

IN THE  
SUPREME COURT  
OF THE  
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

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**CENTURY INSURANCE COMPANY, LTD.,**  
Counter-Claimant-Appellee,

v.

**GUERRERO BROTHERS, INC., et al.,**  
Counter-Defendant-Appellant.

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**SUPREME COURT NO. 2008-SCC-0038-CIV**  
SUPERIOR COURT NO. 01-0478B

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**Cite as: 2010 MP 4**

Decided March 17, 2010

Vicente T. Salas, Saipan, Commonwealth of the Northern Mariana Islands, for Counter-Defendant-Appellant  
Kelley M. Butcher, Saipan, Commonwealth of the Northern Mariana Islands, for Counter-Claimant-Appellee  
BEFORE: MIGUEL S. DEMAPAN, Chief Justice; ALEXANDRO C. CASTRO, Associate Justice; and JOHN A. MANGLONA, Associate Justice

MANGLONA, J.:

¶ 1 The Commonwealth Development Authority (“CDA”) appeals the trial court’s judgment finding that Century Insurance Company (“CIC”), as a surety, is entitled to the remaining contract funds allocated for the construction of Tinian High School.<sup>1</sup> CDA also argues that the trial court erred in setting aside the jury’s award of damages to it for the Public School System’s (“PSS”) breach of the settlement agreement with Guerrero Brothers Incorporated (“GBI”) on the grounds that there was sufficient evidence to support the damage award. For the reasons set forth below, we find that CIC is entitled to all of the remaining contract funds pursuant to the doctrine of equitable subrogation. We further find that there was an insufficient evidentiary basis for the jury’s damage award to CDA for PSS’s breach of the settlement agreement. Accordingly, the trial court’s judgment is AFFIRMED.

## I

¶ 2 GBI and PSS contracted in 1993 for the construction of Tinian High School, and GBI contracted with CIC for the required payment and performance bonds. Under the terms of the bonds, CIC guaranteed that if GBI defaulted on the contract it would step in and finish the project. GBI also secured a loan and a revolving line of credit from the Bank of Saipan, and CDA guaranteed these sums. GBI commenced construction, but four years later PSS terminated GBI’s contract for default. According to the terms of the payment and performance bonds, CIC fulfilled its obligations by paying all of the laborers and suppliers and finishing the school. It subsequently sought \$867,867.16 in reimbursement from PSS for the sums it expended in completing construction.

¶ 3 Due to numerous disputes between PSS and GBI, the parties entered into a settlement agreement in 2001, which in pertinent part required PSS to pay GBI half a million dollars and interplead the remaining \$804,049.73 in contract funds<sup>2</sup> into a then on-going action by CDA against GBI.<sup>3</sup> In response to the settlement agreement, CIC filed suit against GBI and PSS seeking to recover, among other things, the \$867,867.16 it claimed PSS owed it for finishing the school. In its answer, PSS requested a declaratory judgment determining whether CIC, GBI, or CDA was entitled to the remaining funds allocated to the project, and counter-claimed to bring CDA into the lawsuit because it was potentially entitled to all of the remaining funds on the contract as a result of its assignment of GBI’s debt. PSS did

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<sup>1</sup> While this appeal is captioned *Century Insurance Company, Ltd. v. Guerrero Brothers, Inc., et al.*, the real parties in interest are the Commonwealth Development Authority as counter-defendant-appellant and the Public School System as counter-claimant-appellee.

<sup>2</sup> This was all of the remaining money allocated for the contract.

<sup>3</sup> At this time, CDA was suing GBI in Civil Action No. 97-0677 for GBI’s breach of its loan agreement with the Bank of Saipan. CDA, as the guarantor of that loan, had paid the Bank of Saipan ninety-percent of the loan’s value and was seeking compensation from GBI. The case was ultimately appealed to this Court, and we issued *Commonwealth Development Authority v. Guerrero Brothers, Inc.*, 2007 MP 32 (“CDA v. GBI”), upholding the trial court and finding that GBI was liable to CDA.

not claim the funds and sought to avoid exposing itself to liability, and furthermore, stated that it could not interplead the funds because the Department of the Interior (“DOI”) would not release them without a court order. Four months later, however, PSS transferred all of the remaining money allocated for the project to CIC in exchange for a total release from liability; PSS did not interplead the funds as it promised to do under the terms of the settlement agreement.

