No. 1-15-1843

In the
Appellate Court of Illinois
First Judicial District

GK DEVELOPMENT, INC., an Illinois corporation, and COLLEGE SQUARE MALL DEVELOPMENT, LLC, a Delaware limited liability company,

Plaintiffs-Appellees,

v.

IOWA MALL FINANCING CORP., a Delaware corporation, COLLEGE SQUARE MALL ASSOCIATES, LLC, a Delaware limited liability company, and CHICAGO TITLE AND TRUST COMPANY, an Illinois corporation, as escrowee,

Defendants-Appellants.

On Appeal from the Circuit Court of Cook County, Illinois,
County Department, Chancery Division, Case Number 14 CH 15065,
Hon. Neil H. Cohen, Judge Presiding

RESPONSE BRIEF OF PLAINTIFFS-APPELLEES GK DEVELOPMENT, INC. and COLLEGE SQUARE MALL DEVELOPMENT, LLC

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ORAL ARGUMENT REQUESTED

POINTS & AUTHORITIES

NATURE OF THE CASE

This declaratory judgment and specific performance action (case number 14 CH 15065) was brought by Plaintiffs-Appellees GK Development, Inc. and College Square Mall Development, LLC (collectively, "Buyers") against Defendants-Appellants Iowa Malls Financing Corp. and College Square Mall Associates, LLC (collectively, "Sellers") to recover certain funds held in escrow by Chicago Title and Trust Company ("Chicago Title") as part of the sale of the College Square Mall ("Mall"), located in Cedar Falls, Iowa.[1] On May 15, 2015, the Circuit Court of Cook County dismissed case number 14 CH 15065 with prejudice, finding that it lacked jurisdiction to consider the claims raised therein because they were beyond the scope of this Court's prior remand in a related appeal. Buyers filed a notice of appeal from that decision (appeal number 1-15-1584) and requested that the circuit court stay the litigation in the remanded matters (case numbers 06 CH 3427 and 06 CH 3586) pending the disposition of Buyers' appeal. The circuit court granted the stay over Sellers' objection, and instead of filing a motion in Buyers' appeal to lift the stay, Sellers filed this wholly separate appeal. No jury verdict is at issue. The question raised herein solely concerns the appropriateness of the circuit court's stay.

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[1] Buyers include a nature of the case, jurisdictional statement, and statement of facts section because Sellers' opening brief contains numerous inaccuracies and violations of Supreme Court Rules 341 and 342, the latter including, *inter alia*: (1) violation of Rule 341(a)'s 1½ inch margin requirement; (2) violation of Rule 341(h)(4)(ii)'s requirement that the jurisdictional section contain appropriate record citations; (3) violation of Rule 341(h)(6)'s requirement that the facts be stated accurately and with appropriate reference to the pages of the record; and (4) violation of Rule 342(a)'s requirement that "any pleadings or other materials from the record which are the basis of the appeal or pertinent to it" be included in appellant's appendix (Buyers' motion to stay, which is the primary subject of this appeal, is not included in Sellers' record or appendix).

ISSUE PRESENTED FOR REVIEW

Whether the circuit court acted within its discretion to stay Buyers' and Sellers' claims in case numbers 06 CH 3427 and 06 CH 3586 pending Buyers' appeal of the circuit court's dismissal of case number 14 CH 15065.

JURISDICTION

Buyers filed their claims for declaratory judgment and specific performance in case number 14 CH 15065 on September 14, 2014. C145.[2] On May 15, 2015, the Circuit Court of Cook County dismissed those claims with prejudice. C387. On June 1, 2015, Buyers timely filed their notice of appeal (appeal number 1-15-1584), seeking reversal of the May 15, 2015 order and reinstatement of their claims. BA1.[3] On June 1, 2015, Buyers also filed a motion to stay the litigation in case numbers 06 CH 3427 and 06 CH 3586 pending the appeal of the circuit court's decision in case number 14 CH 15065, which request was subsequently granted on June 9, 2015. C393; BA6; BSR__. Sellers assert in their jurisdictional statement that the circuit court stayed case number 06 CH 26662. Sellers' Br. at 3. They are mistaken. The stay order does not reference case number 06 CH 26662. C393. The stay order references only case numbers 06 CH 3427, 06 CH 3586 and 14 CH 15065. This Court has jurisdiction to hear this appeal pursuant to Illinois Supreme Court Rule 307 (*TIG Ins. Co v. Canel*, 389 Ill.App.3d 366, 371 (1st Dist. 2009)).

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[2] For ease of reference, Buyers' appendix is cited herein as "BA__," the Record on Appeal is cited as "C__," and the Supplement Record on Appeal is cited as "BSR__." As of the date of filing, Buyers' motion to supplement the record remains pending.

[3] Buyers request that the Court take judicial notice of their notice of appeal in appeal number 1-15-1584, which is currently pending before this Court. *See Muller v. Zollar*, 267 Ill.App.3d 339, 341 (3rd Dist. 1994) ("[j]udicial notice is proper where the document in question is part of the public record, and where such notice will aid in the efficient disposition of a case").

STATEMENT OF FACTS

The facts underlying this case were largely laid out in this Court's December 19, 2013 opinion addressing two related lawsuits between the parties. *GK Development, Inc. v. Iowa Malls Financing Corporation*, 2013 IL App (1st) 112802. They have more recently been laid out in Buyers' appeal, appeal number 1-15-1584. In order to avoid unnecessary duplication, the following background discussion relates only those facts immediately relevant to this appeal, including those not covered in the prior appeal, and repeating only those additional facts necessary to provide context to the instant dispute.

I. The Underlying Sales Agreements between Buyers and Sellers and the Creation of the Hy-Vee Holdback.

This dispute stems from the sale of the Mall by Sellers to Buyers in 2004. Sellers began marketing the Mall for sale in June 2004, by preparing and circulating an offering memorandum in which they predicted that an existing anchor tenant, Hy-Vee grocery store, would relocate to a larger space within the Mall that became available with the recent departure of a WalMart store. *GK Development*, 2013 IL App (1st) 112802, ¶ 9. If Hy-Vee relocated to the larger space, it would significantly increase the value of its lease and thus the value of the Mall, the value of which was dictated by its rental income.

On September 17, 2004, Buyers and Sellers entered into a Real Estate Sale Contract ("Purchase Agreement") for the purchase of the Mall and three other shopping centers for $117,000,000, and set a closing date of December 17, 2004. *Id.* at ¶¶ 9-12. On November 10, 2004, Buyers and Sellers entered into a Third Amendment to Real Estate Sale Contract ("Third Amendment"). *Id.* The Third Amendment provided, in pertinent part, for the creation of the "Hy-Vee Holdback," a $4.3 million holdback meant to account for the still uncertain nature of HyVee's relocation within the Mall and its effect

on the value of the Mall. *Id.* at ¶¶ 12-15. The Hy-Vee Holdback generally provided for certain deadlines that had to be complied with by the end of October 2005 in order for Sellers to recover the escrowed funds, otherwise those funds would revert back to Buyers. *Id.*

On December 15, 2004, the parties entered into a Deed and Money Escrow Agreement ("DME"), in which they agreed, *inter alia*, that Buyers would perform certain improvements to the parking lot serving the former WalMart space. C147-48. Sellers agreed in the DME to later reimburse Buyers 105% of those construction costs out of the Hy-Vee Holdback, plus interest, with the remainder to go to Sellers if they complied with the other requirements of the holdback agreement. *Id.*

The closing on the sale of the Mall occurred on December 17, 2004. *GK Development*, 2013 IL App (1st) 112802, ¶ 20. Although Hy-Vee eventually executed the new lease and took possession of the larger space, all the conditions of the holdback were not met until January 27, 2006, several months past the October 2005 deadline. *Id.* at ¶ 27, 38. A dispute thereafter arose concerning entitlement to the Hy-Vee Holdback. Buyers claimed that they were entitled to the entire holdback as liquidated damages for Sellers' failure to timely fulfill all their contractual obligations. *Id.* at ¶ 29. Sellers, in turn, claimed that they had met all the contractual obligations and were entitled to the entire holdback, less only $200,000 for the parking lot construction. *Id.* at ¶ 30.

