2014 IL App (1st) 132714-U

THIRD DIVISION
February 25, 2015

Nos. 1-13-2714, 1-13-2745, 1-13-2746 & 1-13-2763 (Cons.)

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

WELLS FARGO BANK MINNESOTA, NA, as Trustee for the Registered Holders of J.P. Morgan Chase Commercial Mortgage Securities Corp., Commercial Mortgage Pass-Through Certificates, Series 2002-C3, Plaintiff-Appellant and Cross-Appellee, v. ENVIROBUSINESS, INC., a Massachusetts Corp., d/b/a EBI Consulting, formerly d/b/a EBI Consultants, Defendant and Third-Party Plaintiff-Appellee and Cross-Appellant, v. CRAIG WALKER, STEVEN BYERS, and CIBC, INC., Third-Party Defendants-Appellees and Cross-Appellees,	)	Appeal from the Circuit Court of Cook County.
WELLS FARGO BANK MINNESOTA, NA,	)	Nos. 2004 L 10701 & 2004 CH 3099 (Cons.)

Plaintiff-Appellant and Cross-Appellee,	)	
v.	)	
CRAIG WALKER, STEVEN BYERS, CIBC, INC., and 318 WEST ADAMS, LLC,	)	The Honorable
Defendants-Appellees and Cross-Appellees.	)	Allen S. Goldberg Judge, presiding.
WELLS FARGO BANK MINNESOTA, NA, as Trustee for the Registered Holders of J.P. Morgan Chase Commercial Mortgage Securities Corp., Commercial Mortgage Pass-Through Certificates, Series 2002-C3,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellee,	)	
v.	)	
ENVIROBUSINESS, INC., a Massachusetts Corp., d/b/a EBI Consulting, formerly d/b/a EBI Consultants,	)	
Defendant and Third-Party Plaintiff-Appellee,	)	
v.	)	
CRAIG WALKER,	)	
Third-Party Defendant-Appellant,	)	
STEVEN BYERS, and CIBC, INC.,	)	
Third-Party Defendants-Appellees.	)	
	)	Nos. 2004 L 10701 & 2004
WELLS FARGO BANK MINNESOTA, NA,	)	CH 3099 (Cons.)
Plaintiff-Appellee,	)	
v.	)	

CRAIG WALKER, Defendant-Appellant, STEVEN BYERS, CIBC, INC., and 318 WEST ADAMS, LLC, Defendants-Appellees.	)	The Honorable Allen S. Goldberg Judge, presiding.
WELLS FARGO BANK MINNESOTA, NA, as Trustee for the Registered Holders of J.P. Morgan Chase Commercial Mortgage Securities Corp., Commercial Mortgage Pass-Through Certificates, Series 2002-C3, Plaintiff-Appellee, v. ENVIROBUSINESS, INC., a Massachusetts Corp., d/b/a EBI Consulting, formerly d/b/a EBI Consultants, Defendant and Third-Party Plaintiff-Appellee, v. CIBC, INC., Third-Party Defendant-Appellant, CRAIG WALKER and STEVEN BYERS, Third-Party Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County.
WELLS FARGO BANK MINNESOTA, NA, Plaintiff-Appellee, v.	)	Nos. 2004 L 10701 & 2004 CH 3099 (Cons.)

CIBC, INC.,	)	
Defendant-Appellant,	)	
CRAIG WALKER, STEVEN BYERS and 318 WEST ADAMS, LLC,	)	The Honorable Allen S. Goldberg
Defendants-Appellees.	)	Judge, presiding.
WELLS FARGO BANK MINNESOTA, NA, as Trustee for the Registered Holders of J.P. Morgan Chase Commercial Mortgage Securities Corp., Commercial Mortgage Pass-Through Certificates, Series 2002-C3,	)	Appeal from the Circuit Court of Cook County.
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Defendant and Third-Party Plaintiff-Appellant,	)	
v.	)	
CRAIG WALKER, STEVEN BYERS, and CIBC, INC.,	)	
Third-Party Defendants-Appellees.	)	
	)	Nos. 2004 L 10701 & 2004 CH 3099 (Cons.)
WELLS FARGO BANK MINNESOTA, NA,	)	
Plaintiff-Appellee,	)	
v.	)	
CRAIG WALKER, STEVEN BYERS, CIBC, INC., and 318 WEST ADAMS, LLC,	)	The Honorable Allen S. Goldberg

Defendants-Appellees.) Judge, presiding.

JUSTICE LAVIN delivered the judgment of the court.
Presiding Justice Pucinski and Justice Mason concurred in the judgment.

ORDER

¶ 1 *Held*: The parties failed to demonstrate that any of the numerous issues raised in these four consolidated appeals, and cross-appeal, constituted reversible error or entitled the parties to relief. The judgment is affirmed in its entirety.

¶ 2 This appeal arises from various parties' attempts to seek recovery of, or avoid responsibility for, damages incurred when a mortgage loan was issued, and later sold, based on inaccurate information regarding the collateral property. The building located at 318 West Adams Street (the Property) was owned by 318 West Adams, LLC (318 West Adams). That entity sought a mortgage from CIBC, Inc. (CIBC). In furtherance of 318 West Adams' quest, CIBC hired Envirobusiness, Inc. (EBI) to inspect and report on the Property's condition. In addition, 318 West Adams' proprietors, Craig Walker and Steven Byers, also supplied information in furtherance of this transaction. CIBC subsequently issued 318 West Adams a loan for its mortgage of the Property and the loan was ultimately sold into a trust, for which Wells Fargo Bank Minnesota, NA (Wells Fargo) was the trustee. The loan went into default and the sale of the Property, which was in significantly worse physical and financial condition than previously represented, provided insufficient recompense after a foreclosure sale. Wells Fargo then commenced this action to recover its damages and multiple claims were subsequently filed among the parties. Following a jury trial on the claims involving EBI and a bench trial on the remaining claims, no party was left entirely satisfied. As a result, Wells Fargo, Walker, CIBC and EBI have all appealed. Notwithstanding their dissatisfaction with the judgments below, we affirm in all respects.

¶ 3 I. BRIEFS

¶ 4 As a threshold matter, most of the briefs filed by the parties suffer from numerous deficiencies. Facts recited in fact sections fail to include citations to the record. At times, the briefs contain inappropriately broad citations to numerous volumes of the record, or improperly cite to the appendices alone. In addition, certain citations to the record do not support the facts alleged. See Ill. S. Ct. R. 341(h) (6) (eff. Feb. 6, 2013). We further observe that certain representations of fact concerning the trial court's findings are supported with citation to pleadings rather than court orders. These same deficiencies are repeated in the parties' arguments. Moreover, certain purported legal principles often lack citation to any legal authority whatsoever. See Ill. S. Ct. R. 341(h) (7) (eff. Feb. 6, 2013).

¶ 5 There are severe consequences for these deficiencies. Failure to comply with Illinois Supreme Court Rule 341 may result in waiver (*Cholipski v. Bovis Lend Lease, Inc.*, 2014 IL App (1st) 132842, ¶ 36),[1] striking of the brief (*Fryzel v. Miller*, 2014 IL App (1st) 120597, ¶ 25), or even dismissal of the appeal (*Id.*). This reflects the oft-stated rule that the appellate court is not a depository in which to dump the burden of research and argument. *Walters v. Rodriguez*, 2011 IL App (1st) 103488, ¶ 5. In addition, compliance with court rules is all the more crucial in appeals involving a multitude of parties, briefs, issues and volumes of record, such as the case before us. Going forward, we expect that all parties presently before us will comply with court rules. See, *e.g.*, Ill. S. Ct. R. 341(h) (7) (eff. Feb. 6, 2013) ("Points not argued are waived and shall not be raised *** on petition for rehearing."); Ill. S. Ct. R. 367(b) (eff. Dec. 29, 2009) (reargument cannot be made in a petition for rehearing). Meanwhile, having considered all of the contentions and supporting arguments set forth in the parties' briefs, including those we do

[1] We note that Rule 341 itself refers to waiver although, for reasons later delineated, such defects based on a failure to act may more appropriately be characterized as forfeiture.

not expressly address in detail, we now address the facts and the parties' contentions as succinctly as possible, surely a vain effort in the mind of some readers of this prolix order.

¶ 6 II. BACKGROUND

¶ 7 In 2000, an entity owned by Walker and Byers purchased the Property for $11.4 million. To finance the original purchase, they obtained a $9.5 million loan. Just two years later, they formed 318 West Adams in order to refinance the original loan through CIBC. In the first of many misrepresentations, they sought to make the building look more valuable by claiming that it had been purchased for $13.5 million. Remaining consistent, they provided CIBC with false information regarding rental income from the Property and created fictitious tenants. CIBC then retained engineering company EBI to inspect the Property and estimate the cost of repairing any observable physical deficiencies.