¶ 4 Several years later, in 2007, GBI and CDA filed cross and counter claims respectively against PSS.<sup>4</sup> CDA and GBI claimed that PSS breached its contract with GBI when it released the remaining funds to CIC and sought damages for this breach; CDA contended that as GBI’s lien creditor it was a third-party beneficiary to the settlement agreement and harmed by the breach of that agreement. A year later the trial court sua sponte bifurcated the trial, and a jury heard the case. After the close of the first phase, the jury found GBI liable to CIC for damages.<sup>5</sup> The second phase of the trial commenced with GBI and CDA claiming that PSS harmed their interests as a result of the breach. GBI filed a motion for partial summary judgment against PSS claiming that PSS breached the settlement agreement; the motion was granted. Even though PSS asserted that it was legally impossible for it to interplead the funds without a judgment, the trial court rejected this explanation because PSS transferred the funds to CIC without a judgment. In PSS’s motion for reconsideration, it argued it was able to transfer the funds to CIC because under principles of surety law it could request a drawn down to pay CIC because CIC finished the project; the motion for reconsideration was denied. PSS then filed a motion for judgment as a matter of law claiming that GBI suffered no harm from the breach of the settlement agreement, and the trial court granted the motion. PSS’s similar motion asserting that CDA was not harmed by the breach, however, was denied.

¶ 5 During the second part of the bifurcated trial, the jury returned the following verdict: (1) CIC did not breach its contract to provide interim payments to GBI; (2) CIC did not unreasonably delay in providing performance and payment bonds to GBI; (3) CIC tortiously interfered with the settlement agreement reached between GBI and PSS; (4) GBI suffered no harm as a result of the tortious interference; and (5) CDA was entitled to damages for PSS’s breach of the GBI-PSS settlement agreement in the amount of \$804,049.73. PSS subsequently filed a renewed motion for judgment as a matter of law.<sup>6</sup> In granting the motion, the trial court first found that pursuant to principles of equitable

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<sup>4</sup> The parties and the record are silent as to why nothing occurred in the case for five years. PSS did seek a dismissal for failure to prosecute, but this was rejected because GBI and CDA were not positioned as plaintiffs; CIC was the original plaintiff in the suit.

<sup>5</sup> The decision from the first phase of the trial was not appealed.

<sup>6</sup> The parties agree that PSS complied with all of the procedural requirements for obtaining judgment as a matter of law.

subrogation, CIC enjoyed priority over GBI, and consequently CDA, to any remaining contract funds, and second, that the parties presented insufficient evidence for a jury to find that CDA suffered harm as a result of PSS's breach of the settlement agreement. The final judgment, which incorporated both phases of the bifurcated trial, ordered: (1) damages in favor of CIC against GBI; (2) no damages to GBI from CIC on the claim of tortious interference with the contract; and, (3) the jury verdict awarding CDA damages for PSS's breach of the PSS-GBI settlement agreement be set aside.

## II

### A. Equitable Subrogation

¶ 6 The first issue is whether the trial court's judgment as a matter of law correctly held that pursuant to equitable subrogation, CIC was entitled to the remaining contract funds irrespective of CDA's claim. We review de novo a trial court's grant of a motion for judgment as a matter of law made pursuant to Commonwealth Rule of Civil Procedure 50(b). *Santos v. Nansay Micronesia, Inc.*, 4 NMI 155, 160 (1994); see *Mendiola v. Commonwealth Utils. Corp.*, 2005 MP 2 ¶ 26 (discussing de novo standard of review for denial of judgment notwithstanding the verdict).

