2011 IL App (2d) 100268-U
Nos. 2—10—0268 & 2—10—0275 cons.
Order filed August 23, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

NAVISTAR INTERNATIONAL CORPORATION and NAVISTAR, INC.,	)	Appeal from the Circuit Court of Du Page County.
Plaintiffs-Appellees and Cross-Appellants,	)	
v.	)	No. 08—CH—2351
LUIS FERNANDEZ,	)	
Defendant-Appellant and Cross-Appellee.	)	Honorable Kenneth L. Popejoy, Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Justices McLaren and Hudson concurred in the judgment.

ORDER

Held: Regarding defendant's appeal, (1) the trial court properly refused to compel arbitration on issues relating to the Waiver and Release because it was a separate contract from the Executive Severance Agreement and did not contain an arbitration provision; (2) declaratory judgment was properly granted because it gave guidance to Navistar's future conduct and was not solely concerned with past conduct; (3) the Waiver and Release was an enforceable contract in that it was supported by the consideration where the parties compromised the disputed issue of whether defendant was covered by an Executive Severance Agreement and Navistar did not breach a provision of the Waiver and Release because defendant's termination as of the date agreed upon in the Waiver and Release; (4) the Waiver and Release was unambiguous; and (5) defendant's failure to file a copy of his amended affirmative

defenses despite being given leave to do so resulted in the forfeiture of the affirmative defenses.

Regarding Navistar's cross-appeal, (1) issues arising out of the Executive Severance Agreement were properly arbitrable, contrary to Navistar's interpretation of paragraph 7 of that agreement; and (2) Navistar was entitled to nominal damages in counts III through VII of the amended complaint but was not entitled to recover the full attorney fees and expenses advanced to defendant under the Executive Severance Agreement.

¶ 1 Defendant, Luis Fernandez, appeals the judgment of the circuit court of Du Page County granting summary judgment in favor of plaintiffs, Navistar International Corporation and Navistar, Inc. (Navistar or plaintiffs), on count I of its amended complaint. Plaintiffs cross-appeal the circuit court's judgment granting summary judgment in favor of defendant on counts III through VII of the amended complaint. On appeal, defendant raises five issues: (1) whether the trial erred in failing to compel arbitration; (2) whether the trial court erred in granting a declaratory judgment where the declaration went only to past conduct; (3) whether the trial court erred in finding that the Waiver and Release was enforceable; (4) whether the trial court erred in finding that the Waiver and Release was unambiguous and that defendant breached it; and (5) whether the trial court erred in finding that defendant's affirmative defenses to the Waiver and Release were not timely pleaded, resulting in their forfeiture. On cross-appeal, plaintiffs raise two issues: (1) whether the trial court erroneously denied Navistar's motion to stay arbitration and granted defendant's motion to compel arbitration; and (2) whether the trial court erroneously determined that defendant's attorneys' fees and costs in arbitration were not compensable damages. We affirm.

¶ 2 Navistar is in the business of manufacturing medium and heavy trucks and diesel engines. It is headquartered in Warrenville, Illinois. On May 14, 2007, Navistar hired defendant, a certified public accountant, as its Vice President of Corporate Audit. At that time, Navistar had been taken off the listings of the New York Stock Exchange, purportedly because it was not in compliance with

the rules of the Security and Exchange Commission. Among defendant's employment responsibilities was bringing Navistar into compliance. Defendant's tenure at Navistar lasted about eight months, until the middle of February 2008, when he was terminated pursuant to Navistar's decision to outsource the corporate audit function to the national accounting firm of Ernst and Young.

¶ 3 Like his peers, defendant was given the opportunity to participate in an executive severance package by signing an executive severance agreement (ESA). The first agreement was offered in May 2007. The rules changed, so, in December 2007, Navistar updated its ESA and requested that eligible executives, including defendant, sign and return the contract (December ESA). Defendant avers that he signed and returned this agreement, but Navistar avers that he never returned a signed copy of the December ESA. In January 2008, Navistar again requested defendant to submit his signed ESA because it had not yet received the December ESA. Defendant avers that he again signed and returned the ESA on the date of the second request.

¶ 4 On February 13, 2008, defendant attended a meeting with, among others, Greg Elliot, Navistar's Vice President of Human Resources. The ostensible purpose of the meeting was to discuss defendant's as yet unpaid bonus. At the meeting, Elliot told defendant that Navistar had not received an executed copy of the ESA and, therefore, it was not effective. Elliot also informed defendant that he was to be terminated immediately and, because he had not returned an executed copy of the December ESA, he would not receive his severance benefits (as provided by the December ESA) in 10 days, but would receive the severance benefits in six months.