II. The Prior Lawsuits between Buyers and Sellers over Entitlement to the Hy-Vee Holdback, the Trial Court's Judgment in Buyers' Favor, and This Court's Partial Reversal Thereof.

On February 17, 2006, Buyers filed suit against Sellers in case number 06 CH 3427, bringing claims for declaratory judgment and specific performance, and seeking

the recovery of the entire Hy-Vee Holdback. *Id.* at ¶ 29. On February 22, 2006, Sellers filed a countersuit against Buyers in case number 06 CH 3586, bringing claims for declaratory judgment and unjust enrichment, also seeking the recovery of the Hy-Vee Holdback. *Id.* at ¶ 30. Case numbers 06 CH 3427 and 06 CH 3586 were subsequently consolidated. *Id.*

While that dispute was ongoing, Buyers completed construction on the Hy-Vee parking lot in accordance with the DME, spending $530,294.86 on that work. C145-54; *GK Development*, 2013 IL App (1st) 112802, ¶ 32. Buyers then sought the release of at least that amount from the Hy-Vee Holdback in accordance with the terms of the Third Amendment and DME. On November 14, 2006, Sellers directed Chicago Title not to release those funds. C149-50. After Sellers refused to authorize the release of the parking lot funds from the Hy-Vee Holdback, Buyers filed a related lawsuit against Sellers in case number 06 CH 26662, seeking recovery of the money they spent repairing the parking lot. C145. That case was transferred as related to the same docket as case numbers 06 CH 3427 and 06 CH 3586. Although Sellers assert that all three cases were consolidated, they fail to cite any consolidation order in the record showing that case number 06 CH 26662 was consolidated with case numbers 06 CH 3427 and 06 CH 3586. *See* Sellers' Br. 6. Sellers cite only to the third paragraph of this Court's prior opinion, which states that case numbers 06 CH 3427 and 06 CH 3586 were consolidated, and that the parties' subsequent appeals were consolidated. *See GK Development*, 2013 IL App (1st) 112802, ¶ 3. The trial court's order of August 24, 2011, *infra*, expressly lists case number 06 CH 26662 as a "[r]elated" case. C221.

Following a three-week bench trial before Judge Carolyn Quinn, the trial court concluded that Sellers had breached the Third Amendment and DME by failing to comply with the October 2005 deadline. C221-45. Judge Quinn further found that the Hy-Vee Holdback constituted a valid and enforceable liquidated damages provision. *Id.* Judge Quinn accordingly entered judgment for Buyers in case number 06 CH 3427, rejected all of Sellers' claims in case number 06 CH 3586, and awarded Buyers the entire Hy-Vee Holdback. C245. The court did not reach the merits of Buyers' claims in case number 06 CH 26662 relating to their parking lot claims, stating that "[h]aving found that Buyer is entitled to the Hy Vee Holdback in its entirety, it is unnecessary for the Court to determine whether Buyer may recover a portion of the holdback related to the construction of the mall parking lot." *Id.* "Case Number 06 CH 26662," said the court "is dismissed as moot." *Id.* Judge Quinn subsequently denied Buyers' claim to postjudgment interest. C248.

Sellers appealed Judge Quinn's decision in case numbers 06 CH 3427 and 06 CH 3586 to this Court. C246. In doing so, Sellers referenced case number 06 CH 26662 on their notice of appeal as a "related" case. *Id.* Buyers separately appealed in case numbers 06 CH 3427 and 06 CH 3586, contesting only the trial court's denial of postjudgment interest. C248-49. Although Sellers assert that Buyers never apprised this Court in the prior appeal that they might be entitled to part of the Hy-Vee Holdback for the parking lot construction if Judge Quinn's decision were reversed (Sellers' Br. at 8), they are mistaken. Buyers alerted the Court of that possibility, but for the reasons stated below

were barred from pursuing that claim at that time because this Court lacked jurisdiction to consider it. BA59.[4]

In its December 19, 2013 opinion, this Court found that the Hy-Vee Holdback was not an enforceable liquidated damages provision, as Judge Quinn had found, but rather functioned as an unenforceable penalty to secure Sellers' performance. *GK Development*, 2013 IL App (1st) 112802, ¶ 75-76. The Court affirmed the finding that Sellers breached the DME, reversed the finding that the holdback was a valid liquidated damages provision, and remanded the matter to the circuit court, directing it to afford Buyers an opportunity to prove actual damages resulting from Sellers' breach and to hear Sellers' claim to attorney fees. *Id.* ¶¶ 76-79, 83-85.

In so remanding, the Court did not address Buyers' parking lot claims in case number 06 CH 26662, which was neither listed as a case before the Court in the opinion's caption nor referenced in the body of the opinion as being a claim before the Court. Further, the parties did not brief the merits of those claims on appeal, and the Court only acknowledged them in its background discussion of the case, mentioning that they were dismissed by Judge Quinn as moot "because any damages owed to Buyer[s] for the parking lot construction would have been paid out of the Hy-Vee Holdback." *Id.* ¶ 38. Buyers thereafter filed a petition for leave to appeal to the Illinois Supreme Court, which was denied on May 24, 2014. The appellate court's mandate issued on July 10, 2014.

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[4] Buyers request that the Court take judicial notice of their Combined Response Brief in appeal numbers 1-11-2802 and 1-12-0432 (consol.). *See Muller v. Zollar*, 267 Ill.App.3d 339, 341 (3rd Dist. 1994) ("[j]udicial notice is proper where the document in question is part of the public record, and where such notice will aid in the efficient disposition of a case").

III. Buyers' Refile Their Parking Lot Claims after the Appellate Court's Remand Removes the Reason Why Those Claims Had Been Mooted.

On September 17, 2014, following this Court's partial reversal of the judgment in Buyers' favor, and with their parking lot claims no longer mooted by the award of the entire Hy-Vee Holdback, Buyers filed case number 14 CH 15065, seeking a declaration that they had satisfied their contractual obligations with regard to the parking lot and were thus entitled to $530,294.86 from the Hy-Vee Holdback, plus interest, fees, and costs. C145. Buyers also brought a claim for specific performance, seeking the release of the same amount from the Hy-Vee Holdback. *Id.* On Buyers' motion, the case was transferred to Judge Neil Cohen, the same docket hearing the remanded case numbers 06 CH 3427 and 06 CH 3586, but not consolidated therewith.

In describing the proceedings below in their statement of facts, Sellers assert that in this case "Buyer[s] took the position, in the Remanded Action [*i.e.*, case number 06 CH 3427 and 06 CH 3586], that its claim in a previously dismissed civil action (the 'Parking Lot Claim') should be relitigated as part of the Remanded Action." Sellers' Br. 1. Sellers further assert that "Buyer[s] . . . asked the trial court to re-litigate Buyer's Parking Lot Claim as part of, and concurrently with the Remanded Action." Sellers' Br. 9; *see also* Sellers' Br. 10 ("Buyer asserted that the Claim should be re-litigated in the trial court as part of the Remanded Action"). Sellers are again mistaken and provide no citation for these assertions. The record is clear. Buyers did not argue that their parking lot claims were part of the remanded action. As explained below, throughout this action Buyers' position has been that the parking lot claims were not and could not have been before this Court on the prior appeal and therefore were not part of the remand. *See e.g.*, C76 (Buyers' "Memorandum Regarding Jurisdiction on Remand" (Oct. 10, 2014)); C157

(Buyers' "Reply in Support of Their Memorandum Regarding Jurisdiction on Remand" (Nov. 24, 2014)). Although Buyers refiled case number 06 CH 26662 as case number 14 CH 15065 out of an abundance of caution, they never argued their parking lot claims were part of the remanded action.

Judge Cohen subsequently ordered briefing on whether he had jurisdiction to consider Buyers' parking lot claims in light of the scope of the appellate court's remand. The contents of that briefing are not immediately relevant to this appeal, as most of the arguments made therein were repeated in the subsequent briefing on Sellers' motion to dismiss (discussed below), and it is the circuit court's stay order following its grant of Sellers' motion to dismiss that is the subject of this appeal.