¶ 7 CDA argues that since CIC failed to perfect its security interest pursuant to Article 9 of the Commonwealth Uniform Commercial Code, CDA enjoys a superior interest to the remaining contract funds. PSS argues that under the doctrine of equitable subrogation, surety CIC's interest is superior regardless of the UCC's recording requirements. There is no dispute that the arrangement between PSS, GBI, and CIC constitutes a surety relationship. The Court in *CDA v. GBI*, 2007 MP 32, discussed surety law in the Commonwealth, and applied the Restatement (Third) of Suretyship and Guaranty (1995) to the parties dispute. A suretyship is created when:

- (1) an obligee has recourse against the secondary obligor for the principal obligor's debt;
- (2) to the extent that the principal obligor's debt is satisfied (by either the principal or secondary obligor), the obligee is not entitled to continued performance by either the principal or secondary obligor on the same debt, and
- (3) the principal obligor, as opposed to the secondary obligor, ought to perform the underlying debt or bear the cost of performance.

*Id.* ¶ 14 (citing Restmt. § 1). PSS is the obligee as the project owner, GBI is the principal obligor as the contractor that agreed to complete the contract, and CIC is the secondary obligor as the company that issued the payment and performance bonds. CDA is GBI's lien creditor and not part of the other three party's surety relationship. When PSS terminated GBI's contract for default, CIC, as the secondary obligor, became liable for ensuring that the school was completed; it fulfilled its responsibilities.

¶ 8 A surety's business is unique, and for over a century a distinct body of law developed to protect the rights of sureties. See generally *Prairie State Bank v. United States*, 164 U.S. 227 (1896). The business of a surety "is not one of ordinary insurance, for the risk is not actuarially linked to premiums, nor is there a pooling of risks." *Nat'l Shawmut Bank of Boston v. New Amsterdam Cas. Co.*, 411 F.2d

843, 845 (1st Cir. 1969) (citing *Pearlman v. Reliance Ins. Co.*, 371 U.S. 132, 140 (1962)). It is also not “one of ordinary financing, for while the surety extends its credit to the owner [], as the ultimate guarantee that the job will be done, this is a credit that may either never have to be drawn upon or, if it is drawn upon at all, will in all likelihood be overdrawn.” *Id.* A surety’s security is not a “fee but a compound of its confidence in the contractor and the opportunity to prevent or minimize its ultimate loss by its right to salvage the debacle by its own performance.” *Id.* Unlike a bank that receives collateral to secure a loan, and can assess management and demand additional security when asked to make additional extensions, a surety receives very little from a contractor other than the right to finish the project. *Id.* When a borrower defaults, the bank takes its security, but a surety only takes on the additional responsibility of finishing the job. *Id.* Thus, a surety’s business is quite distinct from a lender and an insurer, because a surety is paid a fee for bonding a contractor, and if the contractor subsequently defaults, its only security is its right to be paid for the work it completes.

¶ 9 In *CDA v. GBI*, we found that CDA was a surety and discussed principles of equitable subrogation, but allowed CDA to recover on theories of reimbursement and restitution. 2007 MP 32 ¶ 15. Equitable subrogation was unavailable to CDA under the facts of that case because CDA did not totally satisfy GBI’s debt when it only paid the Bank of Saipan ninety-percent of what GBI owed; thus, the other two theories that a secondary obligor may recover under, reimbursement and restitution, were applicable. *Id.* ¶ 20 n.8. Restatement § 27(1) states that subrogation occurs when there is total satisfaction of the underlying obligation; in other words, there must be no outstanding performance owed to the obligee by either the primary or secondary obligor. In this case, unlike in *CDA v. GBI*, CIC, as the secondary obligor, completely discharged the underlying obligation by completing the project. There is no dispute that CIC completely fulfilled its responsibility. Therefore, CIC is entitled to equitable subrogation in this instance, but equitable subrogation was not appropriate in the earlier case because CDA did not purchase all of the outstanding debt GBI owed to the Bank of Saipan. *See Restmt. § 27 cmt. c.* Thus, there is no tension between our refusal to apply equitable subrogation in that case and our decision to rely on equitable subrogation today.