¶ 5 Defendant avers that he protested, stating that he had signed and returned the December ESA. Elliot brought Jonathan Bunge, Navistar's outside counsel into the meeting. Bunge presented

defendant with another copy of the ESA, along with a document entitled "Waiver and Release." According to defendant, Bunge explained to him his obligations under the Waiver and Release. Also according to defendant, Bunge would not let defendant sign the ESA unless he also executed the Waiver and Release. Defendant avers that none of the other executives at Navistar had ever been placed in a similar situation regarding the signing of an ESA, namely, an outside attorney attended the signing and explained the situation and options. According to defendant, he complained about the manner in which the meeting was proceeding and asked for time to have his own attorney review the documents. Defendant avers that he was told he had to sign the Waiver and Release before leaving the room or he would not receive his severance according to the terms of the December ESA. Defendant avers he made it clear to Elliot that he was in financial straights because he had not yet received his 2007 bonus, which, according to defendant, was the reason for arranging the meeting with Elliot in the first place. Defendant further avers that he noted to Elliot that, if Navistar were not going to honor the December ESA, he would be in the untenable position of having no income for a significant period of time (six months). According to defendant, after stating that he was acting under duress, he signed the Waiver and Release and the copy of the ESA produced at that meeting (February ESA).

¶ 6 We turn aside from our recitation briefly to discuss the ESA and the Waiver and Release. The December and February ESAs are identical. Both differ from the May ESA, but the May ESA is still quite similar. The main point of the ESAs, aside from defining the employee's severance pay, was the point that the employee would receive his benefits within 10 days, rather than six months. The provisions at issue here from the December and February ESAs are paragraphs 7 and 9. Paragraph 7 of the February (and December) ESA provides:

"The Executive agrees that at all times during and after the Agreement Period as defined in paragraph 2 above (or such other period specified in paragraph 7(c) below), he or she shall:

(a) not divulge or appropriate directly or indirectly for personal use or the use of others any secret or confidential proprietary information pertaining to the business of [Navistar] obtained during the Executive's employment by [Navistar];

(b) refrain from publishing, providing, or soliciting, directly or indirectly, any oral or written statements about [Navistar] or its respective officers, directors, employees, agents, representatives, products, or practices that may be considered disparaging, slanderous, libelous, derogatory, or defamatory, provided that such restriction shall not limit the Executive's ability to provide truthful testimony as required by law or any judicial or administrative process;

(c) in the event of a Termination as defined in paragraph 4(b) above, not directly or indirectly (whether as owner, principal, agent, partner, officer, director, employee, consultant, investor, lender or otherwise), for the 12-month period immediately after the Executive's Termination, engage in any line of business that is the same as, similar to, or competitive with a material line of business of [Navistar] (determined as of the date of the Executive's Termination), in the cities, counties or other geographic areas anywhere within the United States of America in which [Navistar] is authorized to conduct such material lines of business during such 12-month period; provided that (I) the Executive agrees that [Navistar's] records sufficiently indicate the geographic territories described above and, therefore, an itemization of such territories in this Agreement is unnecessary, (ii) such

restriction shall not prohibit the Executive's purchase or ownership of less than 5% of the outstanding voting stock of a publicly-held company, (iii) the Executive may be associated with an entity that consists of separate business units, one of more of which engages in a lines of business that is the same as, similar to, or competitive with a material line of business of [Navistar] (determined as of the date of the Executive's Termination), as long as the business unit with which the Executive is associated does not engage in a line of business that is the same as, similar to, or competitive with such a material line of business of [Navistar] and the Executive is not associated in any respect whatsoever with (whether as owner, principal, agent, partner, officer, director, employee, consultant, investor, lender or otherwise, on a paid or unpaid basis) any line of business that is the same as, similar to, or competitive with such a material line of business of [Navistar];

(d) refrain, without the written consent of the Company or INTERNATIONAL TRUCK AND ENGINE CORPORATION, from directly or indirectly, (I) recruiting or soliciting any employee of [Navistar] for employment or for retention as a consultant or service provider, (ii) hiring any person who is then an employee, consultant, agent, or representative of [Navistar], or providing names or other information about such employee, consultant, agent, or representative to any person or business under circumstances which could lead to the use of that information for purposes of recruiting or hiring, (iii) interfering with the relationship of [Navistar] with any of its employees, consultants, agents, or representatives, (iv) soliciting or inducing, or in any manner attempting to solicit or induce, any client, customer, or prospect of [Navistar] (1) to cease being, or not to become, a client or customer of [Navistar], or (2) to divert any business of such client, customer, or prospect

from [Navistar], or (v) otherwise interfering with, disrupting, or attempting to interfere with or disrupt, the relationship, contractual or otherwise, between the [*sic*] [Navistar] and any of its customers, clients, prospects, suppliers, employees, consultants, agents, or representatives; and