IV. Sellers Move to Dismiss Buyers' Parking Lot Claims and the Circuit Court Grants that Motion with Prejudice.

In their amended motion to dismiss, Sellers argued, as they do here, that Buyers' parking lot declaratory judgment and specific performance claims in case number 14 CH 15065 should be dismissed because they did not sound in equity. Sellers also argued that the appellate court's remand of case numbers 06 CH 3427 and 06 CH 3586 limited the scope of the circuit court's jurisdiction, even in case number 14 CH 15065. *Id.* In this regard, Sellers accused Buyers of attempting to "circumvent" the limited scope of the remand by refilling their parking lot claims. *Id.* Sellers further argued that the parking lot claims were barred by the rule of waiver, the doctrine of laches, the rule against claim-splitting, and the law-of-the-case. *Id.*

Buyers responded that Sellers' arguments were odd because Sellers' parallel claims in case number 06 CH 3586 were brought in equity and tried before a judge in chancery, because Sellers had previously argued Buyers were not entitled to post-

judgment interest after the first trial because Buyers' claims sounded in equity, and because Buyers had always maintained that their declaratory judgment claim was not equitable, but rather *sui generis*—a point Sellers previously contested. Buyers argued that, regardless, their specific performance claim was not only equitable, but also a regularly used device in real estate cases where an escrowee is holding disputed funds. Moreover, dividing the claims between two different courts would be an inefficient use of judicial resources.

Buyers further argued that the appellate court remand did not control the consideration of their parking lot claims because, as a matter of law, the parking lot dispute was not and could not have been part of the prior appeal. The parking lot claims were dismissed by Judge Quinn as moot because Buyers were awarded the entire Hy-Vee Holdback and thus had no other relief to gain from their secondary parking lot claims, in which they sought only a portion of the Hy-Vee Holdback, the same funds they had already been awarded. Buyers were prohibited from appealing the dismissal of their parking lot claims because they were moot, because Buyers were not prejudiced by their dismissal, and because of the well-established rule against filing contingent appeals. *Id.* Buyers also argued they could not possibly waive or forfeit claims they could not legally pursue. *Id.* Further, the doctrine of laches and the rule against claim-splitting did not apply because in each instance Buyers filed their parking lot claims as soon as they accrued, and pursued those claims at every available opportunity to the point of judgment. *Id.* Finally, there was no applicable law-of-the-case because the merits of Buyers' parking lot claims were never decided—a prerequisite for that doctrine to apply. *Id.*

On May 15, 2015, Judge Cohen issued an order granting Sellers' motion to dismiss with prejudice. C387. The court found that because Sellers' notice of appeal in the prior appeal referenced case number 06 CH 26662 as "related," Sellers "specifically sought reversal of the dismissal" of Buyers' claims, and Buyers' dismissed parking lot claims were "properly before the appellate court on the Seller's appeal." C388-89. Judge Cohen further found that "once the appellate court issued its opinion, it was clear that the claims raised by No. 06 CH 26662, theretofore rendered moot by Judge Quinn's original ruling, were once again in play and had not been resolved," and said that Buyers should have raised their parking lot claims in a Supreme Court Rule 367 motion for rehearing as those claims were, according to Judge Cohen, before the appellate court on Sellers' appeal. C390. Judge Cohen went on to correct a prior finding from a December 15, 2014 order that Buyers' forfeited or waived their parking lot claims, stating that "[c]onsidering the totality of the circumstances attendant to this case, as well as the parties' positions before the appellate court, this court cannot find that the Buyers' decision constituted a knowing and intentional relinquishment of a known right or of a duty to conform to a procedural requirement." C390; C167-69.

Addressing Sellers' motion to dismiss, Judge Cohen found that his jurisdiction was limited by this Court's remand. C391. Because the remand instructed the circuit court to determine Buyers' actual damages and address Sellers' fees claim, Judge Cohen concluded that he could not consider anything else, including Buyers' parking lot claims in case number 14 CH 15065. *Id.* Judge Cohen did not address Buyers' response to that position, nor did he address Sellers' other arguments for dismissal. *Id.*

V. Buyers' Appeal and the Circuit Court Order Granting a Stay Pending the Appeal.

On June 1, 2015, Buyers filed their notice of appeal to this Court in case number 1-15-1584. BA1. That same day, Buyers filed a motion to stay the proceedings in case numbers 06 CH 3427 and 06 CH 3586 pending the disposition of that appeal. BSR__. Buyers argued that a stay was appropriate because if the proceedings in case numbers 06 CH 3427 and 06 CH 3586 went forward while Buyers' appeal of case number 14 CH 15065 is pending, depending on the circuit court's ruling in the first two cases, most, if not all of the HyVee Holdback could be released to Sellers before Buyers' appeal was decided. This would deny Buyers any relief by default on their parking lot claim, even if they prevailed on their appeal. In other words, if the circuit court proceeded in case numbers 06 CH 3427 and 06 CH 3586 and released the balance of the holdback to the Sellers, it could unjustly moot Buyers' parking lot claims, even if Buyers prevailed on appeal. Judge Cohen granted the motion to stay over Sellers' objection, who filed an independent appeal from that order rather than simply filing a motion to lift the stay in Buyers' appeal to this Court.

ARGUMENT

I. Standard of Review

"Courts have inherent power to grant a stay pending appeal, and whether or not to do so is a discretionary act." *Stacke v. Bates*, 138 Ill.2d 295, 302 (1990). Stays are appropriate to "preserve the status quo pending the appeal and to preserve the fruits of a meritorious appeal where they might otherwise be lost." *Id.* The supreme court has identified three relevant factors in deciding whether to grant a stay: (1) whether "a stay is necessary to secure the fruits of the appeal in the event the movant is successful"; (2) "the

movant's likelihood of success on the merits; and (3) "the likelihood that the respondent will suffer hardship, although this is not the controlling factor and it should be considered in light of the other factors." *Id.* at 305-308. Also, "the circuit court has discretion to consider factors such as the orderly administration of justice and judicial economy, as well as its inherent authority to control the disposition of the cases before it." *TIG*, 389 Ill.App.3d at 375 (internal quotations omitted).

Sellers argue that this Court should adopt a fourth factor; namely whether the stay "obstructs a clear and unambiguous directive" of the appellate court (Sellers' Br. 13-14), but this is, of course, a merits question and is thus already accounted for in the second factor. Therefore this is not, as Sellers' incorrectly assert, a "case of first impression." *Id.* at 14. Rather, the applicable standard is well-settled, as is the fact that a circuit court's grant of such a stay will not be disturbed absent an abuse of discretion. *Stacke*, 138 Ill.2d at 302, 308. "[A]n abuse of discretion occurs only where no reasonable person would take the view adopted by the [trial] court." *In re Marriage of DeRossett*, 173 Ill.2d 416, 423 (1996). Put another way, the reviewing court must determine whether the circuit court "acted arbitrarily without the employment of conscientious judgment or, in view of all the circumstances, exceeded the bounds of reason and ignored recognized principles of law so that substantial prejudice resulted." *TIG*, 389 Ill.App.3d at 372 (internal quotations omitted).

II. The Circuit Court Did Not Abuse Its Discretion By Granting the Stay in Case Numbers 06 CH 3427 and 06 CH 3586 Pending Appeal of Its Decision in Case Number 14 CH 15065.

The circuit court's stay in this case was perfectly appropriate. The stay preserves the status quo by preserving the integrity of the Hy-Vee Holdback pending the disposition of Buyers' appeal of the dismissal of their parking lot claims. Further, Sellers' arguments against the merits of Buyers' appeal, which are addressed in Buyers' appeal and repeated below, are flatly wrong. Sellers' entire position is based on their continual refusal to recognize the well-established rule against contingent appeals; the same rule that prevented Buyers from appealing the dismissal of their mooted parking lot claims in the prior appeal. Finally, Buyers are suffering a similar hardship as Sellers in that they are also prevented from accessing the funds to which they are entitled in the Hy-Vee Holdback. The fact that Sellers may be entitled to a larger portion of the holdback does not make their hardship so unendurable as to outweigh the other relevant factors. Moreover, staying the circuit court proceedings pending the disposition of Buyers' appeal unquestionably serves the interests of judicial economy while providing for the orderly administration of justice.