¶ 10 In *Pearlman*, the U.S. Supreme Court determined whether a surety or a bankruptcy trustee had superior rights to the remaining funds on a government construction contract. The bankruptcy code, in discussing priority of interests in bankruptcy, is silent concerning the rights of sureties. *Pearlman*, 371 U.S. at 135. In finding for the surety, the Court noted that “a surety who pays the debt of another is entitled to all the rights of the person he paid to enforce his right to be reimbursed. This rule, widely applied in this country [is] generally known as the right of subrogation . . . .” *Id.* at 137. The Court, in affirming *Prairie State Bank*, *supra*, found that the facts from both cases “followed an already established doctrine that a surety who completes a contract has an equitable right to indemnification out of a retained

fund,” and that it did not matter whether the surety sought compensation for finishing the project or paying the contractor’s debts. *Id.* at 138. The Court ruled that the government was entitled to pay the remaining unpaid laborers and material providers, and that the rest of the proceeds were the surety’s property. *Id.* at 141. While neither *Pearlman* nor *Prairie State Bank* speak to the UCC, both establish that equitable subrogation is created by law and is a firmly placed fixture of American jurisprudence.

¶ 11 In *National Shawmut Bank of Boston*, one of the seminal cases discussing a surety’s right to remaining contract proceeds in light of a secured creditor’s claim to the same funds, the court interpreted provisions of the Massachusetts UCC in a factually similar context. In that case, a general contractor entered into a construction contract with the U.S. Air Force, and applied for payment and performance bonds from the appellee surety. According to the contract’s terms, the contractor assigned earned money from the contract to the surety; the surety, however, failed to record the assignment. The contractor also obtained a line of credit from the appellant bank, and assigned money earned under the same contract as security; the bank, however, did record its assignment pursuant to the requirements of Article 9 of the UCC. The contractor defaulted, and the surety stepped in and satisfactorily finished the project. Both the surety and the bank sought to satisfy their respective claims from the remaining funds.

¶ 12 The court was squarely faced with the question of “to what extent, if any, does the doctrine of subrogation survive the passage of Article 9 of the UCC?” *National Shawmut*, 411 F.2d at 844. The court noted that equitable subrogation was an old concept rooted in equity. *Id.* The appellant bank, just like CDA, argued that the UCC was the sole law governing a surety’s right to reimbursement from a limited pool of funds claimed by multiple parties, and therefore, any attempt to rely upon general principles of surety law promulgated prior to the passage of the code was incorrect. In response, the court began with an analysis of M.G.L.A. § 1-103,<sup>7</sup> which states that “[u]nless displaced by the particular provisions of this chapter, the principles of law and equity . . . shall supplement its provisions.” *Id.* at 845. Thus, the court found there would be no tension between equitable subrogation and the UCC unless a particular provision of the code modified those rights. *Id.* Next, the court analyzed M.G.L.A. §§ 1-201(37), 9-102, 9-106, and 9-312 and concluded that none of those provisions conflicted with equitable subrogation, and resulted in a bank’s right to contract proceeds superseding a surety’s right to priority. *Id.* at 845-46. The court held that “[n]o provision of the Code (UCC) purports to affect the fundamental equitable doctrine of subrogation.” *Id.* at 847 (citing *French Lumber Co., Inc. v. Commercial Realty & Fin. Co., Inc.*, 195 N.E.2d 507, 510 (1964)). The court awarded the surety the remaining contract funds because the UCC’s recording requirement did not apply to sureties and the code did not supplant principles of equitable subrogation. *Id.* at 849.

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<sup>7</sup> This chapter of the Massachusetts code is its codification of the UCC.