(e) cooperate with and provide assistance to [Navistar] at any time and in any manner reasonably required by [Navistar] or its respective counsel in connection with any litigation or other legal process affecting [Navistar], or in answering questions concerning any other matter, in which the Executive was involved or had knowledge of during the course of his or her employment (other than any dispute between the Parties concerning this Agreement); provided, the Company and INTERNATIONAL TRUCK AND ENGINE CORPORATION shall reimburse the Executive's reasonable attorneys' fees and costs and such other expenses in connection with said cooperation and assistance promptly after the Executive submits a written request therefor together with copies of the invoices substantiating such expenses, but in no event shall payment of any such fees, costs, and expenses be made after the last day of the Executive's taxable year following the taxable year in which the expense was incurred; provided further that prior to reimbursement the Executive first delivers a written undertaking to the Company and INTERNATIONAL TRUCK AND ENGINE CORPORATION to repay all such attorneys' fees and costs and expenses paid to the Executive prior to the final disposition of the litigation or other legal process affecting [Navistar] if it ultimately be determined by final judicial decision from which there is no further right to appeal that the Executive is not entitled to reimbursement of such attorneys' fees and costs and expenses.

> The Executive acknowledges that the foregoing restrictions or conditions set forth in this paragraph 7 are reasonable, that irreparable injury will result to [Navistar] in the event of any violation by the Executive of these restrictions, and that said restrictions are a condition precedent to the Company's and INTERNATIONAL TRUCK AND ENGINE CORPORATION's willingness to enter into this Agreement and pay the consideration set forth in this Agreement. In the event that any of the foregoing restrictions are violated, the Company and INTERNATIONAL TRUCK AND ENGINE CORPORATION shall be entitled, in addition to any other remedies and damages available under law, equity, or otherwise, to recoup, offset, suspend, or terminate any or all separation payments and benefits previously paid or otherwise subsequently owed to the Executive under the Agreement, to injunctive relief from any court of competent jurisdiction to restrain the violation of such restrictions, and/or to prevent any threatened violation by the Executive, and/or by any person or persons acting for, or in concert with, the Executive in any capacity whatsoever, without posting a bond or other security. In addition, if such a court or arbitrator deems that any of the foregoing restrictions are unreasonable, the Parties agree that the maximum permissible period and scope prescribed by such court or arbitrator shall be substituted for the stated period and scope."

¶ 7 Paragraph 9 of the February (and December) ESA provides:

> Except as provided in paragraph 7, any controversy or claim arising out of or relating to this Agreement or the alleged breach hereof shall be settled by arbitration in the City of Chicago in accordance with the laws of the State of Illinois by three arbitrators, of whom on[e] shall be appointed by the Company and INTERNATIONAL TRUCK AND ENGINE

CORPORATION, one by the Executive and one by the first two arbitrators. If the first two arbitrators cannot agree on the appointment of a third arbitrator, then the third arbitrator shall be appointed by the Chief Judge of the United States Court of Appeals for the Seventh Circuit. The arbitration shall be conducted in Chicago in accordance with the rules of the American Arbitration Association, except with respect to the place of arbitration and to the selection of arbitrators which shall be as provided in this paragraph 9. Judgment upon any award rendered by the arbitrators shall be final and nonappealable and may be entered in any court having jurisdiction thereof. Any award shall be payable to the Executive no later than the end of the Executive's first taxable year in which the Company and INTERNATIONAL TRUCK AND ENGINE CORPORATION either concede the amount (or portion of the amount) payable or is required to make payment pursuant to a judgment by the arbitrators, and shall include interest on any amounts due and payable to the Executive from the date due to the date of payment, calculated at one hundred and ten percent (110%) of the prime rate in effect at the Northern Trust Company (or any successor thereto) on the first of each month. If it is necessary or desirable for the Executive to retain legal counsel and/or incur other costs and expenses in connection with the enforcement of any or all of the Executive's rights under this Agreement, the Company and INTERNATIONAL TRUCK AND ENGINE CORPORATION shall, within ten (10) days after receipt of a written request from the Executive, advance to the Executive the Executive's reasonable attorneys' fees and costs and such other expenses, including expenses of any expert witnesses, in connection with the enforcement of said rights (including the enforcement of any arbitration award in court); provided that to the extent (and only to the extent) such expenses are subject to Section 409A

of the [Internal Revenue] Code, in no event shall any advance to the Executive of any such fees, costs, and expenses be made after the last day of the Executive's taxable year following the taxable year in which the expense was incurred; provided further that the Executive shall repay any such advance of fees, costs, and expenses if the arbitrators' specific finding is that the Executive's request to arbitrate was frivolous, unreasonable and without foundation."