A. The Stay Preserves the Status Quo by Preserving the Integrity of the Hy-Vee Holdback.

All of the disputes between Buyers and Sellers boil down to entitlement over the $4.3 million Hy-Vee Holdback. In sum, Buyers claim in case number 06 CH 3427 that they are entitled to actual damages relating to Sellers' breach. Buyers also claim in case number 14 CH 15065 that they are entitled to $530,294.86 for the work they performed constructing the new Hy-Vee parking lot. Sellers claim in case number 06 CH 3586 that they are entitled to the entire Hy-Vee Holdback, less only Buyers' actual damages for

their breach in case number 06 CH 3427. Sellers deny Buyers are entitled to money from the holdback for the work they performed on the parking lot. The circuit court dismissed Buyers' parking lot claims, concluding that its lacked jurisdiction to consider them. Buyers have appealed that decision to this Court.

Given these circumstances, it is clear that a stay is required to preserve the status quo pending disposition of Buyers' appeal and to preserve the fruits of their appeal where they might otherwise be lost. If the circuit court were to proceed with Buyers' and Sellers' claims in case number 06 CH 3427 and 06 CH 3586, and thereby presumably award Buyers some portion of the Hy-Vee Holdback for their actual damages and award the remainder to Sellers, the holdback would then be depleted. If Buyers were subsequently to prevail in their pending appeal challenging the dismissal of their parking lot claims, they would be left with no remedy, regardless of the merits of their parking lot claims. This is because the Hy-Vee Holdback expressly provides that Buyers are to be reimbursed for the work they perform on the parking lot *from the Hy-Vee Holdback.* C148. If there are no funds remaining in the holdback, Buyers are left without a remedy under the DME. This is why escrows generally exist after all, to ensure that adequate funds will be available to satisfy the rights of all the parties. As things currently stand, the Hy-Vee Holdback is intact. Preserving the Hy-Vee Holdback thus preserves the status quo and the fruits of Buyers' appeal.

B. Buyers' Are Likely to Succeed in Their Appeal Because This Court's Prior Remand of Case Numbers 06 CH 3427 and 06 CH 3586 Does Not Limit the Circuit Court's Jurisdiction to Hear Buyers' Parking Lot Claims in Case Number 14 CH 15065.

i. Buyers Did Not Appeal the Dismissal of Their Parking Lot Claims by Judge Quinn Because Judge Quinn Never Reached the Merits of Those Claims and Her Judgment Rendered Those Claims Moot.

Buyers brought two separate lawsuits regarding their rights to the Hy-Vee Holdback. In the first action, case number 06 CH 3427, Buyers claimed that, pursuant to the Third Amendment and DME, they were entitled to the entire $4.3 million Hy-Vee Holdback as liquidated damages for Sellers' breach. In their secondary action, case number 06 CH 26662, Buyers claimed that, pursuant to the same agreements, they were entitled to $530,294.86 of the Hy-Vee Holdback for funds they spent repairing the Hy-Vee parking lot. Again, each case was brought when the claims therein accrued, related to separate breaches of the parties' agreements, and were both pursued by Buyers to the point of judgment.

Judge Quinn found for Buyers on their claims in case number 06 CH 3427, against Sellers on their claims in case number 06 CH 3586, and awarded Buyers the entire Hy-Vee Holdback. C245. Buyers were therefore unquestionably the prevailing party, although their secondary parking lot claims were dismissed as a result of their victory on their primary claim. *Id.*: *J.B. Esker & Sons, Inc. v. Cle-Pa's P'ship*, 325 Ill.App.3d 276, 281 (5th Dist. 2001) ("A party that receives judgment in his favor is usually considered the prevailing party"); *cf. Grossinger Motorcorp, Inc. v. American Nat'l Bank and Trust Co.*, 240 Ill.App.3d 737 (1st Dist. 1992) ("A party can be considered a 'prevailing party' for the purposes of awarding fees when he is successful

on any significant issue in the action and achieves some benefit in bringing suit, receives a judgment in his favor or by obtaining an affirmative recovery.")

Judge Quinn never reached the merits of Buyers' parking lot claims. She concluded, and this Court later acknowledged, that her award rendered Buyers' parking lot claims moot. C245. (dismissing Buyers' parking lot claims as moot); *GK Development*, 2013 IL App (1st) 12802, ¶ 38 (acknowledging that Buyers' parking lot claims were dismissed as moot "because any damages owed to Buyer for the parking lot construction would have been paid out of the Hy-Vee Holdback"). Judge Quinn's judgment rendered Buyers' parking lot claims moot because the funds to which Buyers claimed they were entitled in case number 06 CH 26662 were the same funds, or rather a portion of the same funds, that Buyers claimed they were entitled to in case number 06 CH 3427. Resolving Buyers' parking lot claim would thus have had no practical effect on the outcome of the case because Buyers were already awarded all the funds they demanded and could possibly have received.

Put another way, Judge Quinn's ruling in favor of Buyers on their primary claims in case 06 CH 3427 precluded her from granting redundant relief on Buyers' secondary claims in case number 06 CH 26662. The parking lot claims were therefore moot. *Hanna v. City of Chicago*, 382 Ill.App.3d 672, 677 (1st Dist. 2008) ("Mootness occurs once the plaintiff has secured what he basically sought and a resolution of the issues could not have any practical effect on the existing controversy."); *Feret v. Schillerstrom*, 363 Ill.App.3d 534, 538 (2nd Dist. 2006) ("A claim is moot if no actual controversy exists or if events have occurred that make it impossible for a court to grant the claimant effectual relief."). As Judge Quinn's judgment mooted Buyers' secondary parking lot claims, she

was correct to dismiss those claims. *Hanna*, 382 Ill.App.3d at 677 (mooted actions should be dismissed). This, however, was *the only reason* Buyers' parking lot claims were dismissed. Judge Quinn never resolved those claims on the merits, and there was nothing for Buyers to appeal.

ii. This Court's Prior Remand Does Not Limit the Circuit Court's Jurisdiction to Hear Buyers' Parking Lot Claims Because Those Claims Were Never before the Appellate Court.

Judge Cohen found that he lacked jurisdiction to hear Buyers' parking lot claims in case number 14 CH 15065 because this Court's remand of case numbers 06 CH 3426 and 06 CH 3586 in the prior appeal absolutely limited the issues he could consider. C391. Respectfully, he was mistaken. On remand from a reviewing court, circuit courts are generally obliged to examine the reviewing court's decision and proceed in a manner that conforms with the views expressed therein as well as any instructions provided. *Suburban Auto Rebuilders, Inc. v. Associated Tile Dealers Warehouse, Inc.*, 388 Ill.App.3d 81, 95-96 (1st Dist. 2009). Where the appellate court specifically limits the issues the circuit court may consider on remand, orders issued by the circuit court outside the scope of that authority are void for lack of jurisdiction. *Fleming v. Moswin*, 2012 IL App (1st) 103475-B ¶ 28. Provided the circuit court does not act in a manner that is inconsistent with any specific instructions from the appellate court, it is free to exercise its discretion in managing the case and the pleadings. *Suburban Auto Rebuilders*, 388 Ill.App.3d at 95-96.

However, it is self-evident that these rules are relevant only where the appellate court had jurisdiction to consider the relevant claims in the prior appeal. *See Pioneer Trust & Sav. Bank v. Zonta*, 96 Ill.App.3d 339, 344 (1st Dist. 1981) ("Questions which

have not actually been decided by the reviewing court and which were not at issue or involved in the appeal are not concluded and may be considered by the court below in subsequent proceedings on the case.").

Here, the appellate court never had jurisdiction to consider, and did not consider—much less limit on remand—Buyers' parking lot claims. Contrary to Judge Cohen's finding that Buyers' parking lot claims were "properly before the appellate court on the Seller's appeal" (C389), the appellate court did not have jurisdiction to consider those claims because they were moot. It is black-letter law that, with few exceptions, "courts in Illinois do no decide moot questions, render advisory opinions, or consider issues where the result will not be affected regardless of how those issues are decided." *In re Alfred H.H.*, 233 Ill.2d 345, 351 (2009). "[T]he existence of a present controversy is a jurisdictional requirement" and "mootness is at its core a lack of jurisdiction." *Patel v. Illinois State Med. Soc'y*, 298 Ill.App.3d 356, 364 n.5 (1st Dist. 1998). As discussed below, had Buyers improperly attempted to appeal the dismissal of their mooted parking lot claims, this Court would have been obliged (and Sellers surely would have argued) to dismiss the appeal because "[a] reviewing court has a duty to dismiss an appeal when it cannot exercise jurisdiction." *Lozman v. Putnam*, 328 Ill.App.3d 761, 772 (1st Dist. 2002).

