMS DESIGN, INC., and TERRACON CONSULTANTS, INC.,	)	
Defendants.	)	

ORDER

This matter coming to be heard on the motion of defendant Infrastructure Engineering, Inc. ("IEI") for summary judgment pursuant to 735 ILCS 5/2-1005.

FACTS

Briefly summarized, plaintiff Zurich American Insurance Company ("plaintiff") brings the instant case before the Court asserting its subrogation rights to recover amounts it paid under a builder's risk insurance policy after a second flood event related to the construction of the Malcom X College campus. Plaintiff alleged in the complaint that its subrogor, CMO, entered into an agreement with Community College District No 508 d/b/a City College of Chicago ("CCC") to serve as general contractor on the project. Defendant Moody Nolan, Inc. ("MNI") served as architect of record. MNI hired defendant IEI to provide certain civil engineering services, including the design and specification of a stormwater detention system.

In June of 2015, a rainstorm caused flooding to the project's basement, damaging mechanical and electrical equipment. Zurich paid out on the claim made by CMO. After

replacement of the mechanicals were done by CMO, the project again sustained damage due to heavy rains. Zurich again made payment for the damage to the mechanicals in the basement under the Builder's Risk Policy and exercised its rights as subrogee seeking recovery from the defendants. Plaintiff alleged that IEI improperly designed the storm water detention system and a subsequent revision of the design. Plaintiff filed a claim against IEI seeking recovery of the payments made to CMO. Plaintiff argues that IEI breached its subcontract with MNI by providing a defective design for the storm water management system. IEI moved for summary judgment pursuant to 735 ILCS 5/2-1005.

Third-party beneficiary

After review of the pleadings, affidavits and exhibits and taking oral argument, this Court determined that plaintiff was a third party beneficiary to the contract. An intended beneficiary is intended by the parties to the contract to directly benefit for the performance of the agreement; under the contract an intended beneficiary has rights and may sue. *Hacker v. Shelter Insurance Co.*, 388 Ill. App. 3d 386, 394 (2009). "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, and cannot be expanded or enlarged simply because the situation and circumstances justify or demand further or other liability." *Ball Corp. v. Bohlin Building Corp.*, 187 Ill. App. 3d 175, 177 (1989). There is a presumption against conferring third-party beneficiary status. *Id.* Although circumstances surrounding the execution of the contract may be considered, the alleged third-party beneficiary must be expressly named in the contract. *Paukovitz v. Imperial Homes, Inc.*, 271 Ill. App. 3d 1037, 1039 (1995). The subcontract at issue fully incorporates the terms of the Prime Agreement by reference. The contract unambiguously demonstrates an intention that CCC is a third-party beneficiary of the subcontract.

Subrogation

Although CCC is a proper third-party beneficiary to the subcontract, plaintiff has not shown it is subrogated to CCC's rights of recovery. Subrogation has been defined as the substitution of another person in the place of a claimant whose rights he succeeds in relation to the debt or claim asserted which has been paid by him involuntarily. *North American Ins. Co. v. Kemper Nat'l Ins. Co., et al.*, 325 Ill. App. 3d 477, 481 (1st Dist. 2001), citing *Bost v. Paulson's Enterprises, Inc.*, 36 Ill. App. 3d 135, 139 (2d Dist. 1976). *Trogub v. Robinson*, 366 Ill. App. 3d 838, 842 (1st Dist. 2006), the case cited by plaintiff, advises the prerequisites to subrogation are: (1) a third party must be primarily liable to the insured for the loss; (2) the insurer must be secondarily liable to the insured for the loss under an insurance policy; and (3) the insurer must have paid the insured under the policy, thereby extinguishing the debt of the third party.

Plaintiff fails to satisfy the elements of subrogation. First, the insured CCC sustained no loss. Plaintiff makes the argument that simply because CCC is a third party beneficiary under the contract and that plaintiff paid out to *someone*, it follows that plaintiff steps into the shoes of CCC to assert claims, claims CCC did not make because it sustained no loss. The Court invited the parties to research this issue and provide additional authority. While not binding on this Court, the logic of the case offered by IEI is persuasive. In *New York Board of Fire Underwriters v. Trans Urban Construction Co.*, 91 A.D.2d 115, 115-16 (N.Y. App. Div. 1983) *aff'd on other grounds*, 60 N.Y.2d 912 (1983), the insurer represented filed a subrogation action against a general contractor as subrogee of the State of New York for payments made for a windstorm loss during construction of a building owned by the State. The general contractor made all the repairs and submitted to the various insurers. The Court found the insured had no right of subrogation against the general contractor on behalf of the State because the State

suffered no loss since costs of the repairs were covered by the general contractor. The facts in that case are similar to the case at bar. Like the general contractor, CMO was the party that submitted a claim for the flood loss and CMO received all the loss payment from plaintiff. There is no evidence CCC claimed any loss under the policy or that a claim was made on its behalf. There is no evidence CCC received payment of loss. CCC simply sustained no loss and was not paid by the insurer; two requirements for there to be subrogation.

IT IS HEREBY ORDERED THAT:

1. Defendant IEI's Motion for Summary Judgment pursuant to 735 ILCS 5/2-1005 is granted.

ENTERED:

Honorable Patrick J. Sherlock Judge Patrick J. Sherlock
Judge Presiding

OCT - 5 2022

Circuit Court – 1942

October 5, 2022

APPEAL TO THE ILLINOIS APPELLATE COURT
FROM THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

ZURICH AMERICAN INSURANCE COMPANY, as subrogee of Community College District No. 508 d/b/a/ City Colleges of Chicago and CMO, a Joint Venture, Plaintiff-Appellant, v. INFRASTRUCTURE ENGINEERING, INC., Defendant-Appellee,	Circuit Court No. 2016 L 12712 Hon. Judge Patrick Sherlock, Judge Presiding. Notice of Appeal: 1/16/23 Judgment: 12/19/22 S. Ct. Rules 301 & 303

NOTICE OF APPEAL OF APPELLANT
ZURICH AMERICAN INSURANCE COMPANY

Plaintiff-Appellant Zurich American Insurance Company ("Zurich"), by and through its attorneys of record, hereby appeals to the Appellate Court for the First Judicial District from the orders entered in the Circuit Court of Cook County, County Department, Law Division:

(1) October 5, 2022 Order granting Defendant Infrastructure Engineering, Inc.'s Motion for Summary Judgment (Exhibit A); and

(2) December 19, 2022 Order denying Plaintiff's Motion to Reconsider (Exhibit B).

By this appeal, Plaintiff-Appellant Zurich American Insurance Company requests that this Honorable Appellate Court vacate the aforementioned orders and that the matter be remanded for further appropriate proceedings. In the alternative, Plaintiff-Appellant requests such other and further relief as may be deemed appropriate.

Respectfully submitted,

One of Plaintiff's Attorneys

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Attorneys for Plaintiff-Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of ***Plaintiff-Appellant's Notice of Appeal***, has been served *via* electronic transmission, on this 16th day of January 2023 to the attorneys listed below.

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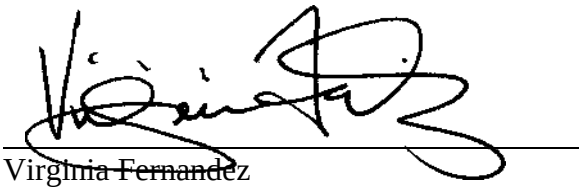

Virginia Fernandez

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

ZURICH AMERICAN INSURANCE COMPANY, As subrogee of Community College District No. 508 d/b/a City College of Chicago and CMO, A Joint Venture, Plaintiff,	)	
v.	)	No. 16 L 12712
MOODY NOLAN, INC., INFRASTRUCTURE ENGINEERING, INC., ENVIRONMENTAL SYSTEMS DESIGN, INC., and TERRACON CONSULTANTS, INC., Defendants.	)	

ORDER

This matter coming to be heard on the motion of defendant Infrastructure Engineering, Inc. ("IEI") for summary judgment pursuant to 735 ILCS 5/2-1005.