¶ 8 The Waiver and Release agreement was also signed at the February 13, 2008, meeting and is also relevant to the parties' disputes in this matter. The Waiver and Release provides:

"Whereas [Navistar] intends to terminate its employment relationship with the Employee [(defendant)] and has informed the Employee that his employment will terminate at the close of business today; and

Whereas [Navistar] would like to secure the Employee's promise to maintain the confidentiality of [Navistar's] secret, confidential, proprietary, attorney work product, and attorney-client privileged information after the Employee's employment relationship with [Navistar] has terminated; and

Whereas the Employee seeks to obtain a more favorable severance package from [Navistar] than would be available to the Employee should the Employee's employment terminate at the close of business today.

Now Therefore the parties mutually agree as follows:

1. [Navistar] agrees to forbear from terminating the Employee at the close of business today, and will extend the Employee's term of employment with [Navistar] until the close of business on February 15, 2008. [Navistar] also agrees to extend to the Employee the opportunity to enter into the "Executive Severance Agreement" that became effective

December 31, 2007[,] that will provide the employee [*sic*] with certain additional benefits upon termination that would not be available should the Employee be terminated at the close of business today.

2. The Employee agrees that in exchange for the consideration described in Paragraph 1 above, the Employee shall:

(a) not divulge or appropriate, directly or indirectly, for personal use or the use of others any secret, confidential, proprietary, attorney work product, or attorney-client privileged information pertaining to the business of [Navistar] obtained during the Employee's employment by [Navistar];

(b) refrain from publishing, providing, or soliciting, directly or indirectly, any oral or written statements about [Navistar] or its respective officers, directors, employees, agents, representatives, products, or practices that may be considered disparaging, slanderous, libelous, derogatory, or defamatory; provided that such restriction shall not limit the Employee's ability to provide truthful testimony as required by law or any judicial or administrative process.

3. The Employee further agrees and acknowledges that he has been counseled by [Navistar] regarding attorney work product and 'attorney-client' privileged information. The Employee understands that he may not disclose [Navistar's] attorney work product (including work product created by attorneys from outside of [Navistar] retained to represent [Navistar]) or attorney-client privileged information to anyone unless such disclosure is authorized by [Navistar's] legal counsel, or authorized by a Director or Officer of [Navistar],

who has the authority to waive or invoke [Navistar's] work-product protection and attorney-client privilege. Should the Employee discuss his employment at [Navistar] with one or more other persons, the Employee must state to that person or persons that he is restricted from discussing [Navistar's] attorney work-product or attorney-client privileged information. The Employee further agrees that should the employee be asked to provide testimony or otherwise to make any statements or be interviewed regarding [Navistar] as part of any legal, judicial, administrative, or investigative process or proceeding, the Employee will notify [Navistar] so that [Navistar] can make arrangements to have its own legal counsel present to protect [Navistar's] privileged and confidential information when the employee is interviewed, makes any statement, or provides any testimony.

4. The Employee further agrees to provide immediately all hard-copy and electronic documentation or information belonging to [Navistar] to [Navistar]. The Employee represents that he does not possess any documentation or other information belonging to [Navistar] at his residence or any other location outside [Navistar's] Warrenville, Illinois headquarters.

5. The Employee acknowledges that the foregoing restrictions or conditions set forth in paragraphs 2, 3, and 4 are reasonable, that irreparable injury will result to [Navistar] in the event of any violation by the Employee of these restrictions, and that said restrictions are a condition precedent to [Navistar's] willingness to enter into this Agreement and pay the consideration set forth in this Agreement. In the event that any of the foregoing restrictions are violated, [Navistar] shall be entitled, in addition to any other remedies and damages available under law, equity, or otherwise, to recoup, offset, suspend, or terminate any or all

separation payments and benefits previously paid or otherwise subsequently owed to the Employee under this Agreement or any other severance agreement, to obtain injunctive relief from any court of competent jurisdiction to restrain the violation of such restrictions, and/or to prevent any threatened violation by the Employee, and/or by any person or persons acting for, or in concert with, the Employee in any capacity whatsoever, without posting a bond or other security.

6. The Employee also agrees to release and forever discharge for himself and on behalf of his wards, heirs, assigns, beneficiaries, next of kin, executors, predecessors, successors, administrators, agents, employees, attorneys, servants, or representatives of any kind, [Navistar] and all of its current or former officers, directors, agents, employees, attorneys, servants, subsidiaries, affiliated companies, parent companies, insurers, divisions, successors, heirs, assigns, beneficiaries, and representatives of any kind, of and from any and all claims, grievances, demands, rights, liabilities, duties, debts, sums of money, contracts, agreements, suits, controversies, reckonings, responsibilities accounts, promises, damages, actions, causes of action of whatsoever kind, nature or description, whether known or unknown, foreseen or unforeseen, direct or indirect, whether in contract, tort or otherwise, and whether legal or equitable that the Employee has or may have against [Navistar] arising on or before February 13, 2008[,] and arising out of the Employee's employment with [Navistar] or the termination of the Employee's employment with [Navistar]. This Waiver includes, but is not limited to any claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 *et seq.*, as amended, the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*, as amended, the Americans with Disabilities Act, 42 U.S.C. § 12100 *et seq.*,