¶ 8 EBI's report's concluded that the Property's facades were in good condition and needed minor patching at a cost of $750, and an additional reserve of $996. Around the same time, LZA Technology (LZA) inspected the Property and issued a report for the City of Chicago. The report, which was filed with the City's Department of Buildings, concluded that far more substantial repairs were necessary. In reality, the Property's facades were in poor condition and required over $3 million in repairs. The parties have essentially disputed who knew or should have known that the contents of the LZA report proved that EBI's report was erroneous.

¶ 9 On December 5, 2002, CIBC closed on an $11 million loan. Because this was a non-recourse loan, the personal liability of the borrower and principals, *i.e.*, 318 West Adams, Walker and Byers, was limited to certain exceptions known as "bad boy carve outs," such as fraud, misrepresentation or the failure to reveal material facts. Prior to closing, Walker, Byers and 318 West Adams had executed a promissory note, mortgage document, closing certificate and

indemnity and guaranty agreement (Indemnity Agreement). This did not end the activity on the mortgage, which then began a circuitous journey through the labyrinthine commercial mortgage world. After closing, the loan was pooled with other loans pursuant to a commercial mortgage-backed securities transaction (CMBS). J.P. Morgan Chase (J.P. Morgan) purchased the loan, which was placed into a trust and Wells Fargo acted as trustee. [2] In December 2002, CIBC and J.P. Morgan entered into the Pooling and Servicing Agreement (PSA) as well as the Mortgage Loan Purchase Agreement (MLPA). Those documents set forth the parties' rights, remedies and obligations.

¶ 10 Soon after the loan closed, 318 West Adams stopped paying in a timely fashion. Specifically, it made nine payments, eight of which were late. As a result, the loan went into default. Wells Fargo filed a complaint against Walker, Byers and 318 West Adams to foreclose the mortgage in February 2004. Wells Fargo also commenced an action against EBI in September 2004, alleging that EBI misrepresented the Property's condition, and the two actions were eventually consolidated. EBI in turn sought relief from CIBC, seeking contribution for negligence and fraud. EBI also claimed that Walker, Byers and 318 West Adams, had committed negligence and fraud.

¶ 11 The Property was sold at a public auction on December 20, 2004, and Wells Fargo had the winning bid of $6 million, leaving a deficiency of almost $5 million. On April 20, 2005, a special purpose entity entered into a contract to sell the Property to Card, LLC, on Wells Fargo's behalf. On July 28, 2005, CIBC was given notice that the Property would be sold the next day for $7.6 million. The notice also stated that the mortgage document, Closing Certificate, PSA and MLPA had been breached, and demanded that CIBC repurchase the mortgage loan. The

[2] We refer to Wells Fargo throughout, rather than the entities for which the securitized loans were held.

sale closed as planned, but CIBC did not repurchase the loan. Wells Fargo eventually added CIBC as a defendant and sent it a reiterated repurchase demand but again, CIBC did not comply. Instead, CIBC alleged that EBI had breached their contract, negligently misrepresented the Property's condition, and committed fraud. CIBC also alleged it was entitled to contribution from EBI. Moreover, Walker had refused CIBC's request for defense and indemnification pursuant to the Indemnity Agreement. Accordingly, CIBC sought relief from Walker and Byers as well. Meanwhile, Wells Fargo had obtained default judgments against Byers and 318 West Adams.

¶ 12 Wells Fargo ultimately filed a sixth amended complaint. In addition to Wells Fargo's previously mentioned foreclosure count (count I), Wells Fargo asserted that (1) Walker, Byers and 318 West Adams breached the closing certificate's representations, misrepresented the income and revenue from the Property, misrepresented the purchase price of the Property, and misrepresented the Property's condition (count II); (2) Walker and Byers were liable under the Indemnity Agreement due to fraud, misrepresentation or failure to disclose, and improper rental practices (count III); (3) 318 West Adams was liable under the note (count IV); (4) Walker, Byers and 318 West Adams committed fraud (count V); (5) Byers violated the Racketeer Influenced and Corrupt Organizations Act (18 U.S.C. § 1961 *et seq.*) (count VI); (6) EBI negligently misrepresented the Property's condition (count VII); (7) alternatively, EBI engaged in fraudulent misrepresentation (count VIII); (8) CIBC breached warranties regarding its knowledge of the Property's condition and value as well as the borrower's compliance with loan requirements (count IX); and (9) CIBC committed fraud (count X).

¶ 13 The trial lasted several weeks. Claims involving EBI were tried by jury while all remaining claims were tried by the court. The jury found in favor of Wells Fargo on its

negligent misrepresentation claim against EBI, determining that Wells Fargo's damages on that count equaled $5,056,326.36. Moreover, the jury determined that Wells Fargo's damages against EBI were attributable to the parties in the following percentage amounts: (1) Wells Fargo 10%; (2) EBI 75%; (3) Walker 0%; (4) Byers 0%; and (5) CIBC 15%. Contrarily, the jury determined that Wells Fargo had not shown EBI had engaged in fraudulent misrepresentation. All of these determinations were rendered meaningless as the trial court ultimately entered judgment on the negligent misrepresentation count in the amount of $4,500, owing to a contractual damages limitation in the agreement between CIBC and EBI.

¶ 14 Moving on to the simpler part of the case, Wells Fargo prevailed on the remaining claims against Walker, Byers and 318 West Adams. Among other things, the court found that Walker, Byers and 318 West Adams had engaged in material misrepresentations or fraud to procure the loan in this case. In addition to previously mentioned misrepresentations, the court found 318 West Adams improperly leased space in the Property on nonmarket terms without the lender's approval, in contravention of the mortgage agreement. The court further found Wells Fargo had proven CIBC's breach of warranty. Conversely, the court found Wells Fargo had not shown that CIBC committed fraud. Moreover, the court found in favor of CIBC and against Walker, who had breached the Indemnity Agreement.

¶ 15 For some welcome brevity, we provide additional post-trial details as necessary to address the parties' contentions on appeal. Suffice it to say, as of July 2013, the trial court had determined that (1) Walker, Byers and 318 West Adams, were jointly and severally liable to Wells Fargo in the amount of $9,729,698.75; (2)Walker and Byers were jointly and severally liable to Wells Fargo for $14,375,905.69; (3) 318 West Adams was liable to Wells Fargo for the same amount; (4) Byers was liable to Wells Fargo for $27,937,883.34; (5) EBI was liable to

Wells Fargo for $4,500; (6) CIBC was liable to Wells Fargo for $11,189,053.19; and (7) Walker, Byers and 318 West Adams were jointly and severally liable to CIBC in the amount of $14,121,577.64.

¶ 16 III. ANALYSIS

¶ 17 A. Wells Fargo's Appeal

¶ 18 1. Limitation on Damages

¶ 19 On appeal, Wells Fargo first asserts that the trial court erred by refusing to enter judgment against EBI for the full amount of damages found by the jury for professional negligence. As stated, while the jury found damages of approximately $5 million, the court reduced that amount to $4,500 because the contract between CIBC and EBI limited damages. Wells Fargo asserts that it was not a party to that contract, that Wells Fargo sued EBI under common law tort, rather than contract law, and that as a rule, exculpatory clauses cannot protect contracting parties from liability to persons not party to the contract. The issue before us presents a question of law, which we review *de novo*. *Wills v. Foster*, 229 Ill. 2d 393, 399 (2008). Accordingly, we need not defer to the trial court's reasoning. *Platinum Partners Value Arbitrage Fund, Ltd. Partnership v. Chicago Board Options Exchange*, 2012 IL App (1st) 112903, ¶ 12.

¶ 20 Parties are permitted to contract away their potential tort liability. *Arkwright Mutual Insurance Co. v. Garrett & West, Inc.*, 790 F. Supp. 1386 (N.D. Ill. Mar. 31, 1992). Stated differently, tort damages can be limited by contract. See e.g. *Rosenstein v. Standard & Poor's Corp.*, 264 Ill. App. 3d 818, 819, 826, 828 (1993); *Hartford Fire Insurance Co. v. Architectural Management, Inc.*, 194 Ill. App. 3d 110, 116-17 (1990); *Purolator Security, Inc. v. Wells Fargo Alarm Service*, 141 Ill. App. 3d 1106, 1112 (1986); see also *Allendale Mutual Insurance Co. v.*

Leaseway Warehouse, Inc., 624 F. Supp. 637, 640-41 (1985) (duty owed was limited by the contract creating the duty). Additionally, contractual exculpatory clauses have been found to apply to tort claims of individuals not directly party to the contract. See e.g. *Rosenstein*, 264 Ill. App. 3d at 819, 826, 828; *Arkwright Mutual Insurance Co.*, 790 F. Supp. at 1390 (same); see also *Allendale Mutual Insurance Co.*, 624 F. Supp. 637, 640-41 (1985) (applying an exculpatory contract clause to claim brought on behalf of entity not party to the contract). Conversely, none of the cases cited by Wells Fargo set forth a firm rule that clauses limiting damages, including tort damages, cannot impact liability to non-contracting parties.