FACTS

Briefly summarized, plaintiff Zurich American Insurance Company ("plaintiff") brings the instant case before the Court asserting its subrogation rights to recover amounts it paid under a builder's risk insurance policy after a second flood event related to the construction of the Malcom X College campus. Plaintiff alleged in the complaint that its subrogor, CMO, entered into an agreement with Community College District No 508 d/b/a City College of Chicago ("CCC") to serve as general contractor on the project. Defendant Moody Nolan, Inc. ("MNI") served as architect of record. MNI hired defendant IEI to provide certain civil engineering services, including the design and specification of a stormwater detention system.

In June of 2015, a rainstorm caused flooding to the project's basement, damaging mechanical and electrical equipment. Zurich paid out on the claim made by CMO. After

EXHIBIT A

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replacement of the mechanicals were done by CMO, the project again sustained damage due to heavy rains. Zurich again made payment for the damage to the mechanicals in the basement under the Builder's Risk Policy and exercised its rights as subrogee seeking recovery from the defendants. Plaintiff alleged that IEI improperly designed the storm water detention system and a subsequent revision of the design. Plaintiff filed a claim against IEI seeking recovery of the payments made to CMO. Plaintiff argues that IEI breached its subcontract with MNI by providing a defective design for the storm water management system. IEI moved for summary judgment pursuant to 735 ILCS 5/2-1005.

Third-party beneficiary

After review of the pleadings, affidavits and exhibits and taking oral argument, this Court determined that plaintiff was a third party beneficiary to the contract. An intended beneficiary is intended by the parties to the contract to directly benefit for the performance of the agreement; under the contract an intended beneficiary has rights and may sue. *Hacker v. Shelter Insurance Co.*, 388 Ill. App. 3d 386, 394 (2009). "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, and cannot be expanded or enlarged simply because the situation and circumstances justify or demand further or other liability." *Ball Corp. v. Bohlin Building Corp.*, 187 Ill. App. 3d 175, 177 (1989). There is a presumption against conferring third-party beneficiary status. *Id.* Although circumstances surrounding the execution of the contract may be considered, the alleged third-party beneficiary must be expressly named in the contract. *Paukovitz v. Imperial Homes, Inc.*, 271 Ill. App. 3d 1037, 1039 (1995). The subcontract at issue fully incorporates the terms of the Prime Agreement by reference. The contract unambiguously demonstrates an intention that CCC is a third-party beneficiary of the subcontract.

EXHIBIT A

Subrogation

Although CCC is a proper third-party beneficiary to the subcontract, plaintiff has not shown it is subrogated to CCC's rights of recovery. Subrogation has been defined as the substitution of another person in the place of a claimant whose rights he succeeds in relation to the debt or claim asserted which has been paid by him involuntarily. *North American Ins. Co. v. Kemper Nat'l Ins. Co., et al.*, 325 Ill. App. 3d 477, 481 (1st Dist. 2001), citing *Bost v. Paulson's Enterprises, Inc.*, 36 Ill. App. 3d 135, 139 (2d Dist. 1976). *Trogub v. Robinson,* 366 Ill. App. 3d 838, 842 (1st Dist. 2006), the case cited by plaintiff, advises the prerequisites to subrogation are: (1) a third party must be primarily liable to the insured for the loss; (2) the insurer must be secondarily liable to the insured for the loss under an insurance policy; and (3) the insurer must have paid the insured under the policy, thereby extinguishing the debt of the third party.

Plaintiff fails to satisfy the elements of subrogation. First, the insured CCC sustained no loss. Plaintiff makes the argument that simply because CCC is a third party beneficiary under the contract and that plaintiff paid out to *someone*, it follows that plaintiff steps into the shoes of CCC to assert claims, claims CCC did not make because it sustained no loss. The Court invited the parties to research this issue and provide additional authority. While not binding on this Court, the logic of the case offered by IEI is persuasive. In *New York Board of Fire Underwriters v. Trans Urban Construction Co.*, 91 A.D.2d 115, 115-16 (N.Y. App. Div. 1983) *aff'd on other grounds,* 60 N.Y.2d 912 (1983), the insurer represented filed a subrogation action against a general contractor as subrogee of the State of New York for payments made for a windstorm loss during construction of a building owned by the State. The general contractor made all the repairs and submitted to the various insurers. The Court found the insured had no right of subrogation against the general contractor on behalf of the State because the State

EXHIBIT A

C 10894 V7

suffered no loss since costs of the repairs were covered by the general contractor. The facts in that case are similar to the case at bar. Like the general contractor, CMO was the party that submitted a claim for the flood loss and CMO received all the loss payment from plaintiff. There is no evidence CCC claimed any loss under the policy or that a claim was made on its behalf. There is no evidence CCC received payment of loss. CCC simply sustained no loss and was not paid by the insurer; two requirements for there to be subrogation.

IT IS HEREBY ORDERED THAT:

1. Defendant IEI's Motion for Summary Judgment pursuant to 735 ILCS 5/2-1005 is granted.

ENTERED:

Honorable Patrick J. Sherlock Judge Patrick J. Sherlock
Judge Presiding

OCT - 5 2022

Circuit Court – 1942

October 5, 2022

EXHIBIT A

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

ZURICH AMERICAN INSURANCE COMPANY, As subrogee of Community College District No. 508 d/b/a City College of Chicago and CMO, A Joint Venture,	)	
Plaintiff,	)	
v.	)	No. 16 L 12712
MOODY NOLAN, INC., INFRASTRUCTURE ENGINEERING, INC., ENVIRONMENTAL SYSTEMS DESIGN, INC., and TERRACON CONSULTANTS, INC.,	)	
Defendants.	)	

ORDER

This matter coming to be heard on Zurich American Insurance Company's motion for reconsideration.

In granting summary judgment, the Court relied upon *Trogub v. Robinson*, 366 Ill. App. 3d 838, 842 (1st Dist. 2006), the case cited by plaintiff, for the proposition that subrogation claims require: (1) a third party must be primarily liable to the insured for the loss; (2) the insurer must be secondarily liable to the insured for the loss under an insurance policy; and (3) the insurer must have paid the insured under the policy, thereby extinguishing the debt of the third party. Zurich argues that it was error for the Court to require it to prove the three elements of subrogation because its case sought contractual subrogation (not equitable subrogation).

Most recently, the First District has reaffirmed this Court's holding: "A claim for equitable *or contractual subrogation* requires the following elements: (1) the defendant carrier must be primarily liable to the insured for a loss under an insurance policy; (2) the plaintiff carrier must be secondarily liable to the insured for the same loss under its policy; and (3) the

EXHIBIT B

C 10896 V7

plaintiff carrier must have discharged its liability to the insured and at the same time extinguished the liability of the defendant carrier." *Econ. Premier Assurance Co. v. Country Mut. Ins. Co.*, 2021 IL App (1st) 192364-U, ¶ 65 citing *SwedishAmerican Hospital Association of Rockford v. Illinois State Medical Inter-Insurance Exchange*, 395 Ill. App. 3d 80, 105, 916 N.E.2d 80, 334 Ill. Dec. 47 (2009); see also *State Farm Mutual Automobile Insurance Co.*, 2014 IL App (1st) 133225, ¶ 21.

Zurich has not convinced this Court that its decision was in error.