as amended, the Employment Retirement Income Security Act, 29 U.S.C. Section 1001 *et seq.*, as amended, the Equal Pay Act of 1963, 29 U.S.C. § 206(d) *et seq.*, as amended, the Family and Medical Leave Act, 29 U.S.C. § 2610 *et seq.*, as amended, the Fair Labor Standards Act, 29 U.S.C. § 201, as amended, Section 806 of the Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A *et seq.*, as amended, or any other state constitution, statute or local ordinance or the common law of any state, including claims of mistreatment, discrimination, negligence, malfeasance, wrongful discharge, breach of contract (express or implied), libel, slander, intentional or negligent infliction of emotional distress, tortuous [*sic*] interference with contractual or business relations or expectancies, or any other alleged wrongdoing or illegality by [Navistar]. Excluded from this General Release are any claims or rights which by law cannot be released by private agreement, including the Employee's right to enforce this Agreement and the Employee's right to file an administrative charge with the Equal Employment Opportunity Commission ('EEOC') or any other administrative agency and to participate in an agency investigation. However, the Employee waives all rights to recover money in connection with any such investigation or any administrative charge, whether filed by the agency, Employee, or any other person."

¶ 9 Defendant avers that he also signed a second Waiver and Release which provided for a seven-day revocation period. (The above-quoted Waiver and Release, at issue here, did not provide for a revocation period.) Defendant further avers that the above-quoted Waiver and Release included some additional paragraphs that the one with the revocation provision did not.

¶ 10 Returning to the February 13, 2008, meeting between defendant and Elliot, defendant avers that outside counsel explained to him that he needed to return "company documents" that were "generated by the company." Defendant avers that Navistar admitted that he was not required to return many documents included in this description, including defendant's company-issued Blackberry and its contents. Additionally, anything that was general public knowledge did not have to be returned. Further, according to defendant, Navistar "didn't distinguish what documents were [defendant's] and what were [Navistar's]. [Navistar] just said all confidential documents" needed to be returned.

¶ 11 Defendant avers that, after he signed the documents, he was immediately terminated and escorted from the premises. Defendant claims that this was in breach of the Waiver and Release, in which Navistar promised to forbear terminating defendant's employment for two more days. We note, however, that in defendant's deposition, in response to questioning about whether he could have turned over documents he retained, he stated that they were in his office and that he planned to return to it on Saturday to remove his personal belongings. Further testimony indicates that defendant did, in fact, return to his office at least one time following the February 13, 2008, meeting. Additionally, on the day that defendant returned to his office, he took two discs which contained the contents of his emails, not just those emails that defendant had marked as "personal." Navistar avers that the nonpersonal emails were confidential and should not have been released to defendant.

¶ 12 After the meeting, defendant sought advice from his legal counsel. Within seven days, defendant emailed Navistar, informing it of his decision to revoke the Waiver and Release. Thereafter, defendant filed an action for retaliatory termination in violation of Sarbanes-Oxley. Because defendant repudiated the Waiver and Release, Navistar determined that it was no longer

required to pay him the severance payments and benefits according to the February ESA. Pursuant to paragraph 9 of the February (and December) ESA, on May 30, 2008, defendant filed a demand for arbitration. Also pursuant to the February (and December) ESA, defendant requested that Navistar advance him his reasonable attorney fees and costs.

¶ 13 Navistar then filed its complaint to enjoin the arbitration along with a motion to stay the arbitration requested by defendant. On June 24, 2008, the trial court denied Navistar's motion to stay the arbitration. On July 7, 2008, Navistar refused to submit to arbitration. On July 15, 2008, defendant filed in the circuit court an emergency motion to compel arbitration. On October 6, 2008, the trial court granted defendant's motion to compel arbitration, and, on November 14, 2008, Navistar submitted to arbitration. Next, defendant filed a motion to stay the proceedings in the circuit court pending the outcome of the arbitration. While defendant's motion to stay was pending, Navistar moved for leave to file an amended complaint under seal.

¶ 14 On December 17, 2008, the trial court denied defendant's motion to stay the proceedings and granted Navistar's motion for leave to file. On December 19, 2008, Navistar filed its amended complaint seeking damages along with a declaration of rights and an injunction prohibiting defendant from disclosing confidential information. Specifically, the amended complaint was divided into nine counts: count I–declaratory judgment finding defendant's conduct has disposed of Navistar's obligations including the paying any severance benefits or advancing attorneys' fees and costs; count II–injunction regarding confidential information; count III–breach of contract–Waiver and Release; count IV–fraudulent inducement–ESA; count V–fraudulent concealment of defendant's possession of information; count VI–breach of contract–ESA; count VII–breach of contract of the confidentiality agreement; count VIII–conversion of privileged, confidential, and proprietary

information; count IX–breach of fiduciary duty by misappropriating privileged, confidential, and proprietary information. Count II is not a subject of defendant's appeal, and counts VIII and IX were nonsuited, so they also are not at issue in this appeal.