¶ 13 Our 5 CMC § 1103 is almost identical to M.G.L.A. § 1-103, and states that “unless displaced by the particular provisions of this title, the principles of law and equity . . . shall supplement its provisions.” CDA cites to 5 CMC §§ 9301(1),<sup>8</sup> 9301(3),<sup>9</sup> 9312,<sup>10</sup> and 4208<sup>11</sup> in support of its position that our UCC’s provisions displace restatement and common law principles of surety law; however, none of those sections mention sureties. The sections discuss the rights of parties with unperfected security interests in the face of parties with security interests, and not surprisingly, a perfected security interest trumps an imperfect interest. These provisions do not support CDA’s position, however, because the common law and principles of equity supplement the UCC unless a provision displaces those rules. 5 CMC § 1103. No section of our UCC abridges or modifies the rights of sureties. Thus, under our UCC and the principles enunciated in *National Shawmut*, a creditor who perfected its security interest pursuant to the UCC does not enjoy priority over a surety to remaining contract proceeds.

¶ 14 Other jurisdictions also consistently find that the UCC does not abrogate a surety’s right to equitable subrogation in the face of a creditor’s perfected security interest. In *Mickelson v. Aetna Casualty & Surety Co.*, 452 F.2d 1219, 1221 (8th Cir. 1971), the issue was whether a claim of equitable subrogation was a security interest for the purposes of the UCC. The court first recognized that the UCC Editorial Board rejected an attempt to subordinate a surety’s interest to that of a bank.<sup>12</sup> Since equitable

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<sup>8</sup> 5 CMC § 9301, titled “Persons Who Take Priority Over Unperfected Security Interests; Rights of Lien Creditor,” and section (1) lists the interests that are superior to an unperfected security interest; equitable subrogation is not discussed.

<sup>9</sup> 5 CMC § 9301(3) defines a lien creditor; there is no dispute that CDA is a lien creditor.

<sup>10</sup> 5 CMC § 9312, titled “Priorities Among Conflicting Security Interests in the Same Collateral,” does not mention sureties or equitable subrogation rights.

<sup>11</sup> 5 CMC § 4208, titled “Security Interest of Collecting Bank in Items, Accompanying Documents and Proceedings,” discusses a bank’s rights in various security interests; a surety’s right to equitable subrogation is not part of this section.

<sup>12</sup> In footnotes five and six the court discussed a proposed provision to the UCC that would have established the priority of banks with a perfected security interest to sureties. The provision, considered as § 9-312(7), provided:

A security interest which secures an obligation to reimburse a surety . . . secondarily obligated to complete performance is subordinate to a later security interest given to a secured party who makes a new advance, incurs a new obligation, releases a perfected security interest, or gives other new value to enable the debtor to perform the obligation for which the earlier secured party is liable.

Recommendations of the Editorial Board for Changes in the Text and Comments of the Uniform Commercial Code, Official Draft, Text and Comments Edition, pp. 24-25, April 30, 1953:

The Surety Companies' representative convincingly took the position that subsection (7) as it stands is a complete reversal of the case law not only of the

subrogation is a right created by law, and not by the intent of the parties as expressed in a contract as required by the UCC, a security interest created by contract does not supersede an equitable lien. *Id.* In *United States Fidelity and Guarantee Co. v. APAC-Kansas, Inc.*, 151 F.Supp. 2d 1297, 1299 (D. Kan. 2001), the court explained that a “surety’s right of equitable subrogation arises by operation of law, rather than by the consent of the parties.” It found no authority indicating that a secured creditor’s interest would trump a surety’s right to remaining contract funds. *Id.* It also quoted “Professor Barkley Clark, in his treatise, *The Law of Secured Transactions Under the Uniform Commercial Code, Revised Edition 1993*,” finding that “[n]ot a single reported decision gives priority to the Article 9 financier in its battle with the surety for the retainage fund. It makes no difference whether the surety files a financing statement or if the surety bonds are executed before the financier’s security interest is perfected.” *Id.* at 1300-01. Thus, the bank’s right to the remaining funds does not attach until the surety receives payment in full and satisfies all of the financial obligations it is subject to, and only then, is it possible for the remaining funds to go to the contractor’s creditors.<sup>13</sup> *Id.*

¶ 15 The state courts are in agreement with the federal courts. In *Mid-Continent Casualty Co. v. First National Bank & Trust Co.*, 531 P.2d 1370 (Okla. 1975), the performing surety was entitled to the remaining contract funds through the right of equitable subrogation in the face of the secured creditor’s claim. The Oklahoma UCC did “not abrogate, modify, affect or abridge the equitable doctrine of subrogation, and [the] [s]urety was not required to file under the Code to preserve its priority under the

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Supreme Court of the United States but also of the highest courts of most of the states. (Citations omitted).