The appellate court also did not have jurisdiction to consider Buyers' parking lot claims because, contrary to Judge Cohen's findings, only Buyers potentially had standing to appeal the dismissal of their own claims. And, as discussed below in greater detail, Buyers could not appeal the dismissal of their parking lot claims because they were not prejudiced by that dismissal. *Adams v. Bath & Body Works, Inc.*, 358 Ill.App.3d 387,

399-400 (1st Dist. 2005) ("a party cannot complain of error that does not prejudicially affect it, and one who has obtained by judgment all that has been asked for in the trial court cannot appeal from that judgment"). Because they were awarded the entire Hy-Vee Holdback in case number 06 CH 3427, the dismissal of Buyers' secondary parking lot claims, seeking a portion of those same funds, did not prejudice them in any way.

Buyers' notice of appeal was directed only to Judge Quinn's denial of postjudgment interest and therefore conferred jurisdiction on the appellate court to hear only that aspect of their claims in case number 06 CH 3427. BA4. This Court simply could not consider the parking lot claims in the prior appeal. *See Fetzer v. Wood*, 211 Ill.App.3d 70, 76 (2nd Dist. 1991) ("a notice of appeal confers jurisdiction upon a reviewing court to consider only the judgment or portion of the judgment specified in the notice"). This Court plainly understood that fact in the prior appeal, recognizing that Judge Quinn dismissed case number 06 CH 26662 as "moot because any damages owed to Buyer for the parking lot construction would have been paid out of the Hy-Vee Holdback," without identifying that case amongst those before it (*i.e.*, case numbers 06 CH 3427 and 06 CH 3586). *GK Development*, 2013 IL App (1st) 112802 ¶ 38. In laying out the issues before it, this Court was clear:

> Seller appeals case Nos. 06 CH 3427 and 06 CH 3586, consolidated (appeal No. 1–11–2802), claiming: (1) that the Hy-Vee Holdback is not a valid liquidated damages provision; (2) that the trial court erred in finding the parties' agreement ambiguous; (3) that the trial court's interpretation of the parties' contract violates Illinois rules of contract construction; and (4) that the trial court erred as a matter of law in failing to award attorney fees to Seller. In response, Buyer claims: (1) that the Hy-Vee Holdback is a valid and enforceable liquidated damages provision; (2) that the trial court's finding that the contract terms were ambiguous and required extrinsic evidence to interpret the parties' intent was reasonable; (3) that Seller did not [*sic*] forfeit several of its arguments concerning the trial

> court's contract interpretation; and (4) that Seller is not entitled to attorney fees.

Id. ¶ 39. Case number 06 CH 26662, containing Buyers' parking lot claims, was never acknowledged by the Court as being before it, and rightly so.

Moreover, contrary to Judge Cohen's findings and Sellers' unsupported assertions here, Sellers lacked standing to appeal the dismissal of Buyers' claims. A defendant cannot appeal the dismissal of a plaintiff's claim unless that dismissal somehow prejudicially affects the defendant. *See Adams*, 358 Ill.App.3d at 399-400 ("a party cannot complain of error that does not prejudicially affect it"). If a party lacks a "direct, immediate and substantial interest in the subject matter of the litigation which would be prejudiced by the judgment or benefit by its reversal" it lacks standing to appeal the judgment. *St. Mary of Nazareth Hosp. v. Kuczaj*, 174 Ill.App.3d 268, 271 (1st Dist. 1988). Sellers could not appeal the dismissal of Buyers' parking lot claims against them because Sellers plainly were not prejudiced by the dismissal of those claims and would not benefit from its reversal. Although Sellers referenced case number 06 CH 26662 in their notice of appeal as a "related case" (C138), that reference had no legal effect; a fact understood by this Court, which again acknowledged the dismissal of the parking lot claims as moot in its opinion, but did not identify it as one of the cases or claims before it. *GK Development*, 2013 IL App (1st) 112802, ¶¶ 38-39. That fact was also apparently understood by Sellers—at least then—as they did not brief the dismissal of Buyers' parking lot claims or otherwise argue that their dismissal should be reversed. And, if this Court believed that Sellers actually attempted to appeal the dismissal of Buyers' parking lot claim, it would have been obligated to dismiss that appeal. *Adams*, 358 Ill.App.3d at 400; *Vowell v. Pedersen*, 315 Ill.App.3d 665, 667 (2nd Dist. 2000). Tellingly, it did not.

iii. Buyers Did Not and Could Not Previously Appeal the Dismissal of Their Parking Lot Claims.

Further, as touched upon above, Buyers did not and could not appeal the dismissal of their parking lot claims. Although their parking lot claims were dismissed, Buyers were awarded all the funds they had asked for and were thus not aggrieved by the dismissal of their secondary parking lot action in case number 06 CH 26662. As a result, Buyers had no grounds for appeal, except on the latter-arising postjudgment interest issue. *Adams*, 358 Ill.App.3d at 399-400 ("a party cannot complain of error that does not prejudicially affect it, and one who has obtained by judgment all that has been asked for in the trial court cannot appeal from that judgment"). As the supreme court has explained:

> As a general rule, "[a] party cannot complain of error which does not prejudicially affect it, and one who has obtained by judgment all that has been asked for in the trial court cannot appeal from the judgment." *Material Service Corp. v. Department of Revenue*, 98 Ill.2d 382, 386 (1983). In addition, "[i]t is fundamental that the forum of courts of appeal should not be afforded to successful parties who may not agree with the reasons, conclusion or findings below." *Illinois Bell Telephone Co. v. Illinois Commerce Comm'n*, 414 Ill. 275, 282-83 (1953).

Geer v. Kadera, 173 Ill.2d 398, 413-14 (1996).

This point was well illustrated in *Adams v. Bath and Body Works, Inc.*, *supra*, in which a tenant whose wife died in a house fire brought a products liability action against the manufacturer and distributor of the candle that he alleged started the fire, as well as a Smoke Detector Act (425 ILCS 60/3) claim against his landlord. 358 Ill.App.3d at 389. The defendants, Bath & Body Works, Inc. (the distributor of the candle), Globaltech (the manufacturer of the candle), the landlord, and her insurer State Farm Fire and Casualty Company, all filed cross-claims against each other seeking contribution, as well as counterclaims against the plaintiff for negligently failing to preserve evidence. *Id.* at 390.

Bath & Body Works also filed a third-party complaint against State Farm for negligent spoliation of evidence. *Id.* As a discovery sanction relating to the plaintiff's failure to preserve evidence, however, the circuit court dismissed the plaintiff's complaint. *Id.* at 391. The circuit court also dismissed the defendants' cross-claims and counterclaims, as well as Bath & Body Works third-party complaint, because the dismissal of the plaintiff's claim had the practical effect of mooting these other claims. *Id.* at 392.

The plaintiff appealed the dismissal of his claim to this Court and Bath & Body Works filed a cross-appeal, the resolution of which Bath & Body Works said was "contingent upon" the appellate court's ruling on the plaintiff's appeal. *Id.* Bath & Body Works argued that if the appellate court reversed the dismissal of the plaintiff's complaint, it should reinstate Bath & Body Works' counterclaims and third-party complaint. *Id.* Bath & Body Works further argued that because the landlord, State Farm, and Globaltech failed to file similar cross-appeals, they waived any right to have their counterclaims reinstated. *Id.* at 399.

After concluding that the circuit court abused its discretion by dismissing the plaintiff's complaint as a discovery sanction, this Court turned to Bath & Body Works' cross-appeal, finding that it lacked jurisdiction to consider that appeal because it posed a hypothetical question; namely, whether Bath & Body Works' counterclaims should be reinstated if the reviewing court reversed the circuit court's order dismissing the plaintiff's claim. *Id.* "It is axiomatic," said the court, "that the existence of an actual controversy is an essential prerequisite to appellate jurisdiction, and courts of review will generally not decide abstract, hypothetical, or moot questions." *Id.* "Because the

resolution of [Bath & Body Works'] argument depends on the resolution of plaintiff's appeal, *this court has no power to consider it*." *Id.* (emphasis added).

