*2012 Ill. App. Unpub. LEXIS 1308, *; 2012 IL App (1st) 111004U, **

GREAT WEST CASUALTY COMPANY as subrogeee of DAIMLER CHRYSLER NORTH AMERICA, LLC and McLEOD EXPRESS, LLC, Plaintiffs-Appellants, v. UNIVERSAL UNDERWRITERS INSURANCE COMPANY and TRUCK CENTERS, INC., Defendants-Appellees.

No. 1-11-1004

APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, SECOND DIVISION

2012 Ill. App. Unpub. LEXIS 1308; 2012 IL App (1st) 111004U

February 14, 2012, Order Filed

NOTICE: THIS ORDER WAS FILED UNDER SUPREME COURT RULE 23 AND MAY NOT BE CITED AS PRECEDENT BY ANY PARTY EXCEPT IN THE LIMITED CIRCUMSTANCES ALLOWED UNDER RULE 23(e)(1).

SUBSEQUENT HISTORY: [*1]
Modified upon granting of rehearing, June 5, 2012.

PRIOR HISTORY: Appeal from the Circuit Court of Cook County. No. 08 CH 8808. Honorable Daniel A. Riley and Mary L. Mikva, Judges Presiding.
Great West Cas. Co. v. Universal Underwriters Ins. Co., 2012 Ill. App. Unpub. LEXIS 304, 2012 IL App (1st) 111004U (2012)

DISPOSITION: Petition for rehearing granted; reversed and remanded with instructions.

CORE TERMS: truck, insured's, covered auto, custody, summary judgment, endorsement, security interest, customer, declaration, trucking, equitable subrogation, coverage, primary coverage, standing to bring, carrier, damaged, public authority, household, tornado, repair, payee, contract claim, primarily liable, discharged, equitable, matter of law, standing to sue, subrogation claim, insurance policy, issue of material fact

JUDGES: PRESIDING JUSTICE QUINN delivered the judgment of the court. Justice Cunningham and Justice Harris concurred in the judgment.

OPINION BY: QUINN

OPINION

MODIFIED ORDER UPON GRANTING OF REHEARING

[P1]** *HELD*: Trial court erred in granting defendants' summary judgment motion and denying plaintiff's summary judgment motion on the grounds that plaintiff did not have standing to bring breach of contract claim and was not entitled to equitable subrogation or contribution.

[P2]** Plaintiff, Great West Casualty Company (Great West), appeals from orders of the circuit court denying its motion for summary judgment and granting summary judgment in favor of defendants, Universal Underwriters Insurance Company (Universal) and Truck Centers, Inc. On February 14, 2012, this court issued an order affirming the circuit court. *Great West*

Casualty Co. v. Universal Underwriters Insurance Co., 2012 IL App (1st) 111004U (Feb. 14, 2012). On March 5, 2012, Great West filed a petition for rehearing pursuant to Supreme Court Rule 367 **[*2]** (Ill. S. Ct. R. 367 (eff. Sept. 1, 2006)). This court ordered Universal to file an answer pursuant to Rule 367(d). Great West subsequently filed a reply to Universal's answer. We now grant the petition for rehearing and reverse.

[P3]** I. BACKGROUND

[P4]** Plaintiff McLeod Express, LLC (McLeod), is a trucking company that purchases its trucks through defendant, Truck Centers, Inc. (Truck Centers) a truck dealership. In January 2006, McLeod placed an order with Truck Centers to purchase 20 trucks. McLeod financed the purchase of the trucks through Daimler Chrysler North America, LLC (Daimler Chrysler), which had a security interest in all of the vehicles. After the order was placed, John Tynan, McLeod's chief financial officer, submitted an Application for Vehicle Title with the Illinois Secretary of State, but on March 12, 2006, the trucks had not yet been delivered to McLeod, and were parked at Truck Centers' Springfield, Illinois facility when a tornado passed through, damaging 14 of the trucks. Truck Centers repaired the trucks at a cost of $139,139.94.