Under the cited case law, the surety's rights come first as to the funds owing by the owner unless the surety has subordinated its right to the bank. Subsection (7) of the Code as written would reverse the situation and give the bank priority in all cases.

Under existing case law, both the contractor and the bank are in a position to bargain with the surety which may or may not be willing to subordinate its claim. Under subsection (7) as written in the Code the surety company would have nothing to bargain about.

<sup>13</sup> See *General Ins. Co. of Am. v. Mezzacappa Bros., Inc.*, 110 Fed. Appx. 183, 184 (2nd Cir. 2004) (“a surety’s rights in the property of its insured are secured by virtue of equitable subrogation, rather than by virtue of a security interest within the meaning of Article 9 of the Uniform Commercial Code”); *In re Alcon Demolition*, 204 B.R. 440, 447 (3rd Cir. Bankr. D. N.J. 1997) (“equitable subrogation rights are superior in priority to perfected bank liens, even in the absence of UCC filing”); *State Bank & Trust Co. v. Insurance Co.*, 132 F.3d 203, 206 (5th Cir. 1997) (“The completing surety’s right of subrogation arises in equity, as an outgrowth of the suretyship relationship itself; it is not dependent on assignment, lien, or contract. As such, the surety’s right of subrogation is not a security interest and thus is not subject to the filing requirements of UCC Article 9.”); *In re Alliance Properties, Inc.*, 104 B.R. 306, 312 (9th Cir. Bankr. S.D. Cal. 1989); *In re Ward Land Clearing & Drainage, Inc.*, 73 B.R. 313, 315 (11th Cir. Bankr. N.D. Fla. 1987) (“The equitable principle of suretyship is that when one, pursuant to obligation – not a volunteer, fulfills the duties of another, he is entitled to be subrogated to the rights of that other against third persons.”); *In re Don’s Electric, Inc.*, 65 B.R. 399, 404 (7th Cir. Bankr. W.D. Wis. 1986) (“Commercial reality dictates that the surety’s subrogation rights not be subject to Article 9 filing requirements.”)



equitable right of subrogation.” *Id.* at 1373. In *American Oil Co. v. L. A. Davidson, Inc.*, 290 N.W.2d 144 (Mich. Ct. App. 1980), the Michigan UCC did not abridge the subrogation rights of a surety. Subrogation rights, while often growing out of contracts, are not contract rights because it is a right created by law to avoid an injustice; therefore, in relation to the UCC, “subrogation rights are not ‘security interests’ within the meaning of Article 9.” *Id.* at 146. Furthermore, during the drafting phase of the UCC, surety companies and banks fought over their respective rights concerning who enjoyed priority to a limited fund; the surety companies won. *Id.* See *Transamerica Ins. Co. v. Barnett Bank N.A.*, 540 So.2d 113, 116 (Fla. 1989) (finding that the well-settled rules of the UCC establish a surety’s priority); see also *Jacobs v. Northeastern Corp.*, 206 A.2d 49 (Pa. 1965).