¶ 21 In *Rozny v. Marnul*, 43 Ill. 2d 54 (1969), the court did not consider whether the amount of tort damages could be limited by contract. There, the plaintiffs purchased property based on inaccurate surveys which the defendant had created for someone else and the issue was essentially whether the plaintiffs could pursue a tort action at all. *Id*. at 56-60, 68. The court found that plaintiffs could do so. *Id*. at 59, 60, 68. That case is inapposite. Wells Fargo's reliance on *Kelley v. Carbone*, 361 Ill. App. 3d 477 (2005) is similarly misplaced, as the reviewing court there was also not required to consider whether tort damages could be limited by a contract between other parties.

¶ 22 We are equally unpersuaded by Wells Fargo's reliance on *Chicago Steel Rule and Die Fabricators Co. v. ADT Security Systems, Inc.*, 327 Ill. App. 3d 642, 643, 652 (2002). There, the issue before the court was not whether a contractual limitation on damages could be applied to a third party; rather, the issue was "whether an exculpatory clause in a contract between two commercial parties can preclude one of the commercial parties from bringing property damage claims based on strict products liability" against the other contracting party. *Id*. at 643. The plaintiff also argued that the defendant fire protection company should not be able to exculpate

or limit its damages for contract or negligence claims. *Id*. at 650. On appeal, the reviewing court affirmed the trial court's determination that the exculpatory clause was enforceable and foreclosed the plaintiff's strict liability action. *Id*. at 645, 649-50. With regard to breach of contract and negligence, the reviewing court rejected the plaintiff's policy argument that enforcing a negligence disclaimer in a fire protection contract would diminish fire alarm companies' incentive to provide appropriate levels of service and in turn, permit the uncontrolled spread of fire and harm to the larger public. *Id*. at 653. The court found that fire alarm companies "could still be exposed to negligence claims by third parties who sustain personal injuries or damage to property." *Id*.

¶ 23 The quoted statement must be read in the limited context in which it arises. The court was not directly presented with the impact of an exculpatory clause on a third person. In addition, while there may be policy reasons to limit application of exculpatory clauses against non-contracting parties under certain circumstances, that is a far cry from a hard and fast rule prohibiting their application to third parties in all instances.

¶ 24 Finally, Wells Fargo cites *Scott & Fetzer Co. v. Montgomery Ward & Co.*, 112 Ill. 2d 378 (1986), in which the court did consider whether a contractual exculpatory clause could be applied to claimants not party to the contract, but Wells Fargo's reading of that case is once again overly broad. There, our supreme court found that the specific exculpatory clause before them clearly and expressly applied only to the contracting parties and property located on one contracting party's premises, to the exclusion of others who were not parties to the contract. *Id*. at 391-92, 395-96. Accordingly, at most, *Scott & Fetzer Co.* supports the notion that an exculpatory clause's effect on third persons depends on the specific clause, not that an exculpatory clause can never limit liability against a third person.

¶ 25 Here, Wells Fargo has cited no case setting forth the legal principle that contractual provisions limiting damages are categorically unenforceable against non-contracting parties. In addition, Wells Fargo has developed no argument concerning the specific contractual language in this case. See Ill. S. Ct. 341(h) (7) (eff. Feb. 6, 2013); *Mack v. Viking Ski Shop, Inc.*, 2014 IL App (1st) 130768, ¶ 17 (a plaintiff forfeits a contention by failing to develop a cohesive argument). Accordingly, we need not consider this issue further.

¶ 26 2. Diminution of Award for Wells Fargo's Negligence

¶ 27 Next, Wells Fargo asserts the court erred in reducing EBI's professional negligence liability by the negligence of Wells Fargo, a lay entity. Specifically, Wells Fargo contends that the audit interference doctrine precludes such a reduction in this instance. Under that doctrine, "the negligence of an employer who hires an accountant to audit the business is a defense only when it has contributed to the accountant's failure to perform his contract and to report the truth." *Board of Trustees of Community College District No. 508, County of Cook v. Coopers & Lybrand*, 208 Ill. 2d 259, 266, 272 (2003).

¶ 28 Even assuming that Wells Fargo, a sophisticated entity, could constitute a lay person in this instance, Wells Fargo's appellant brief has developed no argument that this rule applies outside of the context of accountant negligence. Instead, Wells Fargo states, "[t]here is, *of course*, no reason to apply a different rule to other professions than the rule that is applied to accountants." (Emphasis added.) Wells Fargo ignores the supreme court's more narrow determination that "the application of the audit interference doctrine *in the accounting malpractice context* is in accord with recognized principles of comparative fault." (Emphasis added.) *Board of Trustees of Community College District No. 508, County of Cook*, 208 Ill. 2d at 266, 272. In addition, while the supreme court discussed an earlier supreme court case involving

a dentist's negligence the court did so in the more general context of the Restatement (Third) of Torts: Apportionment of Liability § 7, Comment m, at 70 (2000), which the court found to be consistent with, albeit not necessarily identical to, the audit interference doctrine. See *Board of Trustees of Community College District No. 508, County of Cook*, 208 Ill. 2d at 266, 270-72 (citing *Owens v. Stokoe*, 115 Ill. 2d 177, 183-84 (1987)).

¶ 28 Assuming further still that the supreme court intended to find the audit interference doctrine applied outside of the accountant context because it mirrored the restatement, the latter provision states, "in a case involving negligent rendition of a service, * * * a factfinder does not consider any plaintiff's conduct that created the condition the service was employed to remedy." Restatement (Third) of Torts: Apportionment of Liability § 7, Comment m, at 70 (2000). EBI was not hired, however, to remedy any condition created by Wells Fargo. Thus, Wells Fargo's negligence did not create a condition that Wells Fargo is entitled to have excluded from its own liability. Stated differently, Wells Fargo's negligence constitutes a defense that EBI was entitled to raise. Having considered all of Wells Fargo's arguments, Wells Fargo has not shown error.

¶ 29 3. CIBC's Privileged Communication

¶ 30 Wells Fargo also asserts that while the trial court found it had not proven CIBC knew and understood that the Property's condition was worse than originally suggested, and thus, had not shown CIBC committed fraud, Wells Fargo could have established the requisite knowledge and intent had the court not erroneously excluded a pertinent email as privileged. EBI has incorporated Wells Fargo's contention into its own brief. We review this issue *de novo*. *Illinois Emcasco Insurance Co. v. Nationwide Mutual Insurance Co.*, 393 Ill. App. 3d 782, 785 (2009).

¶ 31 On November 25, 2002, attorney George Espinal sent an email to certain CIBC employees, in which Espinal stated:

> "Attached is a copy of the Exterior Wall Report referenced in the third bulleted item below. Please note that the attached report requires the borrower to complete certain work that does not appear to be covered by the reserve numbers currently contemplated in the loan documents."

The court found that while the first sentence was not privileged, the second sentence constituted legal advice and was privileged.

¶ 32 The attorney-client privilege is intended to promote full and frank consultation between attorney and client. *Consolidation Coal Co. v. Bucyrus-Erie Co.*, 89 Ill. 2d 103, 117-18 (1982). The party asserting a privilege has the burden of proof, however. *Hayes v. Burlington Northern & Santa Fe Railway Co.*, 323 Ill. App. 3d 474, 477 (2001). An attorney's comments conveying legal advice are protected by the attorney-client privilege but the opposite is true as to comments not relaying legal advice. See *Midwesco-Paschen Joint Venture for Viking Projects v. IMO Industries, Inc.*, 265 Ill. App. 3d 654, 661-62 (1994).