[P5]** At the time of the loss, McLeod was insured by Great West through a policy that named Daimler Chrysler as a loss payee and an additional insured. **[*3]** Truck Centers was insured through a policy from Universal, pursuant to which Daimler Chrysler was an additional insured and also had a security interest. Truck Centers' Universal insurance policy states, in pertinent part, as follows:

> "**INSURING AGREEMENT**-WE will pay for LOSS of or to a COVERED AUTO from any cause, including sums an INSURED legally must pay as damages as a result of LOSS to a CUSTOMER'S AUTO, except as stated otherwise in the declarations or excluded."

[P6]** A "covered auto" under the Universal policy is defined as "an AUTO (1) owned by or acquired by YOU or (2) not owned by YOU but in YOUR care, custody, or control." A "customer's auto" is defined, in part, as "a COVERED AUTO not owned or acquired by YOU but in YOUR care custody or control for safekeeping, storage, service or repair."

> The policy also provides:
>
> "**OTHER INSURANCE**-This insurance is primary over any other insurance except when the COVERED AUTO is in the care, custody, or control of any person or organization, other than YOU, a member of YOUR household, YOUR partner, director, stockholder, executive officer, or paid employee or a member of the household of any of them."
>
> Endorsement No. 001 to the Universal policy provides **[*4]** that:
>
> "WE will pay you for any covered LOSS both to YOU and the Security Interest shown in the declarations, as interest may appear. Their interest is protected, to the extent that this insurance applies, unless LOSS results from YOUR wrongful conversion, embezzlement or secretion."

[P7]** McLeod's insurance policy with Great West included a provision permitting the transfer of rights of recovery against others to Great West, as follows:

> "If any person or organization to or for whom we make payment under this Coverage Form has rights to recover damages from another, those rights are transferred to us. That person or organization must do everything necessary to secure our rights and must do nothing afer 'accident' or 'loss' to impair them."

[P8]** Great West paid McLeod and Daimler Chrysler for the cost of the repairs to the trucks and then submitted claims to Universal for repayment. Universal denied Great West's claims, and on March 17, 2009, Great West filed an amended two count complaint against Universal for breach of contract and declaratory judgment. Great West asserted that at the time of the loss, the vehicles were in the care, custody, and control of Truck Centers, and that although McLeod **[*5]** had paid for the vehicles, title was not issued until after the date of the loss. Count I of the complaint, alleging breach of contract, argued that the Universal policy provides primary coverage for the loss and that Universal breached its duty to pay Great West as subrogee of the additional insured and loss payee, Daimler Chrysler, for its losses. In count II, which is a claim for equitable subrogation, Great West sought a declaration that Universal must contribute equitably for payment of the losses.

[P9]** Great West and Universal filed motions for summary judgment, and on September 14, 2010, the trial court entered an order granting summary judgment in favor of Universal and denying Great West's motion. As to count I, the court found that Great West paid Daimler Chrysler as an additional insured under the Great West policy, which is distinct from Daimler Chrysler's status as an additional insured under the Universal policy. Therefore, the court found that Great West, as subrogeee, was not an insured under the Universal policy and lacked standing to claim a breach of that policy. With regard to count II seeking a declaratory judgment, the trial court found that McLeod must have owned the **[*6]** trucks at the time of the loss, otherwise McLeod would have no insurable interest but that pursuant to Endorsement 008 and Part 300 of the Universal policy, Universal is only liable for damage to customer-owned vehicles if the damage is caused by Universal's negligence, which it was not in this case. Therefore, the court held that regardless of who owned the trucks at the time of the loss, Universal owed no duty to Great West for damage to the trucks and was not liable for either equitable contributions or subrogation.