IT IS HEREBY ORDERED THAT:

1. Zurich American Insurance Company's motion for reconsideration is denied.
2. The Court strikes the status set for December 21, 2022.

ENTERED:

Judge Patrick J. Sherlock
DEC 19 2022
Circuit Court – 1942

Honorable Patrick J. Sherlock
Judge Presiding

December 19, 2022

EXHIBIT B

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Econ. Premier Assur. Co. v. Country Mut. Ins. Co.

Appellate Court of Illinois, First District, Sixth Division

June 4, 2021, Decided

No. 1-19-2364

Reporter
2021 IL App (1st) 192364-U *; 2021 Ill. App. Unpub. LEXIS 940 **

ECONOMY PREMIER ASSURANCE COMPANY, individually, and as subrogee of BRENT YORDY, Plaintiff-Appellant, v. COUNTRY MUTUAL INSURANCE COMPANY, Defendant-Appellee.

Prior History: **[**1]** Appeal from the Circuit Court of Cook County. Case No. 16 CH 16402. Honorable Sanjay T. Tailor Judge, Presiding.

Econ. Premier Assur. Co. v. Country Mut. Ins. Co., 2019 Ill. Cir. LEXIS 23749 (Ill. Cir. Ct., Oct. 22, 2019)

Disposition: Affirmed.

Judges: JUSTICE CONNORS delivered the judgment of the court. Presiding Justice Mikva and Justice Harris concurred in the judgment.

Opinion by: CONNORS

Opinion

ORDER

[*P1] *Held:* The circuit court's order that granted defendant's motion for summary judgment and denied plaintiff's motion for partial summary judgment was proper where defendant had no duty to indemnify its insured with respect to the underlying complaint and therefore plaintiff was not entitled to recover against defendant on its subrogation or unjust enrichment claims; affirmed.

[*P2] This appeal stems from a personal injury case filed against Dan Yordy, who had an insurance policy with Plaintiff, Economy Premiere Insurance Company, and Dan's son Brent Yordy, who had an insurance policy with Defendant, Country Mutual Insurance Company. Dan and Brent settled with Dale Green, the plaintiff in the underlying personal injury case, and pursuant to the agreement, Economy agreed to pay Green on behalf of both Dan and Brent. Thereafter, Economy, individually, and as a subrogee of Brent, filed a complaint for a declaratory judgment against Country in **[**2]** which it sought to recover the amount of the settlement it paid on behalf of Brent. Economy now appeals from the circuit court's order that denied Economy's motion for partial summary judgment on its complaint for declaratory judgment against Country and granted Country's motion for summary judgment. On appeal, Economy argues that the circuit court should not have granted summary judgment in favor of Country because Country, not Economy, had a duty to indemnify Brent. Economy argues that therefore it is entitled to recover from Country under the principles of subrogation and the doctrine of unjust enrichment. We affirm.

[*P3] I. BACKGROUND

[*P4] Underlying Case

[*P5] In October 2011, Dale Green filed a personal injury complaint against Dan, Brent, Pioneer Hi-Bred International, Inc. (Pioneer), Yordy Farms, and R.N. Yordy Co., Inc. The complaint alleged as follows. In November 2009, while Green was running alongside a road, he was struck and injured by a "wheeled auger" that had separated from Dan's truck while Dan was

transporting it to another farm.[1] Before the accident, Brent had attached the conveyor to Dan's truck and, in doing so, failed to properly secure it to the truck. Pioneer leased the conveyor **[**3]** that was attached to Dan's truck to Dan and Brent and the agreement provided that Pioneer was responsible for transporting it between farms.

[*P6] In February 2012, Economy sent Brent a reservation of rights letter. The letter stated as follows. Economy issued a personal automobile policy to Dan and Leona Yordy, which was effective from April 9, 2009, to April 10, 2010, and listed the truck Dan was driving on the date of the accident as one of the insured vehicles. Economy offered to defend Brent in the underlying personal injury matter under a "complete reservation of rights", which stated, *inter alia*, as follows:

> "Based on the terms and definitions described above, as compared to the allegations in the underlying complaint, the policy potentially provides for your coverage. However, Economy has learned facts in investigation which, if true, may preclude its duty to indemnify you against the underlying complaint. For example, you did not prepare the auger for towing until well before the auger was actually towed on the date of loss. Moreover, you did not intend to use Dan's auto to tow the auger. In sum, while the underlying complaint may trigger the duty to defend, the policy may not ultimately **[**4]** cover you against the claims made by Green."

[*P7] In July 2016, Green, Dan, and Brent entered into a settlement agreement whereby Green released all claims against Dan and Brent in consideration of $132,000 to be paid by or on behalf of Brent and $33,000 to be paid by or on behalf of Dan. The agreement provided that the payment of the settlement funds to Green would be made by Economy on behalf of Dan and Brent, with Economy making a payment of $132,000 on behalf of Brent and a payment of $33,000 on behalf of Dan. Green dismissed the claims against defendants Yordy Farms, and R.N. Yordy Co., Inc., pursuant to an agreed order, and he proceeded to trial on the claims against Pioneer.

[*P8] Complaint for Declaratory Judgment

[*P9] In December 2016, Economy filed the complaint for declaratory judgment at issue and alleged as follows. In October 2011, Green filed a personal injury complaint against Brent and his father Dan, which alleged that on November 28, 2009, the date of the accident, Brent attached the conveyor to Dan's pickup truck, Dan towed the conveyor to deliver it to another farm, and the conveyor came loose from Dan's truck and struck Green. In February 2012, Economy agreed to defend Brent **[**5]** under a reservation of rights, "on the basis that he was at least potentially 'using' Dan's truck, because the underlying complaint alleged that Brent connected the conveyor to Dan's pickup truck with Dan's permission, and Economy was required to accept this allegation as true for purposes of the duty to defend." Economy alleged in its complaint for declaratory judgment that in its reservation of rights letter, it had "specifically disclaimed a duty to indemnify Brent should subsequent facts lead to a conclusion that Brent was not 'using' Dan's truck and, therefore, was not covered by the Economy policy."

[*P10] Economy further alleged in its complaint that Brent did not attach the conveyor to the pickup truck, but rather attached the tongue of the conveyor to the hitch of Dan's pickup truck. Economy stated that "contrary to the allegations of the underlying complaint, Brent did not at any time 'use' Dan's pickup truck" and that the testimony from that case "was undisputed that the tongue did not become detached from the hitch of Dan's truck, but rather that the connection between the tongue and the auger, secured by Brent the day before the accident, failed, directly causing the accident." **[**6]**

[*P11] Economy's complaint for declaratory judgment further alleged that Country issued an auto insurance policy to Brent with policy No. A12A2666574, that the policy period was from June 21, 2009, to December 21, 2009, and that the policy's liability-bodily injury was limited to $250,000 per person. Economy attached Country's policy to the complaint. The policy defined relative(s), nonowned vehicle, and motor vehicle as follows:

> **"Relative(s)** means a person related to **you** by blood, marriage or adoption who is a resident of the same household as **you**, including a ward or foster

[1] Green's complaint identified the machine as a "wheeled auger." In Economy's complaint for declaratory judgment at issue here, Economy notes that "[w]hat the [underlying complaint] described as an 'auger' was actually a grain belt conveyor" and that "[t]he distinction is immaterial for the purposes of this dispute." In Brent and Dan's deposition testimonies in the underlying case, they identified the machine as a "belt conveyor" and "conveyor" and in Economy's appellant brief, it refers to it as a "conveyor." We will therefore identify the machine as a "conveyor" throughout this order.

child.
***

Nonowned Vehicle in Sections 1, 2, and 3 refers to a land motor vehicle **you** or **your relatives** do not own and which is not available for regular use by **you** or a **relative**.
***

Motor Vehicle means a land motor vehicle designed for use principally on public roads. The term motor vehicle does not include a trailer used:

1. to haul passengers;

2. for business purposes, other than farming;" (Emphasis in original.) The policy further stated as follows:

"We will provide the insurance described in this policy through the company named on the declarations page if **you** have paid the premium and have complied with the policy provisions. **[**7]** When **we** refer to the policy, **we** mean **your** policy booklet (titled Auto Insurance Policy), the declarations page, applications for insurance, and any endorsements. The coverages **you** have purchased are stated on the declarations page and are subject to the limits of liability, exclusions, conditions and other terms of this policy." (Emphasis in original.)