¶ 33 When read in context, we agree with the trial court that the statement at issue was privileged legal advice. The clear purpose of this email chain was for CIBC to obtain assurance from its counsel that the documentation concerning the Property showed that CIBC would be entering into a sound agreement that would shield CIBC from financial loss. Counsel effectively informed CIBC that in his opinion, the present loan documents did not do so. Counsel's statement was more than a recitation of fact. While counsel did not propose a solution, we nonetheless find this constitutes legal advice, not merely business advice. *Cf. CNR Investments, Inc. v. Jefferson Trust and Savings Bank of Peoria*, 115 Ill. App. 3d 1071, 1076 (1983) (an itemization of the bank's options regarding real estate at issue in the litigation, was business advice, not legal advice, and thus, was not privileged). We further note that an attorney's legal

assessment may in some instances reveal a legal problem for which there is no solution and we are unpersuaded by Wells Fargo's overly restricted definition of legal advice, requiring a proposed solution in every instance. *Cf. Midwesco-Paschen Joint Venture for Viking Projects*, 265 Ill. App. 3d at 662, 664 (the reviewing court found that communications merely requesting comments and communications that neither suggested legal conclusions nor advised a future course of conduct, were not privileged). We find no error.

¶ 34 4. Servicing Advances and Prejudgment Interest

¶ 35 Next, Wells Fargo asserts the trial court improperly determined that Wells Fargo could not recover from CIBC approximately $2.6 million in contractually defined "Servicing Advances," *i.e.*, the attorney fees and litigation expenses Wells Fargo incurred in pursuing claims against Walker, Byers and 318 West Adams. Wells Fargo also asserts the trial court improperly determined Wells Fargo was not entitled to $457,021.35 in prejudgment interest from CIBC. While Wells Fargo contends that its complaint effectively sought those sums, the trial court determined that Wells Fargo had "waived" its ability to recover those amounts from CIBC. Having considered all of the parties' lengthy arguments, we will concisely resolve this issue presently.

¶ 36 First, we find that Illinois law applies to this issue, rather than New York law, which Wells Fargo contends applies due to the parties' contract. Although choice of law provisions are generally honored, the law of the forum controls procedural matters. *Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 199 Ill. 2d 325, 351 (2002). Because the issue here presents a procedural matter, we follow Illinois law. Furthermore, although the parties dispute the appropriate standard of review to be applied, we find the trial court's determination was correct under any standard of review.

¶ 37 The concepts of waiver and forfeiture are frequently used imprecisely, by parties and courts alike. See *e.g. Secretary of State v. Illinois Labor Relations Board, State Panel*, 2012 IL App (4th) 111075, ¶ 52. The two terms are not, however, interchangeable. *Gaylor v. Campion, Curran, Rausch, Gummerson & Dunlop, P.C.*, 2012 IL App (2d) 110718, ¶ 34, n. 1. Waiver generally arises from an affirmative, consensual act where a party intentionally relinquishes a known right. *Gallagher v. Lenart*, 226 Ill. 2d 208, 229 (2007). Conversely, forfeiture results from the failure to make a timely assertion of the right. *Id*. In addition, the forfeiture rule is intended to prevent prejudice to a party who had no opportunity to present an issue to the trial court. *People ex rel. Department of Labor v. Valdivia*, 2011 IL App (2d) 100998, ¶ 15. With that said, forfeiture is also intended to preserve finite judicial resources. *In re Marriage of Houghton*, 301 Ill. App. 3d 775, 780 (1998). Thus, the forfeiture rule protects both the parties and the court.

¶ 38 Wells Fargo's October 2011 petition for attorney fees against CIBC stated as follows:

> "[T]he total amount of attorneys' fees and costs the plaintiff is seeking from CIBC through August 31, 2011, is $944,654.21. At the conclusion of the proceedings on this fee petition, Wells Fargo will supplement this petition to add the fees and costs it is seeking against CIBC for work relating to the proceedings on this fee petition from September 1, 2011 forward."

In May 2012, Wells Fargo and CIBC entered into a stipulation:

> "Based upon the Court's August 22, 2011 ruling in favor of Wells Fargo and against CIBC on Count IX of the Sixth Amended and Supplemental Complaint, if such ruling is not reversed on appeal, Wells Fargo is entitled to an award of attorneys' fees and expenses in the amount of $962,924.24 for services rendered through April 30, 2012."

We note that count IX was the only count for which judgment was entered in favor of Wells Fargo and against CIBC. The parties also stipulated that "Wells Fargo may supplement its claim for attorneys' fees and expenses as against CIBC for amounts that accrue from May 1, 2012 forward."

¶ 39 When the fee petition hearing began on May 29, 2012, Wells Fargo's counsel stated, "Your Honor, we're here today seeking a total of $2,511, 067.96 in attorneys' fees and costs against *Mr. Walker* for this proceeding on behalf of the plaintiff." (Emphasis added.) Wells Fargo's counsel did not state that it was also seeking additional fees from CIBC at that hearing. Furthermore, Wells Fargo's counsel, Daniel Hefter, testified at that hearing:

> "Q. And you also felt it would be legally incorrect to seek against CIBC charges related to litigation against Walker and to seek against Walker any charge related to CIBC?
>
> A. Right."

The trial court had originally awarded Wells Fargo the sums it now seeks from CIBC, but subsequently set that award aside on CIBC's motion. The court found that this was a textbook example of waiver. Wells Fargo contends, however, that it could not have waived its right to collect these sums because it did not intentionally relinquish that right.

¶ 40 Assuming that Wells Fargo did not intentionally forgo collecting the fees incurred with respect to Walker from CIBC, we agree that Wells Fargo's right is foreclosed by the procedural default that occurred when Wells Fargo misled the court and the parties to believe it was not pursuing additional amounts against CIBC. Even if the trial court's use of the term waiver in this instance was not entirely accurate, forfeiture occurred and we will not place form over substance. Wells Fargo's fee petition, stipulation with CIBC, oral statement and its attorney's testimony

collectively and unequivocally indicated that Wells Fargo was not actively seeking servicing advances or prejudgment interest against CIBC at the hearing on the fee petition. This deprived CIBC not only of the opportunity to present a defense, but the opportunity to develop one. Absent compelling citation to authority, we will not require CIBC to identify the defense it could have developed and presented under different circumstances. Similarly, we are not persuaded that reopening the hearing for CIBC to present additional evidence was the solution required. In a case that has now been pending for a decade, preserving finite judicial resources is of paramount importance. We will not require the trial court to revisit a matter that, but for Wells Fargo's apparent neglect, should have been completed long ago. Although the mortgage document in this case contained a non-waiver provision that generally protects Wells Fargo from its failure to act, that provision does not prevent the trial court from finding that procedural default occurred due to the conduct before it. The trial court's right to control its docket is not governed by the parties' contract. See *Oldenstedt v. Marshall Erdman and Associates, Inc.*, 381 Ill. App. 3d 1, 15-16 (2008). We find no error.

¶ 41 We also find it appropriate to immediately address a contention raised in CIBC's appeal. The trial court found its determination that Wells Fargo has waived its right to the aforementioned sums was limited to previously incurred fees and thus, that determination did not apply to the attorney fees and litigation expenses Wells Fargo incurred in pursuing claims against Walker, Byers and 318 West Adams going forward. The court found Wells Fargo had now made clear the sums it seeks to collect. In addition, CIBC can argue against the merits of Wells Fargo's claim in whatever manner CIBC sees fit. The trial court properly determined that subsequently incurred sums were not the subject of procedural default. We are not persuaded

that the court's determination put CIBC at a significant disadvantage in defending itself against the imposition of those fees.

¶ 42 5. Deficiency Claim Against Walker

¶ 43 We similarly reject Wells Fargo's assertion that the trial court erred by failing to award a deficiency judgment against Walker and in favor of Wells Fargo on count I. The trial court found Wells Fargo had failed to properly pursue a deficiency judgment against Walker on count I and instead, had only pursued a judgment against Walker on counts II and III.

¶ 44 Wells Fargo's trial brief stated, "Count I of Wells Fargo's complaint was a foreclosure count and that count was resolved with the confirmation of the foreclosure sale in January 2005. This Court need not consider Count I in any way." In addition, at trial, Wells Fargo moved for a directed finding against Walker, stating, "Wells Fargo has two counts against Walker. Count II is for breach of the closing certificate and Count III is for breach of the Indemnity Agreement." Following trial, Wells Fargo filed its proposed findings of fact and conclusions of law, which sought findings against Walker on counts II and III but said nothing of count I. Moreover, the trial court entered an opinion, which resolved the parties' claims against each other but similarly said nothing regarding count I. Wells Fargo's postjudment motion did not challenge the court's failure to enter judgment on that count.