¶ 16 CDA also claims that CIC was not entitled to the remaining contract proceeds because it failed to enter into an indemnity agreement with GBI. CDA points out that “CIC’s trial Exhibit L, the Application for Performance and Payment Bonds and Indemnity Agreement . . . was [neither] signed by GBI,” nor dated. Appellant’s Opening Brief at 5. CDA also takes issue with trial Exhibit F, an agreement entered into between CIC and GBI in 1996, which purported to assign all rights to proceeds on progress payments to CIC. *Id.* CDA interprets these documents as evidence that GBI did not assign its contract rights to CIC before it entered into its contractual relationship with GBI. As stated above, a surety’s right to contract proceeds is superior to a secured creditor’s right because equity creates a surety’s right for the purpose of accomplishing justice. *Pearlman*, 371 U.S. at 136 n.12. Additionally, a surety’s right always relates back in time to when the parties entered into the surety contract. *United States Fidelity & Guar. Co. v. First State Bank*, 494 P.2d 1149, 1157 (Kan. 1972). The trial court found that CIC’s failure to secure signatures on behalf of GBI, and instead obtain signatures from five Guerrero family members was sufficient because CIC relied upon the agreement. We do not address this finding because CIC did not need an assignment agreement with GBI because as a surety who stepped into GBI’s shoes when it defaulted on the contract, CIC became entitled to all remaining contract funds as a matter of law. Therefore, any alleged irregularities or timing issues with when the parties entered into the agreements is inconsequential.

¶ 17 Additionally, in *Alaska State Bank v. General Ins. Co.*, 579 P.2d 1362, 1371-72 (Alaska 1978), the concurring opinion discussed the difference between a surety’s rights to contract proceeds as a matter of equitable subrogation versus its assignments rights in the context of the UCC. The concurrence concluded that if a surety’s rights are grounded solely in an assignment then the UCC’s recording requirements control, but if a surety also claims the funds under equitable subrogation, then equitable subrogation trumps the UCC. Since CIC claimed the remaining funds under a theory of equitable subrogation, CIC enjoys a superior claim. In light of all of the above authority, the Commonwealth’s UCC does not modify, affect, or abridge a surety’s right to equitable subrogation in the face of a lender

with a perfected security interest, and therefore, we find that the trial court properly granted PSS's motion for judgment as a matter of law because the doctrine of equitable subrogation entitles CIC to all of the remaining contract proceeds.

*B. PSS's Failure to Interplead and the Damage Award*

¶ 18 The second issue is whether it was reversible error to set aside the jury's award of damages to CDA for PSS's breach of the settlement agreement. The review of a trial court's grant of a motion for judgment as a matter of law pursuant to Commonwealth Rule of Civil Procedure 50(b) is de novo. *Santos v. Nansay Micronesia, Inc.*, 4 NMI 155, 160 (1994). "Judgment as a matter of law is appropriate when a party fails to establish a legally sufficient evidentiary basis for a reasonable jury to find for that party," and it "is not proper unless all the evidence points one way and is susceptible to no reasonable inferences sustaining the position of the non-moving party." *Anderson v. Indep. Sch. Dist.*, 357 F.3d 806, 809 (8th Cir. 2004) (citations omitted); see also *Mendiola v. Commonwealth Utils. Corp.*, 2005 MP 2 ¶ 26 (discussing standard of review for denial of judgment notwithstanding the verdict).

¶ 19 CDA argues that since PSS failed to interplead the remaining contract funds it suffered harm as a third-party beneficiary to the GBI-PSS settlement agreement because a court did not determine its rights to the remaining funds.<sup>14</sup> As discussed above, CIC is entitled to all of the remaining contract funds under the principle of equitable subrogation; however, if GBI is entitled to some portion of those funds irrespective of CIC's subrogation rights, then CDA may be entitled to damages as a third-party beneficiary of the PSS-GBI settlement agreement. Under no circumstances, however, is GBI entitled to earned progress payments because when a contractor defaults it forfeits those rights. *National Shawmut*, 411 F.2d at 848. In order for CDA to recover for this breach, either it or GBI must present evidence demonstrating GBI's entitlement to some of the \$804,046.73; bald assertions that PSS owed GBI money for work completed and that it was unable to prove its claim because PSS failed to interplead is insufficient.