[*P12] Under "Section 1 — Liability Insurance" the policy stated:

"Bodily Injury, Coverage A

Property Damage, Coverage B

If **you** have paid for coverage under Section 1 (see the declarations page), **we** promise to pay all sums in behalf of an **insured** which the **insured** becomes legally obligated to pay as damages because of:

1. bodily injury (Coverage A), including death resulting from that bodily injury, sustained by any person;
2. damage to or destruction of property (Coverage B), including loss of use.

The bodily injury or property damage must be caused by an accident resulting from the ownership, maintenance, or use of an **insured vehicle**, including loading and unloading, or of any **nonowned vehicle**. Under Coverages A and B, damages include required care, loss of services, loss of use, and death.

We will defend any claim or lawsuit alleging bodily injury **[**8]** or property damage covered by this policy even if there are no grounds for a suit. **We** will make any investigation or settle any claim or suit **we** consider appropriate." (Emphasis in original.)

[*P13] Under the "Persons Insured" section 1 of Country's policy, it stated: "Under this Section of the policy, an **insured** is:

1. with respect to an **insured vehicle:**

a. **you** and any resident of the same household as **you**;

b. anyone using an **insured vehicle** with **your** permission or the permission of an adult **relative**;

c. anyone else, but only with respect to liability resulting from acts or omission of an **insured** as defined in a. or b. above;

2. with respect to use of a **nonowned** vehicle:

a. **you**, when **you** are using a **nonowned vehicle** or when that vehicle is used by **your** agent (for example, an agent would include someone acting in **your** behalf);

b. **your relatives;**

3. **you** with respect to the operation and use of a **motor vehicle** owned or driven by **your** agent (for example, an agent would include someone acting in **your** behalf), provided **you** do not own, rent or lease that vehicle;

4. **you** or **your relatives** with respect to the operation, maintenance or control of a trailer." (Emphasis in original.)

The policy also stated under **[**9]** section 1:

"**Other Insurance**. If there is other applicable liability insurance for a loss covered by this policy, **we** will pay only **our** share of the loss. **Our** share is determined by totaling the limits of this insurance and all other collectible insurance and finding the percentage of the total which **our** limits represent. However, any insurance **we** provide with respect to an automobile **you** do not own will be excess over any other collectible insurance." (Emphasis in original.)

[*P14] Economy alleged that Brent was covered under

Country's policy for the Green accident, "on the basis that the 'bodily injury' at issue was 'caused by an accident resulting from the *** use of *** any nonowned vehicle.'" Economy stated that Country had "never asserted the position that it owes no duty to defend or indemnify Brent, other than the fact that the Economy policy applies on a primary basis, and has never asserted any such policy defense to Economy."

[*P15] Economy further alleged in its complaint for declaratory judgment that it issued a personal automobile insurance policy to Dan with policy number 1238038150, that it was effective from April 9, 2009, through April 10, 2010, and that it listed Dan's pickup truck **[**10]** that he was driving on the date of the accident as one of the insured vehicles. Economy attached a copy of the policy to its complaint. The policy defined automobile, relative, and trailer as follows:

> "**AUTOMBOBILE** means a private passenger automobile, pick-up truck, panel truck or van, designed for use mainly on public roads.
> ***
>
> **RELATIVE** means a person related to **you** by blood, marriage or adoption (including a ward or foster child) who resides in **your** household.
>
> **TRAILER** means a trailer designed for use with an **automobile** which is not used as an office, store, display or passenger trailer. A farm wagon or farm implement is a trailer when used with an **automobile**." (Emphasis in original.)

The policy defined "insured" as

> "**INSURED** means:
>
> 1. with respect to a **covered automobile**
>
> a. **you**;
>
> b. any **relative**; or
>
> c. any other person using it within the scope of **your** permission." (Emphasis in original.)

The policy stated under the "Coverage Provided" section as follows:

> "**We** will pay damages for **bodily injury** and **property damage** to others for which the law holds an **insured** responsible because of an accident which results from the ownership, maintenance, or use of a **covered automobile**, a **non-owned automobile [**11]** or a **trailer** while being used with a **covered automobile** or **non-owned automobile. We** will defend the **insured**, at **our** expense with attorneys of **our** choice, against any suit or claim seeking these damages. **We** may investigate, negotiate or settle any such suit or claim." (Emphasis in original.)

Additionally, the policy stated: "In the event of any payment under this policy, **we** are entitled to all the rights of recovery of the person to whom, or on whose behalf, payment was made." The policy also showed that the it had a $500,000 per person liability limit.

[*P16] Economy alleged that in July 2016, it made repeated demands to Country to settle on behalf of Brent. Green settled with Brent in July 2016 and, pursuant to the agreement, Economy paid $132,000 on behalf of Brent. Economy alleged that Country refused to contribute to the settlement on behalf of Brent. Economy's complaint for declaratory judgment alleged claims for indemnification, contractual subrogation, equitable subrogation, and unjust enrichment. Economy alleged that Country, not Economy, owed indemnity coverage to Brent in the underlying litigation and despite Country's duty to indemnify Brent, it failed to contribute any amount in the settlement to Green on behalf of Brent. Economy paid Green on behalf of Brent and its payment was "standby coverage" after Country **[**12]** refused to fund a settlement on behalf of Brent. The settlement amount was fair and reasonable under the circumstances because Brent was solely responsible for securing the connection between the tongue and the conveyor and that connection failed, which directly caused the accident. Country owed a duty to indemnify Brent's settlement of $132,000 and Economy is entitled to recoup that payment it made on behalf of Green from Country.

[*P17] With respect to Economy's claim for contractual subrogation, it alleged that its policy entitled it to seek recovery from Country for the indemnity payments it paid on behalf of Brent. With respect to Economy's claim for equitable subrogation, Economy alleged that it was equitably subrogated to the rights of Brent against Country "by virtue of its payment of indemnity on behalf of Brent in the underlying litigation." Lastly, Economy alleged that Country was unjustly enriched by its refusal to indemnify Brent in the underlying litigation and that Country unlawfully and illicitly retained the amounts due for Brent's indemnity.

[*P18] Cross-Motions for Summary Judgment

[*P19] Economy's Motion for Partial Summary Judgment

[*P20] Economy filed a motion for partial summary judgment, **[**13]** in which it argued that there were no questions of fact with regard to Country's duty to indemnify Brent. Economy argued that Country's policy covered Brent for the underlying case "on the basis that the 'bodily injury' at issue was 'caused by an accident resulting from the *** use of *** any nonowned vehicle."

[*P21] Economy further contended that it did not have a duty to indemnify Brent. It asserted that when it issued its reservation of rights letter, it agreed to defend Brent on the basis that "he was at least potentially 'using' Dan's truck," because the underlying complaint alleged that Brent connected the conveyor to Dan's pickup truck with Dan's permission. Economy argued that in its reservation of rights letter, it "specifically disclaimed a duty to indemnify Brent should subsequent facts lead to a conclusion that Brent was not 'using' Dan's truck and, therefore, was not covered by the Economy policy." Economy argued that the undisputed facts that were developed in the underlying case contrasted the allegations of the complaint in that case and that, as a result, it did not have a duty to indemnify Brent. Economy further asserted that its policy issued to Dan did not cover Brent **[**14]** because Brent never "used" Dan's truck before the accident and was not "using" Dan's truck.