¶ 45 Wells Fargo subsequently filed proposed additional findings of fact and conclusions of law, in which Wells Fargo stated that it was entitled to a deficiency judgment against Walker in the same amount as the judgment on count II. While the trial court initially entered the judgment sought, finding that Walker had not objected to the inclusion of a deficiency judgment award, the court correctly reconsidered. The court stated, "for the court to retroactively award Wells Fargo millions of dollars on a count that was never litigated must not be permitted to stand. This case

has been going on for many years, and if Wells Fargo intended to seek a deficiency judgment against Walker on Count I, it could have and should have done so many years ago." We agree that Wells Fargo disclaimed an award on count I for years, regardless of whether it intended to do so or merely failed to exercise diligence. We find no error.

¶ 46 C. WALKER'S APPEAL

¶ 47 1. Indemnity Agreement

¶ 48 On appeal, Walker first asserts the trial court erred in entering judgment in favor of Wells Fargo and CIBC, and against Walker pursuant to the Indemnity Agreement because the former entities did not incur damages as a result of Walker's fraud or misrepresentation. In reviewing a judgment following a bench trial, we must determine whether the judgment is against the manifest weight of the evidence. *Green v. Papa*, 2014 IL App (5th) 130029, ¶ 32. The trial court's decision is against the manifest weight of the evidence where the opposite conclusion is apparent or, where the court's findings are arbitrary, unreasonable or not based on the evidence. *Konfrst v. Stehlik*, 2014 IL App (1st) 132113, ¶ 11.

¶ 49 Walker, as the indemnitor, was party to the Indemnity Agreement, which stated the following:

> "Indemnitor hereby assumes liability for, hereby guarantees payment to Lender of, [and] hereby agrees to pay *** and hereby indemnifies Lender from and against any and all *** losses, damages, costs and expenses (including, without limitation, attorneys' fees), causes of action, suits, claims, demands and judgments of any nature or description whatsoever (collectively, "Costs") which may at any time be imposed upon, incurred by or awarded against Lender *as a result of*:

* * *

(i) Fraud or material misrepresentation or failure to disclose a material fact, by Borrower or Indemnitor, *** or any person acting on behalf of, or at the direction of, Borrower or Indemnitor." (Emphasis added.)

The parties do not dispute that this provision applies to damages that resulted from Walker's fraud or failure to disclose information but Walker contends that his conduct did not cause the damages of CIBC or Wells Fargo. CIBC responds that Walker erroneously suggests CIBC and Wells Fargo had to prove actual reliance on Walker's misrepresentation.

¶ 50 Nonetheless, as Walker acknowledges, the circuit court found that Walker's misrepresentations concerning the purchase price of the Property and the Property's income were material and were relied on by both CIBC and Wells Fargo. Walker does not suggest that *no* evidence showed those entities relied on his misrepresentations; rather, Walker contends the record shows those entities also relied on information supplied by other individuals. We reject Walker's suggestion that reliance on his misrepresentations is mutually exclusive of reliance on other information. Even assuming there were multiple causes for the damages of CIBC and Wells Fargo, that did not eliminate Walker's responsibility for all of the damages, as the contract did not require that damages result *solely* from Walker's misrepresentations. Furthermore, Walker has cited no law in support of his proposition that the failure of Wells Fargo and CIBC to discover the misrepresentations for themselves negated the *contractual* causes of action and remedies at issue here. *Cf. Schmidt v. Landfield*, 20 Ill. 2d 89, 90, 94 (1960) (finding in a fraud action that an individual guilty of fraudulent misrepresentation cannot raise the other party's negligence in failing to discover the truth as a defense but the latter party's reliance on the misrepresentation may not be reasonable where he was afforded the opportunity of knowing the

truth); *Kopley Group V., LP, v. Sheridan Edgewater Properties, Ltd.*, 376 Ill. App. 3d 1006, 1018-19 (2007). Additionally, Walker contends that under the Mortgage document, he was not required to indemnify anyone for claims and losses incurred due to the "willful misconduct or gross negligence" of the lender, *i.e.*, CIBC. Even assuming, however, that this provision was incorporated into the Indemnity Agreement, the trial court found CIBC did not commit gross negligence or willful misconduct. Having reviewed, albeit without reciting, the lengthy testimony presented in this case, we find the trial court's determination was not against the manifest weight of the evidence. We find no error.

¶ 60 2. Non-consensual Leases

¶ 61 Walker also challenges the trial court's finding that he was liable for 318 West Adam's failure to obtain written consent before entering into leases that were not at arms' length. The court relied on the following language found in the Indemnity Agreement:

> "[N]otwithstanding anything to the contrary in the Loan Documents, in the event that *** Borrower fails to obtain Lender's prior written consent to any assignment, transfer or conveyance of the Property or any interest therein, if such consent is required by the Loan Documents, then the Loan shall be fully recourse to Indemnitor."

The trial court found this provision applied to leases under the well-settled principle that "[a] lease is a contract, conveying a lesser interest in property than a deed, which gives possession of the leased premises for the full term of the lease." *Metropolitan Airport Authority v. Property Tax Appeal Board*, 307 Ill. App. 3d 52, 56 (1999). Nonetheless, Walker contends that this provision does not apply to leases because the mortgage document, distinguished between leases and conveyances. We note that the trial court found Walker failed to show that the mortgage document was incorporated into the Indemnity Agreement or the closing certificate.

¶ 62 In any event, section 1.10 of the mortgage document provided that the borrower could enter into proposed leases without the lender's prior written consent if, among other things, the lease was entered into at existing local market rates and terms, was arms-length with a *bona fide* and independent third-party tenant, and did not have a materially adverse effect on the Property's value. Section 1.11 of the mortgage document stated:

> "[N]either the Property, nor any part thereof or interest therein, shall be sold, conveyed, disposed of, alienated, hypothecated, *leased* (except to Tenants under Leases which are not in violation of Section 1.10 hereof), assigned[,] pledged, mortgaged, further encumbered or otherwise transferred, nor Borrower shall be divested of its title to the Property or any interest therein, in any manner or way, whether voluntarily or involuntarily (any of the foregoing, a 'Transfer'), except as expressly set forth in this Section 1.11 in each case without the prior written consent of Lender being first obtained, which consent may be withheld in the Lender's sole discretion." (Emphases added.)

¶ 63 Having considered the Indemnity Agreement as well as the mortgage document, we find that the parties intended to give "conveyance," as used in Indemnity Agreement, its plain meaning. *Palm v. 2800 Lake Shore Drive Condominium Ass'n*, 2014 IL App (1st) 111290, ¶ 75 (a contract's language should be given its plain and ordinary meaning). Thus, a conveyance includes a lease, one specific type of conveyance. Even considering the aforementioned sections of the mortgage document, it is clear that the parties referred to both "conveyed" and "leased" property, among numerous other types of transfer, to exhaust all means by which the borrower may purport to place the Property outside of Wells Fargo's control. Given section 1.10's restrictions on leases, the parties clearly intended that the lender would have recourse if the borrower entered into an unusual lease agreement without the lender's consent. Accordingly, it

would be absurd to exclude leases from the Indemnity Agreement's aforementioned provision. *Suburban Auto Rebuilders, Inc. v. Associated Tire Dealers Warehouse, Inc.*, 388 Ill. App. 3d 81, 92 (2009) (courts construe contracts to avoid absurd results).

¶ 64 Walker also contends that Wells Fargo waived its right to object to its lack of consent to the Coldwell Banker and WexTrust leases because after foreclosure, Wells Fargo had the authority to terminate those leases but did not do so. Even assuming that Wells Fargo could have and should have terminated those leases if it did not consent, we agree that the aforementioned non-waiver provision applies to this form of procedural default at issue here. That provision states that "[n]either the failure by Lender to exercise, nor the delay by Lender in exercising, any right, power or remedy upon any Event of Default by Borrower hereunder shall be construed as a waiver of such Event of Default or as a waiver of the right to exercise any such right, power or remedy at a later date." Accordingly, we find no waiver.

¶ 65 3. Closing Certificate Warranties

¶ 66 Walker further argues that the trial court erroneously entered judgment against Walker and in favor of Wells Fargo for breaching the closing certificate, as alleged in count II. In order to demonstrate a breach of warranty, the buyer must demonstrate that the warrantor gave a warranty as an inducement for the buyer to make the purchase and that the buyer actually relied upon the warranty. *Regopoulos v. Waukegan Partnership*, 240 Ill. App. 3d 668, 674 (1992). With that said, the buyer need not demonstrate that its reliance on the warranty was reasonable. *Id*.