This Court went on to explain that even if it had jurisdiction, Bath & Body Works' filing of the cross-appeal was "improper" because "a party cannot complain of error that does not prejudicially affect it, and one who has obtained by judgment all that has been asked for in the trial court cannot appeal from that judgment." *Id.* at 399-400. The court found that there was no part of the circuit court's order that was actually adverse to Bath & Body Works because "[t]he [circuit] court *did not rule* on the substance of any motion against [Bath & Body Works]; it merely ruled that once plaintiff's claims were dismissed, the rest was moot." *Id.* at 400 (emphasis added). The court thus dismissed Bath & Body Works' cross-appeal as improper and remanded the matter to the circuit court. *Id.* Emphasizing that the reversal of the circuit court's order led to the revival of all the other claims, the appellate court ordered the circuit court to reinstate all the claims that the latter either dismissed or found were moot due to that dismissal. *Id.*

Adams is directly on point. This Court was very clear that filing a cross-appeal that is contingent on the appellate court's decision whether to affirm or reverse the circuit court's judgment is improper. Reviewing courts have no jurisdiction to consider such hypothetical appeals, especially when, as here, the party filing such an appeal was not prejudiced by the circuit court's decision. That is, of course, precisely what happened in this case. If Buyers filed a cross-appeal on the dismissal of their parking lot claims, asking the Court to resolve that dispute if it reversed the circuit court's judgment in case

numbers 06 CH 3427 and 06 CH 3586, the Court would have—and should have—dismissed it.

Concluding that the circuit court now lacks jurisdiction to consider Buyers' unappealed and refiled parking lot claims, as Judge Cohen found, would require parties in situations such as this to file improper appeals as a matter of course in order to preserve all of their claims, despite the fact that the appellate court has no jurisdiction to consider those appeals. The law should not and does not demand such an absurd result. Buyers acted correctly when they decided not to appeal the dismissal of their parking lot claims, knowing that if this Court reversed Judge Quinn's judgment, Buyers would be free to refile their revived parking lot claims.

Moreover, the circuit court's assertion that Buyers could have avoided this dilemma by filing a motion for rehearing under Supreme Court Rule 367 is wrong. C390. This Court cannot consider a claim that was never briefed, much less a claim raised before it for the first time in a motion for rehearing, especially where that claim was (in this case, properly) not included in the notice of appeal and thus not before the court on review. The jurisdictional limits of appellate review cannot be so easily avoided.

The lack of an instruction from this Court on the disposition of Buyers' parking lot claims in the prior remand order therefore does not, as the Judge Cohen found, limit the scope of the circuit court's jurisdiction to hear those claims. As those claims were never before this Court, it never had jurisdiction to consider them, much less decide whether or not to remand them for further consideration. This is an action brought on a written contract, stemming from a separate breach as the other actions, and within the applicable 10-year statute of limitations. The circuit court thus has jurisdiction to hear the

parking claims now that they are no longer moot and now that they have been refiled within the applicable statute of limitations. *See* 735 ILCS 5/13-206 (setting 10-year limitation actions based on written contracts); *State Farm Fire & Cas. Co. v. John J. Rickhoff Sheet Metal Co.*, 394 Ill.App.3d 548, 565 (1st Dist. 2009) (breach of contract actions accrue at the time of the breach of contract).[5] The circuit court was mistaken in concluding otherwise and dismissing Buyers' parking lot claims as a result. For these reasons, Buyers have a strong likelihood of succeeding on the merits of their appeal in appeal number 1-15-1584.

C. Sellers' Arguments against the Merits of Buyers' Appeal Are Unavailing.

Sellers argue that the circuit court should have denied Buyers' request for a stay because the correctness of that court's decision to dismiss case number 14 CH 15065 was so "obvious" that that "it was an abuse of discretion for the court to doubt itself by tacitly suggesting that Buyer might prevail on the merits." Sellers' Br. at 13-14. Sellers argue, *inter alia*, that the circuit court lacked jurisdiction to hear Buyers' parking lot claims because they were beyond the scope of this Court's remand, that the claims are barred by the rule of waiver, the doctrine of laches, the rule against claim-splitting and relatedly *res judicata*, as well as the law-of-the-case. C257-72. Sellers' arguments concerning he circuit court's jurisdiction have already been addressed, and these remaining arguments

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[5] As alleged in the complaint in case number 14 CH 15065, Buyers' claims to funds expended in the repair of the Hy-Vee parking lot are based on the terms of the Third Amendment and DME. Sellers breached the relevant terms of those agreements on November 14, 2006, when they directed Chicago Title, the escrowee of the Hy-Vee Holdback, not to release the $530,294.86 spent by Buyers to construct the Hy-Vee parking lot. C61-70. Buyers complaint in case number 06 CH 26662 was filed on December 7, 2006, approximately three weeks after their cause of action accrued, and Buyers refiled their claims on September 14, 2014, soon after this Court's mandate issued, and well within the applicable 10-year limitation period. C145.

lack any appreciable legal merit and in no way detract from the likelihood of Buyers succeeding on their appeal.

i. Buyers' Did Not Waive or Forfeit Their Parking Lot Claims.

Sellers contend that Buyers waived or forfeited their parking lot claims by "failing to raise" them in the prior appeal. Sellers' Br. at 16. First, throughout this dispute, Sellers have conflated the distinct legal doctrines of waiver and forfeiture, incorrectly using both terms indiscriminately. *See Gallagher v. Lenart*, 226 Ill.2d 208, 229 (2007) (explaining that "[w]aiver arises from an affirmative act, is consensual, and consists of an intentional relinquishment of a known right," and forfeiture "is different from waiver" and is the "failure to make the timely assertion of the right") (internal citations omitted). For purposes of clarity, Sellers' argument, which is premised on the notion that Buyers may not raise their parking claims now because they did not appeal the dismissal of those claims before, is based on the doctrine of forfeiture, not waiver. *Id.*

Regardless, Buyers could not and did not forfeit their parking lot claims because Judge Quinn's judgment in their favor rendered the dismissal of those claims unappealable. "[W]hen a question *could have been raised* on a prior appeal but was not, that question is deemed forfeited." *Pace Communications Svcs. Corp. v. Express Products, Inc.*, 2014 IL App (2d) 131058, ¶ 26 (emphasis added). For the reasons stated above, Buyers were prevented from raising the dismissal of their parking lot claims on appeal because, when the appeal was filed, Buyers were the prevailing party, their secondary parking lot claims were moot, and Buyers were prohibited by fundamental rules of appellate jurisdiction from filing a contingent appeal in the event that Judge Quinn's judgment was reversed. Put simply, Buyers had no opportunity to forfeit their

parking lot claims and thus did not do so by "failing" to file an improper contingent appeal on a then moot point.

ii. Buyers' Parking Lot Claims Are Not Barred by the Doctrine of Laches.

Sellers further argue that Buyers' parking lot claims are barred by the doctrine of laches because Buyers have somehow unreasonably delayed the prosecution of those claims. Sellers' Br. at 19. "Laches is an equitable doctrine which precludes the assertion of a claim by a litigant whose unreasonable delay in raising that claim has prejudiced the opposing party." *Tully v. State*, 143 Ill.2d 425, 433 (1991). "The doctrine is grounded in the equitable notion that courts are reluctant to come to the aid of a party who has knowingly slept on his rights to the detriment of the opposing party." *Id.* "Two elements are necessary to a finding of laches: (1) lack of diligence by the party asserting the claim and (2) prejudice to the opposing party resulting from the delay." *Id.* Neither element is present here.

Sellers have never specified how Buyers unreasonably delayed in the prosecution of their parking lot claims, however, the procedural history of this case belies any such assertion. Buyers filed their claim for declaratory judgment and specific performance for the entire Hy-Vee Holdback (case number 06 CH 3427) on February 17, 2006, immediately after those claims accrued. Buyers first filed their parking lot claims (case number 06 CH 26662) on December 7, 2006, soon after Sellers committed a separate breach of the parties' relevant agreements in November 2006. Buyers could not have filed their parking lot claims in February 2006, as Sellers argued they should have to the circuit court, because the breach on which those claims were based did not occur until approximately 10 months *after* the first suit was filed. Thereafter, Buyers did all they

could to pursue their parking lot claims, taking them to the point of judgment before Judge Quinn.