[*P22] Economy attached copies of Dan's and Brent's deposition transcripts from the underlying case that were taken in February 2013. Economy asserted that based on Dan's and Brent's testimonies, Dan, not Brent, hooked the conveyor to Dan's truck and that, as such, Brent never "used" Dan's truck before the accident. Economy also argued that the testimony showed that Brent only attached the tongue to the conveyor, which he did days before the accident with no plan to use Dan's truck and that, therefore, Brent was not "using" Dan's truck.

[*P23] Country's Cross-Motion for Summary Judgment and Response

[*P24] In Country's cross-motion for summary judgment and response to Economy's motion for partial summary judgment, Country argued that Economy admitted that Country was "at most, an excess carrier" and that Economy had "a duty to defend at all times based on the pleadings and the law." Country argued that if there was no liability coverage for Brent under Economy's policy based on the reasoning that Brent did not "use" Dan's truck, then there was also no coverage under Country's policy, which contained essentially **[**15]** identical language as Economy's policy.

[*P25] Country further argued that Economy's policy also included coverage for bodily injury that resulted from the use of a trailer while being used with a covered automobile. It argued that, therefore, the negligence claim against Brent for bodily injury resulting from the use of the trailer, which was connected to Dan's covered automobile, was covered under Economy's policy. Country asserted that Economy was attempting to obtain money from Country that it had voluntarily paid and that there was no contractual or fiduciary relationship between Country and Economy. Country argued that the Illinois Supreme Court has only recognized three specific theories under which one insurer can recover from another insurer—indemnity, equitable contribution, and equitable subrogation—and that Economy could not recover from Country under these theories.

[*P26] Economy's Combined Reply and Response

[*P27] In Economy's reply in support of its motion for partial summary judgment and its response to Country's motion for summary judgment, it argued that Country did not dispute that Brent never used Dan's truck and that, as such, Economy had no duty to indemnify Brent. It also argued **[**16]** that Economy did not owe a duty to indemnify Brent because when Brent attached the tongue to the conveyor, the conveyor "was not being used with Dan's truck" and Brent "was not using Dan's truck; he did not even know that Dan's truck would later haul the trailer." Economy further argued that Country waived its right to assert any coverage defenses because it never raised any defenses until it filed its cross-motion. Economy asserted that even if Country did not waive its right to contest coverage, Country's policy provided indemnity coverage for Brent under the agency clause in the "nonowned vehicle" provision in Country's policy with Brent. Economy asserted that the testimony showed that Dan was acting as Brent's agent when he towed the conveyor to the next farm.

[*P28] Country's Reply in Support of its Motion for Summary Judgment In Country's reply in support of its motion for summary judgment, it asserted that Economy never argued that Country had a duty to indemnify Brent because Dan was acting as Brent's agent at the time of

the accident. Country stated that the agency argument was raised for the first time in Economy's combined response and reply brief on the motions for summary judgment. **[**17]** Country also contended that if Brent did not "use" Dan's automobile such that Brent was not covered under Economy's policy, then Brent would also not be covered under Country's policy. Country asserted that Economy "chose to allocate the lion's share of the settlement amount to an individual that was neither insured by [Economy] or [Country], as would be the ultimate result of [Economy's] argument," and that Economy "exclusively controlled the defense and settlement on behalf of Brent and Dan."

[*P29] Brent and Dan's Deposition Testimonies

[*P30] Attached to Economy's motion for partial summary judgment were Brent's and Dan's deposition testimonies that were taken for the underlying personal injury case on February 26, 2013.

[*P31] Brent testified that he was part owner of Yordy Turkey Farm and Yordy Farms and that in November 2009, he had an agreement with Pioneer whereby he segregated beans for seed production and stored them for Pioneer until the beans were ready to be loaded onto Pioneer's trucks. To load the beans on the trucks, Pioneer supplied a "belt conveyor." When the beans were ready for pickup, Pioneer would generally offer to bring the conveyor to Brent. If the conveyor was at a nearby location, **[**18]** Brent would sometimes offer to pick it up. Brent had moved a conveyor from one farm to another farm about five or seven times and he did not receive training on how to transport it.

[*P32] Brent testified that Pioneer delivered the conveyor at issue to the Dean Hild Farms, where their storage bin was located, and Brent helped move the seeds from the storage bin into Pioneer's trucks. Before Brent used the conveyor, he had to remove the tongue, or hitch, from the conveyor. About one or two days after Brent had finished loading the beans for the job, he returned to conveyor he had used, filled it with gas, and re-attached the tongue. To attach the tongue to the conveyor, Brent used a threaded bolt, which had come with the conveyor when it was delivered to him, and then used a wrench to tighten the nut to the bolt. He testified that he got the conveyor ready for transport "eventually" and for whomever would need it next.

[*P33] Brent further testified that on the day of the accident, Pioneer did not ask Brent to move the conveyor. Dan offered to move the conveyor to the next farm and Brent told Dan to "just bring it home to the home farm" and "the next person would pick up there." Brent testified that **[**19]** Dan, "being the nice guy he is," told Brent, "Well, I'll just take it to the neighbor." Brent testified that he then "told Dan where to go with it, and [Dan] took it." Brent testified that he did not pay Dan to move the conveyor and that Dan used Dan's vehicle "just out of kindness to help out." Brent testified that the conveyor became unattached from Dan's truck because the bolt broke.

[*P34] Dan Yordy testified he was the president of R.N. Yordy, Inc., a land-holding corporation that owns real estate and, at the time of the accident, he and Brent were part owners of Yordy Farms, which rented land from R.N. Yordy, Inc. Yordy Farms was a farming business that engaged in the operations of raising crops, soybeans, and corn. Brent and Dan each owned portions of the land that Yordy Farms used for its farming operations. Yordy Farms had a contract with Pioneer with respect to raising and storing seed beans and Dan signed the contract with Pioneer that was in effect at the time of the accident. Brent managed most of the contracts for the farm.

[*P35] On the date of the accident, November 28, 2009, Pioneer picked up the beans from the Dean Hild Farm, a farm where Brent and Dan rented a bin. After Pioneer **[**20]** picked up the beans from the farm, Dan spoke with Brent, who told him, "Well we're done with those beans over there, and we need to move that conveyor sometime between now and Monday." Dan also testified that Brent told him, "Hey, we got that bin empty, the beans are all picked up; why don't you move that conveyor, just bring it to our farm." Dan testified that he told Brent, "Well, I'm not doing anything. I'll do it now," and that he told Brent that he would take it to the next person scheduled to use it. Dan testified that Brent told him that Peter Baer had planned to use it next and that he told Brent, "Well, I'll just take it to his place," which was about seven miles away from the Dean Hild Farm. Brent did not give Dan any instructions as to how to move the conveyor. Dan testified that the rule was to fill the conveyor with gasoline before transporting it and that Brent "probably told me it's full of gasoline and ready to be pulled." Dan testified that Brent also told him "it's full of gas" and "be careful."