¶ 20 In setting aside the jury's verdict awarding CDA damages, the trial court found that the breach did not harm CDA because the parties failed to present any evidence at trial demonstrating GBI's right to any portion of the remaining contract funds; without a showing of harm, CDA could not recover damages. Appellee's Excerpts of Record at 61. The court acknowledged that CDA's status as a lien creditor qualified it as a third-party beneficiary per the Restatement (Second) of Contracts § 304 (1981). The order then discussed Restatement § 344, and the three theories upon which a party can recover: (1) expectation interests, (2) reliance interests, and (3) restitution interests. CDA was not entitled to expectation damages because neither it nor GBI presented any evidence at trial indicating that GBI would receive any of the

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<sup>14</sup> The trial court granted GBI's motion for partial summary judgment, which asserted that PSS breached the settlement agreement when it transferred the remaining funds to CIC instead of interpleading them into the civil action between CDA and GBI. Appellant's Excerpts of Record at 2-4.

interpleaded funds, and therefore, if the agreement was followed, CDA would still not receive any money. Additionally, under principles of equitable subrogation CIC was entitled to all of the remaining funds because what remained was less than what CIC spent to finish the school. Second, CDA failed to present any evidence that it detrimentally relied upon the GBI-PSS agreement; CDA's contractual relationship arose before the settlement agreement, and there was no evidence presented that CDA changed its position in reliance on the agreement. Finally, CDA was not entitled to restitution damages because it sought damages for GBI's accrued interest on unpaid debts, which was GBI's liability and not PSS's fault. At trial, neither GBI nor CDA presented evidence indicating that GBI suffered harmed from the breach, and therefore, CDA was not entitled to damages as a third-party beneficiary.

¶ 21 The record submitted for this appeal contains no evidence demonstrating that GBI was entitled to any portion of the funds, and CDA fails to direct the Court to any evidence to the contrary. CDA only makes bald assertions that as a third-party beneficiary to the GBI-PSS agreement it has a right to have the funds interpleaded to determine whether PSS owes GBI earned contract proceeds. If GBI possessed evidence that it would have presented during the interpleader action that it was entitled to some portion of the funds then that evidence should have been presented at trial; CDA cannot now claim that it is entitled to a damage award because GBI was unable to prove that it was entitled to some of the remaining contract proceeds because the funds were never interpleaded. Without evidence that GBI was entitled to some of the money, CDA cannot recover damages for PSS's failure to interplead the funds. Furthermore, at oral argument, CDA claimed that the settlement agreement superseded principles of equitable subrogation; this is incorrect because equitable subrogation arises as a matter of equity irrespective of contract rights. *Pearlman*, 371 U.S. at 136 n.12. PSS's agreement to interplead the funds cannot abridge CIC's equitable subrogation rights. Thus, any argument that the settlement agreement abridged CIC's equitable subrogation rights fails; the doctrine arises as a matter of equity irrespective of contract rights.

¶ 22 CDA also asserts that *National Shawmut* states that the surety steps into the shoes of all of the parties, including the lienholders and obligor, and therefore, it must satisfy the lienholders demands for payment before it can subrogate its claim. CDA misconstrues *National Shawmut* because the opinion holds that the surety steps into "the shoes of laborers and material men who have been paid by the surety – who may have had liens." *Id.* at 845. The case clearly does not stand for the proposition that the surety must pay the lien creditor before it can make its own claim to the remaining contract proceeds. As a matter of law, CDA's right to any remaining funds as GBI's creditor comes after CIC recuperates its costs. *Id.* at 848. While this Court respects the jury's role in our judicial process, judgment as a matter of law was appropriate in this instance because CDA failed to establish a legally sufficient evidentiary basis for the jury to find that it was entitled to damages for PSS's failure to interplead the remaining contract funds.

### III

¶ 23 For the foregoing reasons, we hold that a surety's right of equitable subrogation supersedes a secured creditor's right to remaining contract funds, and also, that there was an insufficient evidentiary basis to award CDA damages for PSS's breach of the settlement agreement. Therefore, we AFFIRM the trial court's judgment.

SO ORDERED this 17th day of March, 2010.

/s/  
MIGUEL S. DEMAPAN  
Chief Justice

/s/  
ALEXANDRO C. CASTRO  
Associate Justice

/s/  
JOHN A. MANGLONA  
Associate Justice