Further the gap between the time of Judge Quinn's dismissal of Buyers' parking lot claims and their refilling in case number 14 CH 15065 is explained by the prior appeal—first brought by Sellers—and not any lack of diligence by Buyers. Buyers timely filed their notice of appeal in the prior case before this Court, and timely filed their petition for leave to appeal from this Court's December 19, 2013 opinion with the supreme court. Their petition was denied on May 24, 2014. This Court's mandate issued on July 10, 2014. And soon thereafter, on September 17, 2014, Buyers refiled their parking lot claim in 14 CH 15065. As this timeline should make clear, Buyers pursued their parking lot claim at every available opportunity. There was little or no delay in the prosecution of those claims, much less the kind of unreasonable delay required for laches to attach. Nor, therefore, was there any prejudice to Sellers. Sellers' conclusory assertions that the parking lot claims are barred by laches merely because this litigation has been protracted (in no small part due to Sellers' several appeals) is therefore entirely unfounded.

iii. Buyers' Parking Lot Claims Are Not Barred by the Rule against Claim-Splitting or *Res Judicata*.

Sellers further contend that Buyers' violated the rule against claim-splitting. As a matter of fact and law, they are wrong. Offering two pages of citations and only sentence of argument, Sellers' position is not entirely clear. They appear to argue that Buyers artificially split their claims by strategically filing separate complaints in separate actions. Sellers' Br. at 21. Sellers presumably make this assertion in an effort to bring the procedural history of this case in line with their string citations, all of which simply recite

some variant of the rule against claim-splitting, but none of which relate to the facts of this case.

As explained above, Buyers filed their first parking lot claims (06 CH 26662) in December 2006, soon after they accrued in November 2006. Buyers could not have filed their parking lot claims with their primary claim (06 CH 3427) in February 2006 because the facts on which the latter claims were based did not occur until 10 months *after* the first claim was filed. These separate claims therefore did not arise from the same facts, but rather arose from separate events that occurred at separate times, concerning separate breaches, albeit of the same agreement. The rule against claim splitting simply does not apply in such circumstances.

The rule against claim-splitting "prohibits a plaintiff from suing for part of a claim in one action and then suing for the remainder in another action." *Rein v. David A. Noyes & Co.*, 172 Ill.2d 325, 340 (1996). *Rein* and its progeny "stand[] for the proposition that a plaintiff who splits his claims by voluntarily dismissing and refilling part of an action after a final judgment has been entered on another part of the case subjects himself to a *res judicata* defense." *Hudson v. City of Chicago*, 228 Ill.2d 462, 473 (2008); *accord Matejczyk v. City of Chicago*, 397 Ill.App.3d 1, 9 (1st Dist. 2009) ("We read *Rein* and *Hudson* to establish that a dismissal on the merits by the circuit court of one or more counts in a complaint puts the plaintiff on notice that, should he elect to take a voluntary dismissal under 2-1009 of the Code [of Civil Procedure] for whatever reason, he risks triggering the *res judicata* bar to refilling."). That did not occur here.

In this case, Buyers sued on their primary claims (06 CH 3427) and their parking lot claims (06 CH 26662) when they arose, and when they were no longer rendered moot

(14 CH 15065), and in all cases pursued all those claims to the point of judgment. Buyers did not file and adjudicate one accrued claim while waiting to bring another accrued claim on the same facts. And unlike in *Hudson* and *Matejczyk*, Buyers did not voluntarily dismiss one claim only to refile the same claim later. They filed both claims when each arose and pursued them to the point of judgment. That Judge Quinn involuntarily dismissed one of those claims as moot is in no way attributable to Buyers.

Further, Buyers did not voluntarily dismiss or abandon their parking lot claims on appeal. As explained above, Buyers could not have previously pursued the mooted parking lot claims on appeal because contingent appeals are prohibited as a matter of law. Unlike in *Rein*, Buyers did not voluntarily dismiss one of their claims in order to pursue another involuntarily dismissed claim on immediate appeal, nor did they fail to delay the challenge to the dismissal of one claim until there was a ruling on the merits of another claim. Instead, Buyers correctly decided not to bring an improper contingent appeal and refiled their parking claims as soon as they could after the mandate was issued and their parking lot claims were no longer moot. Sellers' assertion that Buyers were splitting claims is thus completely unfounded.

Moreover, the supreme court has explained that the rule against claim-splitting does not bar a plaintiff from bringing a second action if "the plaintiff was unable to obtain relief on his claim because of a restriction on the subject-matter jurisdiction of the court in the first action." *Hudson*, 228 Ill.2d at 472 (quoting *Rein*, 172 Ill.2d at 341) (summarizing Restatement (Second) of Judgments § 26(1))). That is precisely what happened here. Mootness is a paradigmatic subject-matter jurisdiction restraint. *Farrar v. City of Rolling Meadows*, 2013 IL App (1st) 130734, ¶ 13. And "the dismissal of a

complaint for lack of subject-matter jurisdiction is not considered a decision on the merits." *Nowak v. St. Rita High School*, 197 Ill.2d 381, 390 (2001); *accord LaSalle Nat'l Bank v. City of Chicago*, 3 Ill.2d 375, 382 (1954). As Buyers, the trial court, and this Court have all repeatedly observed, Judge Quinn's judgment mooted Buyers' parking lot claims, and thus deprived the trial and appellate courts of jurisdiction to further consider those claims prior to this Court's reversal of that judgment. There was thus no violation of the rule against claim-splitting in this case and Sellers' argument to the contrary is without any factual or legal merit.

Sellers' related argument that Buyers' parking lot claims are barred by *res judicata* is a nonstarter. Unlike in *Rein*, *Hudson* and *Matejczyk*, Buyers did not violate the rule against claim-splitting and therefore did not open the door to a *res judicata* defense. However, even assuming, *arguendo*, that Buyers did impermissibly split their claims, *res judicata* would still not apply. "'The doctrine of *res judicata* provides that a final judgment on the merits rendered by a court of competent jurisdiction bars any subsequent actions between the same parties or their privies on the same cause of action.'" *Hudson*, 228 Ill.2d at 467 (quoting *Rein*, 172 Ill.2d at 334). "Three requirements must be satisfied for *res judicata* to apply: (1) a final judgment on the merits has been rendered by a court of competent jurisdiction; (2) an identity of cause of action exists; and (3) the parties or their privies are identical in both actions." *Id.* "[A] judgment on the merits is a requisite to the application of Res judicata, [and] . . . the doctrine is not available when a prior action was dismissed for lack of jurisdiction." *People ex rel. Scott v. Chicago Park Dist.*, 66 Ill.2d 65, 69 (1976). For the reasons stated above, there was never a ruling on the

merits of Buyers' parking lot claims, which were was dismissed by Judge Quinn as moot (*i.e.*, for lack of subject-matter jurisdiction).

In this regard, the supreme court's decision in *Nowak* is instructive. In that case, the plaintiff sought recovery for a violation of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12101 *et seq.* 197 Ill.2d at 385. The plaintiff brought the ADA action and a pendent state claim in federal court. *Id.* The district court granted the defendant summary judgment on the ADA claim and then declined supplementary jurisdiction over the pendent state claim, dismissing it for lack of jurisdiction. *Id.* at 387. When the plaintiff refiled in state court, the defendant argued the claim was barred by *res judicata. Id.* at 387-88. The supreme court rejected that argument, explaining that the plaintiff had properly asserted his state law claim in the federal action and because that claim was dismissed by the district court for lack of jurisdiction, there was no adjudication on the merits of that claim. *Id.* at 389, 392. *Res judicata* therefore did not apply. *Id.*; *accord Hudson*, 228 Ill.2d at 477 (discussing *Nowak*). The same is true here, where Buyers' parking lot claims were prosecuted, but dismissed for lack of jurisdiction and never decided on the merits. Sellers' *res judicata* argument is therefore as unavailing as their claim-splitting argument.

iv. Buyers' Parking Lot Claims Are Not Barred by the Law-of-the-Case.