[*P36] Dan testified that when he arrived at the Dean Hild Farm to the move the conveyor, he did not hook up the tongue to the conveyor. He hooked the conveyor to the truck by backing **[**21]** up his truck, lifting the conveyor, and putting it on the hitch. When Dan was

driving the conveyor to Baer's farm, he felt the conveyor zig-zag, so he looked in the side view mirror and saw a light zig-zag. About a few seconds later, the conveyor became completely detached from Dan's truck, after which it went into a road ditch and hit Green. After the accident, the tongue was still attached to Dan's truck. Generally, the tongue should stay with the conveyor. Dan believed that the failure of the pin that hooked the tongue to the conveyor caused the conveyor to come loose from his truck. Asked whether anybody other than Brent had ever asked him to move a conveyor from one farm to another, Dan testified, "You know, I've never really been employed, so I don't have many people tell me what to do" and Brent was "probably the one that ever gives me a job." He had moved conveyors about six or eight times before the date of the accident. Pioneer never asked him to move a conveyor from one farm to another.

[*P37] Attached to Economy's motion for partial summary judgment were the transcripts from Dan's and Brent's trial testimonies from when they testified at the jury trial for Green's case against **[**22]** Pioneer. Economy stated in its motion that Dan's and Brent's testimonies at that trial were consistent with their deposition testimonies for the Green case.

[*P38] Circuit Court's Ruling

[*P39] At the hearing on the parties' motions for summary judgment, Economy's counsel argued that he believed the facts from the underlying case established that Brent was responsible for the connection that failed and that Brent, "contrary to the allegations of the underlying complaint which were disproved and later on through evidence, didn't qualify as an insured under the Economy policy." Economy's counsel also stated that Brent is covered under Country's policy, after which the following colloquy occurred:

> "THE COURT: Is the issue here whether he was using the vehicle?
>
> MR. SYREGELAS [(PLAINTIFF's ATTORNEY)]: The issue here is that the vehicle was being used for him by an agent to his dad. So under the insured provision, which I can hand up to the Court, if you would like it, with respect to use of a non—
>
> THE COURT: Whose farm is it? MR. SYREGELAS: Both.
>
> MR. CARLSON [(DEFENSE ATTORNEY)]: Both of theirs. They both own it jointly.
>
> THE COURT: So does that make one the agent of the other? I mean, partners, are they agents **[**23]** of the other?
>
> MR. SYREGELAS: I don't know that this—I don't know—I do know. This transaction was not part of their joint business.
>
> THE COURT: It was or was not?
>
> MR. SYREGELAS: It was not. His father was doing—
>
> THE COURT: But how can that be if the auger is being used—
>
> MR. SYREGELAS: Because the testimony says it.
>
> THE COURT: — to move grain?
>
> MR. SYREGELAS: Because the testimony says it. Brent testified that his dad was doing him a favor by moving the auger to another farm.
>
> THE COURT: Well, that's kind of—people do others favors all the time even though it might be when they are business partners. Father and son, Dan and Brent, are business partners in this farm, right?
>
> MR. SYREGELAS: Correct."

[*P40] Country's counsel argued that Economy did not plead an agency theory and did not plead any of the facts regarding Dan being Brent's agent in the underlying case, the declaratory judgment complaint, or reservation of rights. He argued that Economy raised the issue for the first time in its reply brief. Country's counsel also argued that there was potential coverage for Brent under Economy's policy because of Brent's "use of the trailer connected to the covered automobile" and it was alleged that Brent improperly **[**24]** connected the tongue to the conveyor.

[*P41] Following argument, the court denied Economy's motion for partial summary judgment and granted Country's motion for summary judgment. In doing so, the court stated:

> "So Economy's motion for partial summary judgment is predicated on the theory that—agency theory, which is that Brent was a principal and Dan was an agent. And it is predicated on the testimony that Brent had—or told Dan's father to bring the auger back to the farm, their farm, jointly owned. And Dan said that no. I am going to drive it down to the next user, presumably being a good neighbor. I am just not persuaded that's what this provision is intended to attract. I am not persuaded by the agency argument. Typically an agent has the principal's direction here. Well, they are business partners. So if [Dan] is Brent's agent, the dad is the son's agent, and it is acceptable, but even if it is, there is nothing against the son's wishes."

[*P42] This appeal followed.

[*P43] II. ANALYSIS

[*P44] On appeal, Economy argues, *inter alia*, that Country owes a duty to indemnify Brent and therefore had a duty to compensate it for settling on behalf of Brent. Economy argues that it is fully subrogated to Brent's right **[**25]** to coverage under the Country policy, because Country had a duty to insure Brent and Economy did not. It argues that Country waived any right to assert any policy defenses in its obligation to indemnify Brent because it failed to raise any defenses in a reservation of rights and that the only defense that Country ever pled was that Economy's policy was primary and sufficient to satisfy the settlement. Economy contends that it had no duty to indemnify Brent and Brent did not qualify as an "insured" under its policy because Brent was not "using" Dan's truck at the time of the accident, noting that Dan connected the conveyor to the truck and Brent only connected the conveyor to the hitch. Economy also argues that Country's policy covered Brent for Dan's use of his truck at the time of the accident because Dan was acting as Brent's agent and Country's policy covers Brent when a "nonowned vehicle" is used by Brent's agent. Economy claims that the evidence was clear that Dan towed the conveyor on Brent's behalf. Economy argues that because Country had an obligation to indemnify Brent and Economy did not have a duty but paid the full amount of the settlement, it is entitled to recover from **[**26]** Country under the principles of indemnification, subrogation and unjust enrichment.

[*P45] In response, Country argues, *inter alia*, that the circuit court properly determined that Economy did not prove agency and Country did not owe a duty to indemnify Brent. Country argues that there is no recognized theory under which Economy can recover from Country the money that Economy paid on behalf of Brent. Country asserts that Economy "is the acknowledged primary insurer of [Brent]" and that "[i]t admits it always had the primary duty to defend, but nevertheless is seeking to recover from another insurer with whom it has no relationship what it voluntarily paid as a primary insurer in settlement."

[*P46] A circuit court may properly grant summary judgment where "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." *735 ILCS 5/2-1005(c)* (West 2018). "[T]he construction of an insurance policy and a determination of the rights and obligations thereunder are questions of law for the court and appropriate subjects for disposition by summary judgment." *Konami (America), Inc. v. Hartford Insurance Co. of Illinois, 326 Ill. App. 3d 874, 877, 761 N.E.2d 1277, 260 Ill. Dec. 721 (2002)*. When parties file **[**27]** cross-motions for summary judgment in an insurance case, they acknowledge that no material questions of fact exist, and the only issue of law present is regarding the construction of an insurance policy. *American Family Mutual Insurance Co. v. Fisher Development, Inc., 391 Ill. App. 3d 521, 525, 909 N.E.2d 274, 330 Ill. Dec. 561 (2009)*. Our review of a circuit court's ruling on a motion for summary judgment is *de novo*. *Clark Investments, Inc. v. Airstream, Inc., 399 Ill. App. 3d 209, 213, 926 N.E.2d 408, 339 Ill. Dec. 176 (2010)*. We may affirm a grant of summary judgment on any basis appearing in the record. *Home Insurance Co. v. Cincinnati Ins. Co., 213 Ill. 2d 307, 315, 821 N.E.2d 269, 290 Ill. Dec. 218 (2004)*.

[*P47] "The primary objective in construing the language of an insurance policy is to ascertain and give effect to the intentions of the parties as expressed in their agreement." *Pekin Insurance Co. v. CSR Roofing Contractors, Inc., 2015 IL App (1st) 142473, ¶ 26, 397 Ill. Dec. 148, 41 N.E.3d 559*. "If the terms of a policy are clear and unambiguous, they must be given their plain and ordinary meaning." *American States Insurance Co. v. Koloms, 177 Ill. 2d 473, 479, 687 N.E.2d 72, 227 Ill. Dec. 149 (1997)*. However, if "the policy language is ambiguous, it will be construed liberally in favor of coverage." *Markel International Insurance Co. v. Montgomery, 2020 IL App (1st) 191175, ¶ 37*.