¶ 67 Here, the closing certificate stated, "[t]his Closing Certificate (this 'Certificate') was delivered to Lender in order to induce Lender to make the Loan. Borrower hereby acknowledges that Lender shall rely upon this Certificate and the making of such representations, warranties

and covenants." The trial court below determined that in *Regopoulos*, the reviewing court found that similar contractual language was in itself sufficient to establish actual reliance. Walker essentially argues that the trial court misconstrued *Regopoulos* and that contractual language does not show actual reliance where the buyer relied on additional sources. Regardless of how *Regopoulos* should be read, here, we hold that the contractual language was in itself sufficient to demonstrate actual reliance. If Walker did not want others to actually rely on his warranties, he should not have agreed to such reliance in writing. We reiterate that the existence of other sources of information did not negate actual reliance on the warranty. We need not consider this contention further.

¶ 68 4. Indemnity for Liability to Wells Fargo

¶ 69 Next, Walker challenges the trial court's determination that the Indemnity Agreement required Walker to indemnify CIBC for the entirety of its liability to Wells Fargo as well as CIBC's attorney fees incurred in this case. More specifically, the trial court found that CIBC had received from Wells Fargo two written requests to repurchase the loan but failed to do so. Accordingly, CIBC was liable to Wells Fargo for breach of contract based on CIBC's failure to meet that obligation. Walker essentially contends that the Indemnity Agreement was not broad enough to encompass liability for CIBC's own breach of contract in this instance. We review a contract's interpretation *de novo*. *Paluch v. United Parcel Service, Inc.*, 2014 IL App (1st) 130621, ¶ 13. While indemnity contracts are strictly construed and any ambiguity will be construed against the indemnitee (*American Management Consultant, LLC v. Carter*, 392 Ill. App. 3d 39, 63 (2009)), we find no ambiguity in the contract before us.

¶ 70 The Indemnity Agreement stated as follows:

> "Indemnitor hereby assumes liability for, hereby guarantees payment to Lender of, hereby agrees to pay, protect, defend and save Lender harmless from and against, and hereby indemnifies Lender from and against any and all liabilities, obligations, losses, damages, costs and expenses (including, without limitation, attorneys' fees), causes of action, suits, claims, demands and judgments of any nature or description whatsoever (collectively, 'Costs') which may at any time be imposed upon, incurred by or awarded against Lender as a result of:
>
> * * *
>
> Fraud or material misrepresentation or failure to disclose a material fact, by Borrower or Indemnitor, or any holder of equity interests in Borrower or Indemnitor, or any person acting on behalf of, or at the direction of, Borrower or Indemnitor[.]"

Walker disregards, however, the Indemnity Agreement's other pertinent provision:

> "[T]he liability of Indemnitor under this Agreement shall be unconditional and absolute and shall in no way be impaired or limited by any of the following events, whether occurring with or without notice to Indemnitor or with or without consideration: *** (iv) the accuracy or inaccuracy of the representations and warranties made by Indemnitor herein or by Borrower in any of the Loan Documents; *** or (ix) the taking or failure to take any action of any type whatsoever. *No such action which Lender shall take or fail to take* in connection with the Loan Documents or any collateral for the Loan, *nor any course of dealing with Borrower or any other person, shall limit, impair or release Indemnitor's obligations hereunder*, affect this Agreement in any way or afford Indemnitor any recourse against Lender. Nothing contained in this Section shall be

construed to require Lender to take or refrain from taking any action referred to herein." (Emphases added.)

¶ 80 We find the contract unambiguously and clearly required Walker to indemnify CIBC regardless of whether CIBC failed to act by repurchasing the loan. Simply put, Walker is a sophisticated party who could have declined to agree to such broad language if he found it to be disagreeable. In addition, Walker states that an agreement to indemnify against willful misconduct is generally contrary to public policy. See *Davis v. Commonwealth Edison Co.*, 61 Ill. 2d 494, 500-01 (1975). This rule is more narrow, however, than Walker suggests and does not apply in these circumstances. See *Dixon Distributing Co. v. Hanover Insurance Co.*, 161 Ill. 2d 433, 445-46 (1994) ("Although *Davis* states that an agreement to indemnify against willful misconduct, would as a general rule, be contrary to public policy, the authority it cites for this proposition only prohibits a party from exempting oneself from tort liability for harm caused intentionally."). While Walker asserts the duty to indemnify against injuries or damages outside of his control is unreasonable, Walker ignores that CIBC would not have even been asked to repurchase the loan but for the conduct of Walker. We find no error.

¶ 81 5. Indemnity Assignment

¶ 82 Walker further asserts that CIBC assigned its entire interest in the Indemnity Agreement to Wells Fargo, and thus, CIBC retained no interest in the agreement that led to CIBC's indemnity judgment against Walker. In response, CIBC argues that Walker failed to preserve this issue. Even if Walker had preserved the issue, his contention would nonetheless fail. The Indemnity Agreement states:

"Indemnitor hereby consents and agrees that Lender may at any time *** do any of the following events, and *the liability of Indemnitor* under this Agreement shall be

> unconditional and absolute and *shall in no way be impaired or limited by* the following events *** any sale, *assignment* or foreclosure of the Note, the Security Instrument or any of the other Loan Documents or any sale or transfer of the Property[.]" (Emphases added.)

This provision unambiguously provides that the assignment of the mortgage to Wells Fargo did not impact Walker's liability to CIBC under the Indemnity and Guaranty Agreement. We need not consider this issue further.

¶ 83 6. Setoff

¶ 84 Additionally, Walker contends that the trial court erred by failing to setoff the judgments in favor of Wells Fargo and CIBC, and against Walker, with the amount of fault that the jury found belonged to Wells Fargo, CIBC, and EBI. This contention suffers from several flaws, including scant citation to legal authority. See Ill. S. Ct. R. 341(h) (7) (eff. Feb. 6, 2013). In any event, we address one fatal flaw: Walker's mischaracterization of the scope of the jury's determination. As the trial court found, the jury's allocation of fault pertained only to contributory liability for EBI's misrepresentation concerning the Property's condition. The jury's determination did not apply to the totality of claims among the parties. Because Walker's contention rests on a false premise, he has not shown error.

¶ 85 7. Election of Remedy

¶ 86 Finally, Walker asserts that Wells Fargo improperly obtained judgments simultaneously against CIBC based on Wells Fargo's disaffirmance of the loan and against Walker based on affirmance of the loan. He essentially contends that Wells Fargo improperly obtained a double recovery based on inconsistent legal theories.

¶ 87 As previously stated, Rule 341(h) (7) (eff. Feb. 6, 2013) requires parties to provide proper citations to legal authority in support of their contentions. This includes the obligation to provide pinpoint citations. *Menard v. Illinois Workers' Compensation Comm'n*, 405 Ill. App. 3d 235, 238 (2010). Additionally, failure to comply with our supreme court's mandatory rules may result in forfeiture. *Id*. at 238. The majority of Walker's citations with respect to this issue lack pinpoints. In addition, one case for which Walker does provide a pinpoint citation (*Fischer v. Jackson*, 239 Ill. App. 322, 329 (1925)), is neither binding, as it predates 1935 (see *Wells Fargo Bank Minnesota, NA v. Envirobusiness, Inc.*, 2014 IL App (1st) 133575, ¶ 24), nor persuasive. Accordingly, we now consider the one post-1935 case for which Walker has provided an appropriate citation.

¶ 88 Walker relies on the following proposition: "The purpose of a remedy in contract is to place the injured party into the position he or she would have occupied if the contract had been performed, not a better position." *Stahulak v. City of Chicago*, 291 Ill. App. 3d 824, 833 (1997). Standing alone, this proposition does not further Walker's position. Walker acknowledges that under the doctrine of joint and several liability, a plaintiff can pursue all parties responsible for his injury for the full amount of damages, but can obtain only one satisfaction. Here, however, no satisfaction has occurred. See Black's Law Dictionary (9th ed. 2009) (satisfaction of judgment contemplates a complete discharge of obligations under a judgment or payment of judgment). Walker has not shown that any improper recovery has occurred.

¶ 89 D. CIBC's Appeal

¶ 90 1. Breach of MLPA

¶ 91 On appeal, CIBC asserts the trial court erred by holding it liable for breaching the MLPA. We first find, however, that this contention is forfeited. Arguments must contain citations to the

page of record relied on. Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013). Additionally, citing the appendix does not satisfy this requirement, as an appendix is not part of the record, and results in forfeiture. See *People v. Snow*, 2012 IL App (4th) 110415, ¶ 11. Furthermore, where a litigant's brief cites only to the appendix, the reviewing court has discretion to strike the brief and dismiss the appeal or, disregard unsupported arguments. *Budzileni v. Department of Human Rights*, 392 Ill. App. 3d 422, 439-40 (2009). This discretion comports with the notion that the court has no duty to sift through the record in order to find support for an issue. *Walters*, 2011 IL App (1st) 103488, ¶ 6.