In a related argument, Sellers contend that Buyers' parking lot claims are barred by the law-of-the-case doctrine. Sellers' Br. at 21-23. "The law-of-the-case doctrine prohibits the reconsideration of issues that *have been decided* by a reviewing court in a prior appeal." *In re Christopher K.*, 217 Ill.2d 348, 363 (2005) (emphasis added). "The rule of the law of the case provides that where an issue has been litigated *and decided*, a

court's unreversed decision on a question of law or fact settles that question for all subsequent stages of the suit." *Norton v. City of Chicago*, 293 Ill.App.3d 620, 624 (1st Dist. 1997) (emphasis added). For the reasons stated above, Judge Quinn never decided Buyers' parking lot claims. Buyers could not and did not appeal the dismissal of those claims. Buyers could not and did not forfeit those claims. And this Court did not comment—much less decide—on the merits of the parking lot claims in any way aside from acknowledging their dismissal by Judge Quinn as moot. Nowack, 197 Ill.2d at 390 ("the dismissal of a complaint for lack of subject matter jurisdiction is not considered a decision on the merits"). Sellers' entire argument on this point is premised on the incorrect assertion that Buyers could have raised the dismissal of their parking lot claims in the prior appeal. As that assertion has no legal merit, Sellers' dependent law-of-the-case doctrine lacks merit as well.

Moreover, although it does not impact the relevant legal analysis, Sellers' repeated assertions that Buyers never advised this Court in the prior appeal that their parking lot claims may no longer be moot if Judge Quinn's judgment were reversed are undeniably false. Sellers' Br. at 7, 23. Buyers alerted this Court to that possibility in their response brief in the prior appeal, but did not argue the merits of the parking lot claims because this Court had no jurisdiction to consider them. BA59.

v. Sellers' Other Arguments Attacking the Merits of Buyers' Claims Are Unavailing.

Sellers' contention that Buyers "simply asked for the Stay without any showing as to why it was justified" and "on that basis alone" the stay should be lifted is also false. Sellers' Br. at 16. Buyers' Motion to Stay Proceedings laid out the reasons why a stay of case numbers 06 CH 3427 and 06 CH 3586 pending the appeal on case number 14 CH

15065 was appropriate. BA6. Buyers incorporated the reasoning of their prior briefing on the jurisdictional issue and explained that continuing with case numbers 06 CH 3427 and 06 CH 3586 while their appeal was pending could leave them without a remedy even if they prevailed on their appeal. *Id.* The circuit court agreed and entered an order granting the stay. The circuit court understood the circumstances and reasonably concluded that a stay was appropriate.

Seller's remaining argument that the Buyers claims were properly dismissed with prejudice because they do not sound in equity are curious. As Judge Quinn explained, Buyers' claims to the Hy-Vee Holdback in case number 06 CH 3427 for declaratory judgment and specific performance essentially paralleled Sellers' claims to the holdback in case number 06 CH 3586 for declaratory judgment, breach of contract and unjust enrichment (C222), all of which were brought by both parties in equity and tried before a judge in chancery. Moreover, in the prior appeal, Sellers argued Buyers were not entitled to post-judgment interest after the first trial because Buyers' claims *sounded in equity*. For their part, Buyers always maintained that their declaratory judgment claim was not equitable, but rather *sui generis*. BA55 (p.40). It was Sellers who argued otherwise. *Id.* Regardless, as Buyers have consistently maintained, their specific performance claim is equitable. *Butler v. Kent*, 275 Ill.App.3d 217, 227 (1st Dist. 1995). Sellers' argument now that Buyers' declaratory judgment and specific performance claims to a portion of the holdback do not sound in equity would seem to be a renunciation of their entire strategy up to this point.

Notwithstanding Sellers' volte-face, their argument in this regard provides no support for the dismissal of Buyers' parking lot claims with prejudice. Even assuming,

arguendo, that Buyers' claims are better brought at law, Cook County Circuit Court General Order 1.3(b) provides that "[n]o action shall be dismissed and no judgment order or decree shall be vacated, set aside or invalidated because the action was filed, tried or adjudicated in the wrong department, division or district." If these claims are better brought in the Law Division, then they should simply have been dismissed without prejudice and transferred. For all these reasons, Sellers' arguments against the merits of Buyers' position are unavailing and in no way detract from the likelihood of Buyers succeeding on their appeal.

D. The Relative Hardships Do Not Particularly Favor Sellers or Tip the Balance in Their Favor and against the Stay.

Sellers offer no clear argument or citation, aside from one sentence in their standard of review discussion, as to why the balance of hardships favors them in this instance. *See* Sellers' Br. at 13 ("This creates [an] obvious and continuing hardship for Seller, which has been waiting since 2004 to receive proceeds of a sale that occurred then"). Sellers have thus forfeited this point.

> Illinois Supreme Court Rules provide that the appellant's brief must contain contentions along with citations to the authorities and pages in the record relied upon. Ill. S.Ct. R. 341(h)(7) (eff. July 1, 2008). A failure to cite relevant authority violates Rule 341 and can cause a party to forfeit consideration of the issue. *Fortech, L.L.C. v. R.W. Dunteman Co.*, 366 Ill.App.3d 804, 818, 304 Ill.Dec. 201, 852 N.E.2d 451, 463 (2006). Arguments that violate Rule 341 do not merit consideration and can be rejected solely for that reason.

Kic v. Bianucci, 2011 IL App (1st) 100622, ¶ 23. In any event, Buyers have also waited years for the money they spent constructing the new Hy-Vee parking lot. And even if this factor somewhat weighed in favor of Sellers because they are entitled to a larger portion of the Hy-Vee Holdback, the supreme court has made clear that this is not a controlling

factor and cannot outweigh the other factors, all of which weigh in favor of Buyers. *Stacke*, 138 Ill.2d at 305-308.

E. The Stay Promotes Judicial Economy and the Orderly Administration of Justice.

Finally, although Sellers do not address this point (and for the reasons stated above forfeit it as well), the stay in this case plainly promotes judicial economy and the orderly administration of justice. If Buyers prevail on their current appeal and their parking lot claims are reinstated, proceeding with their actual damages claim and parking lot claims in different proceedings a plainly inefficient solution. Buyers' and Sellers' claims claims should be tried together and this case finally resolved in one proceeding. The circuit court recognized this logic and, exercising its inherent authority to control the disposition of the cases before it, chose to grant the stay. That decision was entirely reasonable.

CONCLUSION

The circuit court's stay does not constitute an abuse of discretion. The stay preserves the status quo pending disposition of Buyers' appeal and thereby preserves the fruits of their appeal where they would otherwise be lost. Further, it is clear that the circuit court has jurisdiction to hear Buyers' parking lot claims and Buyers are therefore likely to prevail on their appeal. Sellers' arguments to the contrary rely on misstatements of fact and misapplications of law. Moreover, the relevant hardships in this case do not greatly favor Sellers, and even if they did, that factor would not be enough to outweigh the others. Finally, the stay promotes judicial economy and the orderly administration of justice by ensuring that if Buyers do prevail on their appeal, this dispute can finally be resolved in one last proceeding rather than in a multiplicity of proceedings. Therefore, the

circuit court's decision to stay case numbers 06 CH 3427 and 06 CH 3586 pending the outcome of Buyers' appeal of case number 14 CH 15065 neither constitutes an arbitrary act exercised "without the employment of conscientious judgment," nor does it "exceed[] the bounds of reason." *TIG*, 389 Ill.App.3d at 372. The stay order should be affirmed so that Buyers may proceed with their appeal secure in the knowledge that if they prevail, they will have some relief.

WHEREFORE, and for all the reasons stated above, Plaintiffs-Appellants GK Development, Inc. and College Square Mall Development, LLC, respectfully request that this Court affirm the circuit court's stay order and grant any other relief the Court deems just and appropriate.

Dated: October 5, 2015

Respectfully submitted,

GK Development, Inc. and College Square Mall Development, LLC, Plaintiffs

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SUPREME COURT RULE 341(c) CERTIFICATE OF COMPLIANCE

The undersigned, an attorney, certifies that the Brief of Plaintiffs-Appellees Development, Inc. and College Square Mall Development, LLC, conforms to the requirements of Supreme Court Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, and the Rule 342(a) Appendix, is 38 pages.

Dated: October 5, 2015

Respectfully Submitted,

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