[*P48] In seeking repayment from Country, Economy is claiming that, as Brent's insurer, Country should be compelled to repay Economy for the settlement amount that it paid on behalf of Brent because Country was the insurer directly responsible for covering Brent. See generally, 15 Couch on Ins. § 217:16. Both parties agree that this turns on whether Country's policy provided coverage for Brent, although each of them also contends that the other **[**28]** waived or was estopped from asserting that the policy language did not apply to the Green accident.

[*P49] Economy's Waiver Argument

[*P50] Economy asserts that Country had a duty to indemnify Brent and it waived any limitation on that duty

by its failure to plead its "non-owned vehicle limitation" or to assert this limitation in a reservation of rights. Specifically, according to Economy, Country was required to plead as an affirmative defense or in a counterclaim or in a reservation of rights, that there was no coverage for Brent in this accident because the accident was in a "non-owned vehicle," and Dan was not acting as the agent of Brent at the time of the accident. According to Economy, the fact that the pleadings are silent on this issue and that there was never a reservation of rights from Country, means that the circuit court should not have even considered the language of its policy that Country relies on to find that Brent was not insured by Country for this accident.

[*P51] Economy presents no authority for placing this burden on Country. Rather, the burden was on Economy to show that another insurer—here Country—had the obligation to indemnify Brent. Economy cites cases where an insurer, who **[**29]** fails to defend its insured under a reservation of rights or seek a declaratory judgment that there is no coverage, is estopped from raising policy defenses to coverage. See, *e.g.,* *Standard Mutual Insurance Co. v. Lay, 2013 IL 114617, ¶ 19, 989 N.E.2d 591, 371 Ill. Dec. 1*. However, Economy states in its reply brief that it has "never argued that Country either had a duty to defend or that it is estopped" and, as those cases make clear, where, as here, Country had no obligation to defend in the underlying case against Brent, it cannot now be estopped from asserting a defense based on policy language. See *Employer's Reinsurance Corp. v. E. Miller Insurance Agency, Inc., 332 Ill. App. 3d 326, 340, 773 N.E.2d 707, 265 Ill. Dec. 943 (2002)* ("the estoppel doctrine applies only when an insurer has breached its duty" and "if the insurer had no duty to defend or its duty to defend was not properly triggered, estoppel cannot be applied against the insurer"). Further, Economy cites no cases that suggest that estoppel applies in this context or that Country cannot rely on policy language because it did not specifically cite that language in the pleadings. Accordingly, we agree with Country that it had no burden to reserve its rights to rely on language in its policy. We reject Economy's argument that Country is estopped from directing the court to the language of the policy to determine whether Country had an obligation **[**30]** to indemnify Brent for this accident. We turn therefore to the language of the policy and we agree with the circuit court that Country had no obligation to indemnify Economy for the settlement it paid on behalf of Brent for this accident.

[*P52] Nonowned Vehicle Provision in Country's Policy

[*P53] Economy argues that Country's policy provided indemnity coverage for Brent under the "nonowned vehicle" provision in its policy. This provision defined "insured" as follows: "**you**, when **you** are using a **nonowned vehicle** or when that vehicle is used by **your** agent (for example, an agent would include someone acting in **your** behalf)." (Emphasis in original.) The parties do not dispute that Dan owned the truck that was involved in the Green accident or that the truck was considered a "nonowned vehicle" under Country's policy with Brent. The parties also do not dispute that Dan was driving the truck involved in the Green accident or that Dan connected the conveyor to the truck while Brent connected the tongue to the conveyor. Economy argues that Brent is covered under the nonowned vehicle provision because Dan's truck, the nonowned vehicle, was used by Dan, Brent's agent.

[*P54] Agency

[*P55] We initially note that in the **[**31]** underlying complaint, Green did not allege any theories based on an agency relationship between Dan or Brent or any facts to support that Dan was acting on Brent's behalf at the time of the accident. Rather, since Economy is asserting that Country had an obligation to indemnify Brent, it is relying on the actual facts, rather than the facts as they were pled. See, *American States Insurance Co., v. CFM Construction Co., 398 Ill. App. 3d 994, 1001, 923 N.E.2d 299, 337 Ill. Dec. 740 (2010)* ("The duty to indemnify turns on whether the claim is covered by the policy."). When the circuit court denied Economy's motion for partial summary judgment, it expressly found that the facts did not support Economy's agency theory. We agree.

[*P56] "An agency is a fiduciary relationship in which the principal has the right to control the agent's conduct and the agent has the power to act on the principal's behalf." *Kaporovskiy v. Grecian Delight Foods, Inc., 338 Ill. App. 3d 206, 210, 787 N.E.2d 268, 272 Ill. Dec. 453 (2003)*. "A principal-agent relationship exists when the principal has the right to control the manner in which the agent performs his work and the agent has the ability to subject the principal to personal liability." *Kaporovskiy, 338 Ill. App. 3d at 210*. "The right to control the actions of another is a hallmark of agency." *Id.*

[*P57] Here, as previously discussed, Country's policy with Brent provided coverage for Brent if the nonowned

vehicle "is used by **your** agent **[**32]** (for example, an agent would include someone acting in **your** behalf)." (Emphasis in original.) However, the record does not show that Dan was acting on Brent's behalf or that he acted at Brent's direction when he decided to tow the conveyor to the other farm. The record shows that Dan and Brent were part owners of Yordy Farms and that Pioneer, not Brent, owned the conveyor at issue. Although Brent managed most of the contracts for the farm, Dan signed the contract with Pioneer that was in effect at the time of the accident. Brent did not pay Dan to move the conveyor and Dan testified that Brent did not give him any instruction as to how to move the conveyor.

[*P58] Further, Brent's and Dan's deposition testimonies regarding Dan's decision to transport the conveyor to the next farm does not support that Dan was acting on Brent's behalf when he made that decision, and we disagree with Economy's assertion that the record "is clear that Brent *explicitly* asked Dan to move the conveyor." (Emphasis in original.) Brent testified that on the day of the accident, Dan offered to move the conveyor to the next farm and Brent told Dan to "just bring it home to the home farm" and "the next person would pick **[**33]** up there." Brent also testified that Dan told him "being the nice guy he is" that he would "just take it to the neighbor" and that Dan moved the conveyor "just out of kindness to help out." Dan's testimony regarding his decision to move the conveyor also supports that he did not move the conveyor to the next farm on Brent's behalf. Dan testified that after Pioneer picked up the beans, Brent told Dan, "[W]e're done with those beans over there, and we need to move that conveyor sometime between now and Monday," after which Dan told Brent that he was not "doing anything" and "I'll do it now." We acknowledge that Dan also testified that Brent told Dan, "[W]hy don't you move that conveyor, just bring it to our farm." However, based on the record as a whole, we cannot find that Dan moved the conveyor to the next farm at Brent's direction or on Brent's behalf. Thus, we disagree with Economy's argument that Country's policy covered Brent under the nonowned vehicle provision because Dan was acting as Brent's agent.

[*P59] Citing *Ioerger v. Halverson Construction Co., Inc., 232 Ill. 2d 196, 202, 902 N.E.2d 645, 327 Ill. Dec. 524 (2008)*, Economy asserts that Dan was Brent's agent because "[p]artners are agents of the partnership ***and of one another*** for purposes of the business." (Emphasis in original.) However, **[**34]** the testimony shows that Dan and Brent were part owners of Yordy Farms. Asked whether "Yordy Farms in any way incorporated or a partnership or anything like that?" Dan responded, "No. It's just doing business as." Thus, we are unpersuaded by Economy's argument that Dan was acting as Brent's agent when he drove the conveyor to the other farm solely because they are considered agents of one another by virtue of a partnership.