¶ 15 The documents at the center of this controversy consist of 43 hard copy pages that Navistar alleges defendant wrongfully took or retained and the contents of two CDs given to defendant by Navistar personnel who was copying defendant's emails for him. Defendant avers that, at all times, Navistar retained the originals of the each of the documents. In April 2008, defendant returned some of the documents to Navistar, but retained certain documents to evidence his efforts at making sure that Navistar was compliant with the law.

¶ 16 In May 2008, the SEC subpoenaed defendant in regard to its investigation of his Sarbanes-Oxley complaint. The subpoena requested the 11 documents that defendant continued to retain. Defendant met with the SEC attorneys in an attempt to determine whether the documents were privileged or confidential. In July 2008, complying with the trial court's order, defendant returned all the documents in his possession to Navistar and took steps to make sure that any remaining copies he or his attorneys still held were destroyed.

¶ 17 Regarding the CDs containing his emails, defendant avers that the person who copied his emails had received approval from Navistar's senior management to both make the copies and give them to defendant. Defendant further avers that his "possession of the CDs was permissible under Navistar's confidentiality agreements with him, and Navistar specifically approved giving the CDs to him." In April 2007, Navistar requested defendant return the CDs, and defendant promptly complied without having previously distributed the contents to any third party.

¶ 18 We now turn to the parties' maneuvering in the trial court along with the trial court's orders. In June 2008, Navistar filed an emergency motion seeking a temporary restraining order and requesting an order staying defendant's demand for arbitration and any ensuing arbitration. Navistar also sought a ruling that it was not required to advance to defendant any attorney's fees and other expenses incurred in conducting the arbitration. The trial court denied the motion.

¶ 19 Following the denial of Navistar's motion to stay arbitration, Navistar still refused to submit to arbitration. Defendant filed a motion to compel arbitration. On October 6, 2008, the trial court granted defendant's motion to compel.

¶ 20 In November 2008, defendant moved to stay the judicial proceedings pending the outcome of the arbitration. The trial court denied defendant's motion, ruling that, at a later date, it would decide "what is interwoven, what may not be interwoven" with the arbitration. At that time, the trial court also granted Navistar's motion for leave to file an amended complaint.

¶ 21 In April 2009, defendant, after first securing leave of the trial court, filed another motion to stay the judicial proceedings under the amended complaint. Defendant also filed a motion for leave to file an amended answer. The amended answer included the same affirmative defenses as defendant's original answer, and it added additional factual allegations. The trial court denied defendant's motion to stay, but granted the motion for leave to file an amended answer. Navistar filed a motion to strike defendant's affirmative defenses which the trial court struck as moot. The trial court also ordered Navistar to respond to defendant's amended answer. On June 16, 2009, Navistar filed its response to the amended answer.

¶ 22 On September 1, 2009, Navistar filed a motion for summary judgment on count III (breach of the Waiver and Release) of the amended complaint. Defendant filed a cross-motion for summary

judgment on all counts except for count II. On October 27, 2009, the court issued a letter of opinion. On November 6, 2009, the court vacated the October 27 letter of opinion and filed a revised letter of opinion resolving the summary judgment motions. The court held that defendant did not effectively revoke the Waiver and Release, there was consideration supporting the Waiver and Release, the Waiver and Release was not ambiguous, and defendant's affirmative defenses were waived.

¶ 23 Defendant filed a motion for reconsideration. On December 22, 2009, the trial court denied the motion. Additionally, the court granted Navistar summary judgment on count I of the complaint. In denying reconsideration, the court reiterated its holdings from its November 6, 2009, letter of opinion.

¶ 24 Navistar also moved to stay the arbitration noting that, with the grant of summary judgment on count I (injunction), there was nothing left for the arbitration. Navistar also argued that, with the holding that the Waiver and Release was enforceable, the ESA had been voided, again leaving no subject matter for the arbitration. The arbitration panel requested that defendant (Navistar refused) seek clarification of the December 22, 2009, order in the trial court.

¶ 25 On January 2, 2010, the trial court entered an agreed order on count II of the amended complaint enjoining defendant from certain activities. Defendant moved to clarify the December 22 order. On February 22, 2010, the court considered the motion for clarification and again reiterated its holdings from the November 6, 2009, order, stating that "the waiver and release agreement which was the subject, the limited subject of Navistar's motion for summary judgment on Count One was valid, was binding, did constitute an enforceable contract against the defendant in this action Luis

Fernandez, and that by his actions the defendant has breached that waiver and release period. That is my ruling today." Defendant timely appeals. Navistar timely cross-appeals.