[P10]** Great West filed a motion to vacate and reconsider the trial court's order. On January 11, 2010, Judge Mikva, who had taken over the case, issued an order denying the motion. Judge Mikva found that Great West had no standing to bring a breach of contract action under Universal's policy because Great West seeks reimbursement for payments made under the policy issued to McLeod, under which Daimler Chrysler is an additional insured. The court stated that "[t]he coincidental fact that Daimler Chrysler is an additional insured under the Universal policy issued to Truck Centers is irrelevant to this claim and in no way entitles Daimler Chrysler to sue under Universal's policy **[*7]** for this particular loss." As to count II, Judge Mikva stated that neither McLeod nor Daimler Chrysler is an intended beneficiary under the Universal policy and that "[r]egardless of who owned the trucks at the time of the damage, McLeod and Daimler Chrysler would have to bring an action against Truck Centers for the loss, before Universal's policy would be implicated. Great West tried to circumvent this by alleging that Daimler Chrysler was an additional insured under this policy. However, *** this additional insured status did not extend to this loss." This timely appeal followed.

[P11]** II. ANALYSIS

[P12]** We review de novo a trial court's decision granting summary judgment. *Hartford Fire Insurance Co. v. Everest Indemnity Insurance Co.*, 369 Ill. App. 3d 757, 761, 861 N.E.2d 306, 308 Ill. Dec. 241 (2006). Summary judgment is appropriate where the pleadings, depositions, and admissions on file, together with any affidavits and exhibits, when viewed in the light most favorable to the nonmoving party, indicate that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West

2008). Where, as here, the parties file cross-motions for summary judgment, they concede **[*8]** the absence of a genuine issue of material fact and invite the court to decide the questions presented as a matter of law. *Steadfast Insurance Co. v. Caremark Rx, Inc.*, 359 Ill. App. 3d 749, 755, 835 N.E.2d 890, 296 Ill. Dec. 537 (2005).

[P13]** A threshold question on appeal is whether the circuit court erred in finding that Great West lacked standing to bring a breach of contract claim against Universal. Under Illinois law, lack of standing is an affirmative defense. A plaintiff need not allege facts establishing that he has standing to proceed. Rather, it is the defendant's burden to plead and prove lack of standing. *Chicago Teachers Union, Local 1 v. Board of Education of the City of Chicago*, 189 Ill. 2d 200, 206, 724 N.E.2d 914, 244 Ill. Dec. 26 (2000). Failure to raise standing as an affirmative defense in a timely fashion is a waiver of the issue. *Greer v. Illinois Housing Development Authority*, 122 Ill. 2d 462, 508, 524 N.E.2d 561, 120 Ill. Dec. 531 (1988). Here, defendant failed to raise the standing issue before the circuit court and therefore, waived the issue.

[P14]** Even if defendant had timely raised lack of standing as an issue, it has no merit in this case. Daimler Chrysler was an additional insured and had a security interest under the Universal policy. By paying Daimler Chrysler for **[*9]** its damages, Great West, as subrogee, acquired the rights of Daimler Chrysler, namely the right to sue Universal for its failure to pay under the Universal policy. *Dworak v. Tempel*, 17 Ill. 2d 181, 190, 161 N.E.2d 258 (1959). Standing requires some injury in fact to a legally cognizable interest. *Wexler v. Wirtz Corp*, 211 Ill. 2d 18, 22, 809 N.E.2d 1240, 284 Ill. Dec. 294 (2004). The claimed injury must be (1) distinct and palpable; (2) fairly traceable to defendant's actions; and (3) substantially likely to be prevented or redressed by the grant of the relief requested. *Id.* at 23. The three requirements for standing have been met here since there is a distinct and palpable injury, namely Great West's payment for damage to the trucks, which should have been paid for by Universal; that loss is traceable to Universal's refusal to pay; and the injury can be redressed by granting Great West the relief it requests. Since Daimler Chrysler had standing to sue Universal for its refusal to pay under the terms of the Universal policy, Great West acquired the same standing to sue. Therefore, the trial court erred in finding that plaintiff had no standing to bring the breach of contract claim and in granting Universal's motion for summary judgment **[*10]** as to Count I.

[P15]** Next, Great West argues that the trial court erred in granting summary judgment as to count II because the principles of equitable subrogation required that Universal reimburse Great West for its payment on the loss. The elements of an equitable subrogation claim are as follows: (1) the defendant carrier is primarily liable to the insured for a loss under a policy of insurance; (2) the plaintiff carrier is secondarily liable to the insured for the same *loss* under its policy; and (3) the plaintiff carrier discharged its liability to the insured and at the same time extinguished the liability of the defendant carrier. *Home Insurance Co. v. Cincinnati Insurance Co.*, 213 Ill. 2d 307, 323, 821 N.E.2d 269, 290 Ill. Dec. 218 (2004) (emphasis in original).