[*P60] Accordingly, the nonowned vehicle provision in Country's policy did not provide coverage for Brent based on Dan having acted as an agent of Brent or on Brent's behalf. The circuit court did not err when it granted summary judgment in favor of Country.

[*P61] Brent's "Use" of the Nonowned Vehicle

[*P62] To the extent Economy argues that Brent is covered under the nonowned vehicle provision in Country's policy because Brent was personally "using" a nonowned vehicle, we disagree. Economy acknowledged in its complaint for declaratory judgment that Brent did not "use" Dan's truck, as it stated that "contrary to the allegations of the underlying complaint, Brent did not at any time 'use' Dan's pickup truck." Likewise, in Economy's motion for partial summary judgment, it argued that **[**35]** it did not have a duty under its policy with Dan to indemnify Brent because Brent was not "using" and he never "used" Dan's truck before the accident. Specifically, Economy argued that the undisputed facts involving the trailer and its attachment to Dan's pickup truck contrasted with the allegations in the underlying complaint and showed that Dan, not Brent, hooked the conveyor to Dan's truck and that, as such, "Brent never 'used' Dan's truck" before the accident. Economy also asserted that Brent was not 'using' Dan's pickup truck because [he] did not attach the auger to Dan's pickup truck" and that "he only attached the tongue to the auger and that was done days before the accident." Accordingly, given that Economy acknowledged that Brent was not using Dan's truck and that Brent never used it when he connected the tongue to the conveyor, we cannot find that Country's policy covers Brent for the Green accident under the provision in Country's policy that provides coverage if Brent was personally "using" a "nonowned vehicle."

[*P63] Subrogation

[*P64] Economy argues that it is entitled to recover against Country under the theory of contractual

subrogation pursuant to a subrogation clause in its policy **[**36]** with Dan, which states: "In the event of any payment under this policy, **we** are entitled to all the rights of recovery of the person to whom, or on whose behalf, payment was made." (Emphasis in original.) Economy argues that the subrogation clause in its policy with Dan transfers Brent's rights to recover against Country to Economy upon Economy's payment of Brent's claim. Economy also argues that, in the alternative, Economy is entitled to equitable subrogation.

[*P65] "Subrogation simply means substitution of one person for another; that is, one person is allowed to stand in the shoes of another and assert that person's rights against the Country." (Internal quotation marks omitted.) *State Farm Mutual Automobile Insurance Co. v. Easterling, 2014 IL App (1st) 133225, ¶ 20, 385 Ill. Dec. 598, 19 N.E.3d 156* (quoting *Trogub v. Robinson, 366 Ill. App. 3d 838, 842, 853 N.E.2d 59, 304 Ill. Dec. 527 (2006)*). Subrogation allows a party who pays a debt or claim of another to succeed to the rights of the other with respect to the debt or claim the party paid. *State Farm Mutual Automobile Insurance Co. v. Du Page County, 2011 IL App (2d) 100580, ¶ 33, 955 N.E.2d 67, 352 Ill. Dec. 891*. "The right of subrogation may be grounded in equity and may also be founded upon an express or implied agreement." *North American Insurance Co. v. Kemper National Insurance Co., 325 Ill. App. 3d 477, 481, 758 N.E.2d 856, 259 Ill. Dec. 448 (2001)*. "The doctrine of subrogation is broad enough to include every instance in which one person, not a mere volunteer, pays a debt for which another is primarily liable and in which equity and good conscience should have been discharged **[**37]** by the latter." *Id.* "Where the right of subrogation is created by the terms of an enforceable contract, the contract terms control, rather than common law or equitable principles." *American Family Mutual Insurance Co. v. Northern Heritage Builders, L.L.C., 404 Ill. App. 3d 584, 588, 937 N.E.2d 323, 344 Ill. Dec. 617 (2010)*. "A claim for equitable or contractual subrogation requires the following elements: (1) the defendant carrier must be primarily liable to the insured for a loss under an insurance policy; (2) the plaintiff carrier must be secondarily liable to the insured for the same loss under its policy; and (3) the plaintiff carrier must have discharged its liability to the insured and at the same time extinguished the liability of the defendant carrier." *SwedishAmerican Hospital Association of Rockford v. Illinois State Medical Inter-Insurance Exchange, 395 Ill. App. 3d 80, 105, 916 N.E.2d 80, 334 Ill. Dec. 47 (2009)*; see also *State Farm Mutual Automobile Insurance Co., 2014 IL App (1st) 133225, ¶ 21*.

[*P66] Here, Economy, the plaintiff insurer, is seeking recovery from Country, the defendant insurer, based on the subrogation clause in Economy's policy with Dan and is claiming that it is a subrogee of Brent because it paid Green in the underlying accident on behalf of Brent. Economy argues that as a subrogee of Brent, it is entitled to recover from Country because Country's policy covers Brent for the Green accident under the nonowned vehicle provision. However, as previously discussed, Economy has not established that Country's policy with Brent covers Brent **[**38]** for the underlying accident. Economy therefore cannot show that Country is liable to Brent or that Economy is entitled to recover from Country the payments it made on behalf of Brent in the underlying case. Thus, Economy cannot establish its claims for either equitable or contractual subrogation.

[*P67] We note that in Economy's reply brief, it asserts that it is entitled to recover from Country under its contractual subrogation claim. Citing various cases with Country as a party, Economy argues that Country has a similar subrogation clause in the policy at issue here and has "vigorously litigated its right to assert its insureds' claims thereunder." Even if the cases cited by Economy would apply here, they do not impact our analysis. As previously discussed, Country's nonowned vehicle provision in its policy does not cover Brent for the Green accident and therefore, Economy, who asserts it is a subrogee of Brent under the subrogation clause in its policy with Dan, is not entitled to recover from Country the payments it made on behalf of Brent pursuant to a settlement agreement in the underlying case.

[*P68] Unjust Enrichment

[*P69] Lastly, Economy asserts it is entitled to recover from Country under the **[**39]** theory of unjust enrichment. To properly plead an unjust enrichment claim, "a plaintiff must allege that the defendant has unjustly retained a benefit to the plaintiff's detriment, and that defendant's retention of the benefit violates the fundamental principles of justice, equity, and good conscience." *Gagnon v. Schickel, 2012 IL App (1st) 120645, ¶ 25, 983 N.E.2d 1044, 368 Ill. Dec. 240* (quoting *HPI Health Care Services, Inc. v. Mt. Vernon Hospital, Inc., 131 Ill. 2d 145, 160, 545 N.E.2d 672, 137 Ill. Dec. 19 (1989)*). Unjust enrichment "is inapplicable where an express contract, oral or written, governs the parties' relationship." *Id.* "For a cause of action based on

a theory of unjust enrichment to exist, there must be an independent basis that establishes a duty on the part of the defendant to act and the defendant must have failed to abide by that duty." *Philadelphia Indemnity Insurance Co. v. Pace Suburban Bus Service, 2016 IL App (1st) 151659, ¶ 49, 409 Ill. Dec. 344, 67 N.E.3d 556*. As previously discussed, Country had no duty to indemnify Brent as Brent was not covered under Country's policy for the Green accident. Thus, Economy cannot show that Country unjustly retained a benefit and Economy has not established a claim for unjust enrichment. The circuit court therefore did not err when it granted Country's motion for summary judgment and denied Economy's motion for partial summary judgment.

[*P70] III. CONCLUSION

[*P71] Based on the foregoing, we affirm the circuit court's decision to grant Country's motion for summary **[**40]** judgment and deny Economy's motion for partial summary judgment.

[*P72] Affirmed.

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