¶ 26 Before we begin our consideration of the issues raised on appeal, we are compelled to comment on the parties' briefs in this matter. In contravention of the Supreme Court Rules, the statements of facts for both parties were fraught with conclusions and argument. While we could strike the offending briefs we will instead ignore the improperly argumentative portions and admonish the parties that the Supreme Court Rules are not advisory, but are mandatory and must be followed. *McGrath v. Botsford*, 405 Ill. App. 3d 781, 790-91 (2010). We also note that, as the briefing progressed, the tone of the argument became less civil and the parties resorted to vilification and *ad hominem* attacks on each other. Schoolyard name calling and one-upmanship has little place in legal argument and most certainly should not be employed in lieu of the reasoned development of a party's contentions. We again admonish the parties to forego the momentary and transitory pleasure of such expression as it really does not assist the court in evaluating the merits of their arguments. Instead, we sincerely adjure the parties to essay a more civil tone in future, notwithstanding the self-perceived righteousness of their position versus the unjustness of their opponent's.

¶ 27 We turn first to defendant's contentions on appeal. Defendant initially contends that the trial court failed to properly compel arbitration of issues arising out of the ESA. Instead, according to defendant, the trial court improperly maintained jurisdiction over issues that were related to the ESA instead of allowing those issues to be arbitrated. We review these contentions, arising from contractual interpretation and the trial court's grant of summary judgment, *de novo*. *American Family Mutual Insurance Co. v. Page*, 366 Ill. App. 3d 1112, 1115 (2006).

¶ 28 Defendant appears to first argue that the trial court initially granted his motion to compel arbitration, but later, granted Navistar summary judgment on count I of the amended complaint. Defendant contends that this latter judgment was inconsistent with its earlier judgment and was manifestly erroneous.

¶ 29 We note first that defendant wholly fails to support this argument with citation to legal authority, thereby forfeiting the contention on appeal. Ill. Sup. Ct. R. 341(h)(7) (eff. Sept. 1, 2006); *Vilardo v. Barrington Community School District 220*, 406 Ill. App. 3d 713, 720 (2010). Forfeiture notwithstanding, defendant's contention fails because an order pursuant to a motion for summary judgment (if it does not finally dispose of all issues) is interlocutory in character, and is subject to modification or vacation at any time before final judgment is rendered. *Berry v. Chade Fashions, Inc.*, 383 Ill. App. 3d 1005, 1009 (2008). Even if the latter order is inconsistent with the earlier order, that earlier order denying Navistar summary judgment with respect to count I of the amended complaint was only interlocutory and the trial court could revisit and change that order at a later time. Accordingly, we reject defendant's argument on this point.

¶ 30 Defendant next contends that the Waiver and Release is so intertwined with the ESA (apparently either the February or December versions) that any issues regarding it should be deemed to be arising from the ESA and thereby subject to arbitration. Defendant reasons that, because the February ESA and the Waiver and Release were executed in the same place at the same time, they should be considered and interpreted as a single contract. Defendant concludes that, as a result of the singular nature of the ESA and Waiver and Release, the issues relating to the Waiver and Release specifically are subject to arbitration and the trial court erred in granting summary judgment in favor of Navistar.

¶ 31 Defendant correctly sets out the principles regarding arbitration and determining the arbitrability of issues. Arbitration is a matter of contract and parties to an agreement are bound to arbitrate only those issues they have agreed to arbitrate. *Board of Managers of Chestnut Hills Condominium Ass'n v. Pasquinelli, Inc.*, 354 Ill. App. 3d 749, 754 (2004). Further, an arbitration agreement will not be extended under the guise of construction or implication. *Board of Managers*, 354 Ill. App. 3d at 755. The matters the parties have agreed to submit to arbitration determine the extent of the arbitrator's power. *Donaldson, Lufkin & Jenrette Futures, Inc. v. Barr*, 124 Ill. 2d 435, 445 (1988). Where the language of the arbitration agreement is clear, and the dispute to be arbitrated clearly falls within or without the scope of the arbitration clause, the circuit court should decide the issue of arbitrability *Donaldson*, 124 Ill. 2d at 445. However, where the language of the arbitration clause is broad and it is unclear whether the disputed matter falls within the scope of the arbitration clause, the arbitrator initially should determine the issue of arbitrability. *Donaldson*, 124 Ill. 2d at 447-48.

¶ 32 With these principles in mind, we turn to the agreements at issue here. Defendant argues that since the agreements were executed at the same time and place, they should be considered to be a single contract for purposes of determining arbitrability. Under this view, then, except as provided in paragraph 7 of the ESA, "any controversy arising out of or relating to this Agreement or the alleged breach hereof shall be settled by arbitration." If the two agreements are truly one, then all issues in this case arise out of the agreement, and all issues would be subject to arbitration. The problem with this view, however, is that the Waiver and Release is not subsumed into the February ESA.