[P16]** Here, Great West asserts that all three elements are satisfied. First, Great West argues that Universal was liable for the loss because its policy offered primary coverage for "covered autos," which were "owned or acquired by" Truck Centers or autos in Truck Centers' "care, custody or control for safekeeping, storage, service or repair." Great West argues that at the time of the loss, the trucks were owned by Truck Centers, because title had not passed to McLeod **[*11]** and the trucks had not been delivered, but assert that even if they were not owned by Truck Centers, they were in the care, custody, or control of Truck Centers. Next, Great West argues that it was only secondarily liable to pay Daimler Chrysler because the "Other Insurance" provision of the policy limits primary coverage to situations where a covered auto is "used exclusively in your business as a 'trucker' and pursuant to operating rights granted to you by a public authority." Since the vehicles never left the Truck Centers' lot, Great West asserts, they were clearly not involved in the trucking business and could not be operating under public authority. Lastly, Great West argues that by paying for the damage to the trucks, it has discharged Universal's liability to Daimler Chrysler. Therefore, Great West argues, the

trial court erred in granting summary judgment as to count II. We agree

[P17]** First, we find that at the time of the loss, Truck Centers was the owner of the damaged vehicles. Ownership of a vehicle on a particular day for purposes of determining liability coverage is governed by the intention of the parties. *Country Mutual Ins. Co. v. Aetna Life & Casualty Insurance Co.*, 69 Ill. App. 3d 764, 767-68, 387 N.E.2d 1037, 26 Ill. Dec. 207 (1979). **[*12]** Here, Mark McLeod, president of McLeod Express, LLC, testified that in previous transactions with Trucking Centers, purchase of the trucks was not completed until the new vehicles were delivered to McLeod, the McLeod trade-in vehicles were returned to Trucking Centers, and Trucking Centers gave McLeod the keys to the vehicles. On the date of loss, title had not passed to McLeod, the new vehicles and keys had not been delivered to McLeod, and the trade-in vehicles were not delivered to Truck Centers. Therefore, based on all of these factors and past practices between the parties, Truck Centers not McLeod owned the trucks at the time of the loss.

[P18]** Even if an argument could be made that the vehicles were not owned by Truck Centers, they were acquired by and were clearly in the care, custody, and custody of Truck Centers on the date they were damaged. The vehicles had not been delivered to McLeod but instead were on the Truck Centers lot with the keys in Truck Centers' possession. Therefore, the vehicles were still owned by Truck Centers and in Truck Centers' care and custody at the time of the loss, making Universal primarily liable.

[P19]** Second, Universal is primarily liable for the **[*13]** loss suffered by Great West. Part 300 of the Universal policy states as follows:

> "**OTHER INSURANCE**-This insurance is primary over any other insurance except when the COVERED AUTO is in the care, custody, or control of any person or organization, other than YOU, a member of YOUR household, YOUR partner, director, stockholder, executive officer, or paid employee or a member of the household of any of them."

[P20]** The policy defines a "covered auto" as one that is "(1) owned by or acquired by YOU or (2) not owned by YOU but in YOUR care, custody, or control." Here, as discussed above, the vehicles were acquired by and in the care, custody, and control of Truck Centers at the time of the loss. Therefore, pursuant to the plain language of the policy, Universal has primary liability to any loss to covered autos, which in this case, includes the trucks that were damaged by the tornado.

[P21]** Further, Endorsement No. 001 to the Universal policy makes clear that coverage extended to parties who owned a security interest by providing as follows:

> "WE will pay you for any covered LOSS both to YOU and the Security Interest shown in the declarations, as interest may appear. Their interest is protected, to the extent **[*14]** that this insurance applies, unless LOSS results from YOUR wrongful conversion, embezzlement or secretion."