¶ 92 This case presents a perfect example of why citation to the record is necessary. It goes without saying, that in an appeal with over 250 volumes of record, the absence of citation to the record hinders an already cumbersome review. In CIBC's first 20-page argument, CIBC has provided only six citations to the record. Instead, CIBC's argument is replete with facts supported only by citation to the appendices filed in this appeal. Accordingly, we find CIBC's contention is forfeited. Despite this harsh-sounding result, we would nonetheless find that no error occurred.[3]

¶ 93 CIBC contends that *prompt* notice of a breach, as opposed to mere notice, was a condition precedent for CIBC's duty to repurchase the loan at issue. CIBC also asserts that while it was a condition precedent for the notice to identify a specific breach of CIBC's warranties, Wells Fargo gave notice only of the borrower's misrepresentations. In response, Wells Fargo argues that the alleged defects in the notice given were not the subject of a condition precedent. A condition precedent exists where an act or event, other than the lapse of time, must occur

[3] CIBC and Wells Fargo agree that pursuant to the parties' contractual choice of law provision, New York law governs this issue.

before a duty to perform a promise arises, unless the condition is excused. *MHR Capital Partners LC v. Presstek, Inc.*, 12 N.Y.3d 640, 645 (N.Y. 2009). With that said, a contractual duty will not be interpreted as a condition precedent absent clear language demonstrating that the parties intended to make it a condition. *Unigard Security Insurance Co. v. North River Insurance Co.*, 79 N.Y.2d 576, 571 (1992).

¶ 94 Here, the MLPA states: "*Upon notice pursuant to Section 2.03 of the Pooling and Servicing Agreement* and Section 6(d) above, the Seller shall, not later than 90 days from the earlier of the Seller's receipt of the notice *** repurchase the affected Mortgage Loan at the applicable Repurchase Price ***." (Emphasis added.) This language did not expressly state, however, that the duty of the seller, CIBC, was conditioned upon notice being prompt. In addition, although section 2.03 of the PSA stated, among other things, that Seller "shall give prompt written notice of such Defect or Breach, (emphasis added)," that language, even when considered with the MLPA, does not make clear that the parties intended every detail in section 2.03 of the PSA to be a condition precedent. Furthermore, we agree with the trial court's suggestion in this case that section 18 of the MLPA sheds further light on the parties' intent. That section provides that "[n]o failure or delay on the part of any party to exercise any right, power or privilege under the Agreement *** shall operate as a waiver thereof." This shows that the parties' did not intend for any of CIBC's duties to be conditioned upon Wells Fargo's action. Accordingly, these documents do not contain clear language showing the parties intended promptness and specificity with regard to the breach at issue to constitute conditions precedent.

¶ 95 We further note that CIBC's appellant brief only addresses prejudice in a footnote, without citation to the record or legal authority. See also Ill. S. Ct. 3441(h)(7) (eff. Feb. 6, 2013) ("Points not argued are waived and shall not be raised in the reply brief [.]"). In addition, the

trial court found CIBC's suggestion that it would have repurchased the loan if given earlier notice to not be credible. Moreover, while CIBC argues that Wells Fargo improperly demanded that CIBC enter into a repurchase agreement the next day when Wells Fargo's only available remedy was to have CIBC repurchase the loan within 90 days, the trial court properly found this assertion to be factually incorrect. Finally, we agree with the trial court's determination that the loan at issue was at all times a mortgage loan capable of being repurchased, notwithstanding CIBC's suggestion to the contrary. We find no error.

¶ 96 2. Walker's Liability to CIBC for Wells Fargo's Fees

¶ 97 Next, CIBC contends that it is entitled to recover from Walker the legal fees CIBC had stipulated it would pay Wells Fargo. While the parties argue this issue at length, we succinctly find the trial court properly determined CIBC's claim to recover that sum was the subject of procedural default.

> In its August 2011 memorandum, the court ordered as follows:
>
> "Since a final appealable judgment will not exist until the Court resolves attorneys fees and statutory pre-judgment interest, the parties are directed to meet and *update damage figures* before a hearing and resolve any other inconsistencies as to damages. If the parties cannot reach a resolution, then the issue should be submitted to the Court before a final appealable judgment order is entered." (Emphasis added.)

Accordingly, the court clearly wanted the parties to provide the amounts they sought to recover.

¶ 98 CIBC's subsequently filed pleadings, however, did not state that it was seeking a given dollar amount from Walker based on Wells Fargo's legal expenses. Even after CIBC stipulated that it would pay $962,924.24 for Wells Fargo's expenses, CIBC did not file a pleading asking to collect that specific amount from Walker. After the fee petition hearing, CIBC filed proposed

findings of fact and conclusions of law that did not request a judgment against Walker for the amount of Wells Fargo's legal fees. On September 25, 2012, the trial court entered a memorandum opinion and judgment, which referred to the stipulation between Wells Fargo and CIBC but did not pass that amount on to Walker.

¶ 99 CIBC then filed a post-trial motion, asking the court to award CIBC additional sums that had not been awarded in the court's last judgment based on CIBC's liability to Wells Fargo for legal fees. The trial court denied that request, finding CIBC had abandoned its right to seek additional fees from Walker and that CIBC was otherwise precluded from recovering additional sums due to estoppel and waiver.

¶ 100 Regardless of how the trial court characterized CIBC's procedural default, CIBC clearly forfeited this issue. As the trial court noted, it had ordered CIBC to provide updated damage figures, *i.e.*, dollar amounts. CIBC's updated damage figures did not include the sum now sought; rather, CIBC included that sum only after a hearing and ruling by the court. We find no error.

¶ 101 3. Contribution to EBI

¶ 102 Finally, CIBC asserts that it cannot be held liable in contribution to EBI for Wells Fargo's negligent misrepresentation (count VII) judgment against EBI, notwithstanding the jury's determination that 15% of Wells Fargo's damages on that claim were attributable to CIBC's negligence.

¶ 103 Section 2 of the Joint Tort Feasor Contribution Act states, "where 2 or more persons are subject to liability in tort arising out of the same injury to person or property, or the same wrongful death, there is a right of contribution among them, even though judgment has not been entered against any or all of them." 740 ILCS 100/2(a) (West 2014). Accordingly, the basis for

a party's contribution liability is that party's liability in tort to the injured party. *Government Employees Insurance Co. v. Buford*, 338 Ill. App. 3d 448, 456 (2003). It follows that a party not liable in tort cannot be subjected to contribution. *Id*. at 456-57.

¶ 104 CIBC contends that contribution is improper in this instance because CIBC could not be held liable in tort. Generally, purely economic losses cannot be recovered under a tort theory, *Fireman's Fund Insurance Co. v. SEC Donahue, Inc.*, 176 Ill. 2d 160, 163 (1997). This is because contract law provides sellers and buyers with the ability to define their terms. *Id*. at 164. Where a seller's duty has traditionally been defined by contract, recovery should be limited to a contract theory, even though tort recovery would otherwise have been available under traditional tort law. *Id*. An exception exists "where the plaintiff's damages are proximately caused by a negligent misrepresentation by a defendant in the business of supplying information for the guidance of others in their business transactions." *Id*. at 165.

¶ 105 We reject CIBC's attempt to narrow the aforementioned exception. The exception, as recited by our supreme court, is not restricted to instances in which the parties did not have a contract. In addition, we reject CIBC's contention that any information it provided to Wells Fargo was merely ancillary to the sale of the loan. The information provided by CIBC was a crucial component of this transaction. We further note that CIBC has not cited any authority in support of its suggestion that the trial court's determination that Wells Fargo had not proven CIBC had intentionally committed fraud foreclosed any other form of tort liability based on negligent behavior. Because CIBC has failed to show that it could not be held liable in tort, we find no error with regard to contribution.

¶ 106 E. EBI's Appeal

¶ 107 1. Proximate Cause

¶ 108 On appeal, EBI asserts the trial court erred in denying its motions for a directed verdict, for a judgment notwithstanding the verdict and for a new trial. We review the former motions *de novo* (*Harris v. Thompson*, 2012 IL 112525, ¶ 15), and the latter motion for an abuse of discretion (*Garest v. Booth*, 2014 IL App (1st) 121845, ¶ 53). In considering a motion for a new trial, courts will weigh the evidence and set aside the jury's verdict only if the verdict is contrary to the manifest weight of the evidence. *Ford v. Grizzle*, 398 Ill. App. 3d 639, 650 (2010). With that said, the jury is entitled to resolve conflicts, assess credibility and decide what weight to give the witnesses' testimony. *Id*. As a result, the trial court cannot set aside the verdict merely because the jury could have come to different conclusions or because the trial court believes that other results are more reasonable. *Redmond v. Socha*, 216 Ill. 2d 622, 652 (2005).