[P22]** Daimler Chrysler was an additional insured under the Universal policy as well as the holder of a security interest, and therefore, the Universal policy provided primary coverage to Daimler Chrysler. Conversely, the Great West policy only provided secondary liability to Daimler Chrysler. Under the terms of the Great West policy, McLeod was the named insured and Daimler Chrysler was a loss payee and an additional insured. The "Other Insurance" provision of the Great West policy limits primary coverage to situations where a covered auto is "used exclusively in your business as a 'trucker' and pursuant to operating rights granted to you by a

public authority." Since the trucks never left the Truck Centers' lot, they were clearly not involved in the trucking business and could not be operating under public authority.

[P23]** Lastly, it is clear that Great West discharged Universal's liability to Daimler Chrysler. Great West paid for the damage to the trucks caused by the tornado while they were in Truck Centers' lot, and Universal has made no claim in any pleading that Daimler Chrysler is alleging **[*15]** that they have not been paid. Contrary to the trial court's finding, there is no basis for treating Daimler Chrysler, a loss payee and a security interest holder, any differently than any other insured under the policy. Therefore, Great West has satisfied all of the elements of equitable subrogation claim.

[P24]** We also must address the trial court's finding that pursuant to Endorsement No. 008 and Part 300 of the Universal policy, Truck Centers is not liable to great West for equitable subrogation. Endorsement No. 008 provides as follows:

> "As it applies to CUSTOMER'S AUTOS, this Coverage Part [Part 300] is changed as follows:
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> The first paragraph of the Insuring Agreement is changed to read:
>
> INSURING AGREEMENT-WE will pay all sums YOU legally must pay as damages for LOSS to CUSTOMER'S AUTOS, except as excluded or as stated otherwise in the declarations."

[P25]** The trial court concluded that if the vehicles were owned by Truck Centers at the time of the loss, Great West had no insurable interest. Conversely, if they were owned by McLeod, they were "customer vehicles" and under Endorsement 008 and Part 300 of the policy, Universal could only be liable for damage to the truck caused by Truck Center's **[*16]** negligence. Because the loss here was caused by a tornado and not Truck Center's negligence, the trial court concluded that "Count II fails, regardless of who owned the trucks at the time of the loss."

[P26]** Great West contends that endorsement No. 008 is ambiguous and should not apply because it is not identified as an endorsement on the declarations page but rather is listed under the Perils and Deductibles schedule. Therefore, Great West asserts, this ambiguity should be construed against Universal and Endorsement No. 008 should not be applied. See *United Service Automobile Assn. v. Dare*, 357 Ill. App. 3d 955, 963, 830 N.E.2d 670, 294 Ill. Dec. 258 (2005) ("insurance policies are to be liberally construed in favor of coverage, and where an ambiguity exists in the insurance contract, it will be resolved in favor of the insured and against the insurer.").

[P27]** Further, Great West argues that a reasonable reading of the Universal policy is that "customer autos" is a subset of "covered autos," since the policy states that "customer autos" are a type of "covered auto." Therefore, Great West asserts, even if Endorsement 008 applies, it only applies to "customer autos" under the policy, not to "covered autos," which are covered for **[*17]** loss from any cause. We agree. As noted above, a covered auto is one that is "owned or acquired" by the insured or in the insured's "care, custody, or control." Regardless of which party actually owned the vehicles, they were acquired by and in the custody of Truck Centers at the time of the loss and are covered under the Universal policy. Therefore, the trial court erred in granting summary judgment to Universal as to Count II seeking equitable subrogation.

[P28]** III. CONCLUSION

[P29]** For the foregoing reasons, we reverse the circuit court's orders granting summary

judgment in favor of Universal and denying Great West's motion for summary judgment. Therefore, we find that Universal is primarily liable for the loss incurred and order Universal to pay Great West $139,139.94, the amount that Great West paid for the cost of repairs to the damaged trucks. We remand this matter to the circuit court with instructions to enter an order consistent with this opinion.

[P30]** Petition for rehearing granted; reversed and remanded with instructions.