¶ 109 Generally, the trier of fact is entitled to determine whether proximate cause exists. *Crumpton v. Walgreen Co.*, 375 Ill. App. 3d 73, 79 (2007). Proximate cause requires both cause in fact and legal cause. *Abrams v. City of Chicago*, 211 Ill. 2d 251, 258 (2004). A defendant's conduct constitutes cause in fact if such conduct was a material element and substantial factor in bringing about the plaintiff's injury. *Abrams*, 211 Ill. 2d at 258. The question is whether, absent that conduct, the plaintiff's injury would not have occurred. *Id*.

¶ 110 In contrast, legal cause is demonstrated where an injury was foreseeable as the type of harm a reasonable person would expect to likely result from his conduct. *Crumpton*, 375 Ill. App. 3d at 79. In addition, more than one proximate cause may exist. *Elliot v. Williams*, 347 Ill. App. 3d 109, 113 (2004). Accordingly, so long as a defendant's conduct contributed in whole or part to the plaintiff's injury, the defendant may be held liable, despite that his negligence was not the sole proximate cause. *Id*. Conversely, a defendant's negligence does not constitute a proximate cause of the plaintiff's injuries where an intervening act supersedes the defendant's

negligence. *Calloway v. Bovis Lend Lease, Inc.*, 2013 IL App (1st) 112746, ¶ 79; see also *Crumpton*, 375 Ill. App. 3d at 79 (A proximate cause produces injury through a sequence of events that is natural and continuous, and that is unbroken by an effective intervening cause.). If the defendant could have reasonably foreseen the intervening act, however, that act will not relieve him from liability. *Mack*, 283 Ill. App. 3d at 57. Where reasonable people may differ, proximate cause should not be determined as a matter of law. *Id*. at 57-58.

¶ 111 Here, the jury was entitled to find that EBI's misrepresentations were a proximate cause of Wells Fargo's injuries. Notwithstanding EBI's attempts to recharacterize this issue, Wells Fargo's theory was that EBI's property condition report misrepresented the condition of the Property and that Wells Fargo relied on the truth of EBI's misrepresentations in obtaining the loan by assignment from CIBC. Wells Fargo alleged it was reasonably foreseeable that it would rely on the truth of the Property condition report's representations in deciding whether to purchase the loan from CIBC.

¶ 112 Wells Fargo's theory is supported by the record. But for EBI's overly generous representation of the Property's condition, Wells Fargo would not have purchased the loan. In addition, EBI's report specifically stated that it may be relied on by not only CIBC, but CIBC's assigns, which includes Wells Fargo. Any suggestion that it was not reasonably foreseeable that assigns such as Wells Fargo would rely on the report is entirely disingenuous. In addition, even assuming that other parties had the ability to intervene to prevent the harm based on the LZA report, which exposed deficiencies in EBI's report, any inaction in this case does not constitute an intervening act that superseded EBI's negligence. Where, as here, EBI agreed that Wells Fargo would be able to rely on EBI's report, the jury was entitled to find it was reasonably forseeable that Wells Fargo would do just that. Furthermore, we categorically reject EBI's

suggestion that it was not reasonably foreseeable that Wells Fargo would be unable to collect on the loan. EBI was hired to value the collateral in light of that very possibility.

¶ 113 2. Jury's Assessment of Fault

¶ 114 Next, we reject EBI's assertion that the trial court abused its discretion in denying its motion for a new trial. EBI contends the trial court abused its discretion because the jury's determination that Walker and Byers were responsible for 0% of Wells Fargo's claim against EBI was against the manifest weight of the evidence.

¶ 115 Initially, we find that any determinations the trial court made with respect to the claims before it in the bench trial, have no bearing on findings that the jury made as the trier of fact in the jury trial. Each fact finder was entitled to come to its own conclusions, regardless of what the other found. The only question before us is whether the trial court properly found the jury's determination that Walker and Byers had no responsibility for Wells Fargo's negligent misrepresentation claim against EBI (count VII) was not against the manifest weight of the evidence.

¶ 116 Wells Fargo's theory was that EBI, who was hired to inspect the Property, negligently represented that the facades were in good condition when, in fact, the facades were in a seriously deteriorated condition. Wells Fargo suggested that EBI should have known of the Property's true condition based on its own observations as well as the LZA report. Wells Fargo foreseeably relied on EBI's report and never would have purchased the loan had it known of the Property's true condition, which required about $3 million in repairs. The jury apparently found that Wells Fargo had proven its claim. The jury also found, however, that the responsibility of Walker and Byers with respect to EBI's negligence in failing to discover and accurately report the Property's true condition, was 0%.

¶ 117 Following trial, the trial court clearly understood the jury's role, stating that the "[j]ury heard the evidence and made its decision." The trial court found it was foreseeable to EBI that an inaccurate report on the Property's condition would result in Wells Fargo having less collateral to foreclose upon than it anticipated and that EBI's negligence, rather than the negligence of Walker or Byers, caused this particular loss. Having reviewed the evidence presented, we cannot say the jury's determination that Walker and Byers were not responsible for this particular loss was against the manifest weight of the evidence, even if another trier of fact may have reached a different conclusion. While EBI argues that Walker testified before the jury that Byers was in prison for fraud, Walker more specifically testified that Byers had "been convicted of fraud with a whole group of people, a large amount of people, *not involved in this*, although he was involved in this." (Emphasis added.) In addition, although Walker testified he was stupid to have trusted Byers, that did not require the jury to find Walker or Byers were responsible for this particular claim. While the jury could have found Walker and Byers shared responsibility with respect to this count, neither we nor the trial court could find that the jury was required to do so without usurping its authority. We need not consider this contention further.

¶ 118 3. Special Interrogatory

¶ 119 EBI further contends the trial court erred by refusing its special interrogatory on proximate causation. We review the trial court's decision *de novo*. *Garcia v. Seneca Nursing Home*, 2011 IL App (1st) 103085, ¶ 35.

Section 2-1108 of the Code of Civil Procedure, which governs special interrogatories, states as follows:

"Unless the nature of the case requires otherwise, the jury shall render a general verdict. The jury may be required by the court, and must be required on request of any party, to

> find specially upon any material question or questions of fact submitted to the jury in writing. Special interrogatories shall be tendered, objected to, ruled upon and submitted to the jury as in the case of instructions. Submitting or refusing to submit a question of fact to the jury may be reviewed on appeal, as a ruling on a question of law." 735 ILCS 5/2-1108 (West 2012).

In addition, the trial court lacks discretion to decline giving the jury a special interrogatory that is proper in form. *Oldenstedt*, 381 Ill. App. 3d at 15. A special interrogatory is generally in proper form where (1) the interrogatory relates to an ultimate factual issue which the rights of the parties depend on, and (2) an answer responsive thereto is inconsistent with a general verdict that may be returned. *Simmons v. Garces*, 198 Ill. 2d 541, 555 (2002). A special interrogatory should not, however, be confusing, repetitive or misleading. *Garcia*, 2011 IL App (1st) 103085, ¶ 49.

¶ 120 Here, the verdict form submitted to the jury stated, "We, the jury, find for Wells Fargo and against EBI on Wells Fargo's Negligent Misrepresentation claim (count VII)." The jury was then asked to check yes or no. If the jury were to check yes, it was then required to complete the following: "Without taking into consideration the question of reduction of damages due to the negligence of Wells Fargo, if any, we find that the total amount of damages suffered by Wells Fargo as a proximate result of the negligence of EBI is: $_____." The jury entered $5,056,326.36 into that blank. Accordingly, based on the second part of the verdict form, the jury clearly stated that EBI's negligence proximately caused Wells Fargo's damages. Notwithstanding the verdict form, however, EBI also submitted the following special interrogatory: "Was EBI guilty of negligent misrepresentation that was a proximate cause of the damages to Wells Fargo?" The court found that the special interrogatory essentially asked the same question included on the verdict from and declined to tender the interrogatory to the jury.

We agree with the trial court's determination. EBI's special interrogatory would be repetitive, if not confusing, and as a result, was not in proper form. We find no error.

¶ 121 III. CONCLUSION

¶ 122 In the proceedings before the trial court, the parties were not consistently diligent or thorough. In contrast, the trial court navigated these complex proceedings as efficiently and accurately as possible. Having considered the record and all of the parties' arguments, we find no error that would warrant prolonging this litigation further.

¶ 123 For the foregoing reasons, we affirm the trial court's judgment.

¶ 124 Affirmed.