¶ 33 There is, of course, a "long-standing principle that instruments executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction are regarded as one contract and will be construed together." *Gallagher v. Lenart*, 226 Ill. 2d 208, 233 (2007). The rub for defendant comes, however, because even though the two contracts, the Waiver and Release and the February ESA, were executed at the same time and during the same transaction, they were not for the same purpose. The purpose of the Waiver and Release was to effect a confidentiality agreement whereby defendant would agree not to disclose confidential information about Navistar. The purpose of the February ESA was to allow defendant to obtain severance benefits and to collect them in 10 days as opposed to six months. Thus, because the purpose of the agreements was separate, we cannot treat the two contracts as a single contract and apply the arbitration clause in the February ESA to the Waiver and Release, which contains no mention of arbitration.

¶ 34 Our conclusion is reinforce by considering *Thread & Gage Co., Inc. v. Kucinski*, 116 Ill. App. 3d 178, 183 (1983). In that case, three agreements effecting the sale of the company to the purchaser were executed at the same time. The purchaser repudiated one of the agreements, but paid on the other two. The court noted that, even though the three agreements constituted a single transaction, they would be construed separately because there was no language in any of the agreements requiring that a default on one of the agreements would constitute a default for all three of the agreements. *Thread & Gage*, 116 Ill. App. 3d at 183. Likewise here. The February ESA included an arbitration clause; the Waiver and Release did not include an arbitration clause. The differing purpose and subject matter of each agreement, despite the reference in the recitals of the Waiver and Release to the February ESA, manifest an intent that the contracts are separate and not to be considered as a

single agreement for purposes of future judicial interpretations. Accordingly, we reject defendant's contention on this point.

¶ 35 Defendant next argues that the Waiver and Release is too intertwined with the February ESA, so even if the court had the authority to consider the issue of arbitrability, it should have stayed the judicial proceedings and allowed the arbitrators to rule on the other arbitrable issues. Defendant contends that, because Navistar's amended complaint alleged that defendant breached the Waiver and Release by taking or keeping confidential documents, and the February ESA provided that defendant could not use the documents, Navistar's recourse was the arbitration provided in the February ESA. We disagree. Defendant overlooks the fact that the Waiver and Release has its own prohibitions about taking or divulging confidential information. Thus, Navistar is not alleging that defendant breached the Waiver and Release by engaging in conduct solely prohibited by the February ESA; rather, Navistar is contending that the breach was caused because defendant engaged in conduct that the Waiver and Release prohibited. Defendant appears to be attempting to bootstrap the arbitration clause into the Waiver and Release by arguing that the conduct he is alleged to have undertaken was conduct only prohibited by the February ESA. As the conduct at issue was also squarely prohibited by the Waiver and Release, we reject this contention.

¶ 36 Defendant also contends Navistar cannot defeat the arbitration clause by alleging that no contract exists, citing *Jensen v. Quik International*, 213 Ill. 2d 119, 126 (2004), for precisely that proposition. There are at least two problems with defendant's contention. First, *Jensen* does not unequivocally stand for the proposition defendant contends it does; instead, the arbitration discussion arose in the context of determining whether the parties could rescind a contract, not whether the arbitration clause was properly enforceable. Thus, in our view, defendant wrenched the proposition

out of its proper context. Second, and more importantly, we do not perceive Navistar to be denying the existence of a contract between the parties. Rather, Navistar notes that the Waiver and Release and the February ESA are two different contracts, and the Waiver and Release does not contain an arbitration clause. Navistar is proceeding on a claim that defendant breached the Waiver and Release, which does not contain an arbitration clause. This is different than arguing that, because the contract was breached, the arbitration clause cannot be enforced because the breach invalidated the existence of the contract. Defendant's argument is inapposite and fails.

¶ 37 Defendant also contends that, because the allegations of the amended complaint refer to the ESA, we can view them as arising out of the February ESA and thus, they are arbitrable. While Navistar did include allegations referring to the ESA in its amended complaint, that fact does not trump the fact that the ESA and the Waiver and Release are two separate contracts with two different and separate purposes. Further, the Waiver and Release does not contain an arbitration clause, and this means that the parties did not agree to arbitrate issues related to the Waiver and Release, such as its breach. Thus, while defendant's arguments regarding the arbitration of claims arising out of a contract containing an arbitration clause (*e.g.*, *Bass v. SMG, Inc.*, 328 Ill. App. 3d 492, 500 (2002) may not be incorrect, they are of limited utility here, where Navistar has pursued an action under the Waiver and Release, not the ESA, and the fact that there are two separate contracts serves to distinguish defendant's authority and contentions. We reject defendant's arguments regarding whether the trial court properly retained jurisdiction over Navistar's claims.

¶ 38 Next, defendant challenges the propriety of the trial court's grant of summary judgment in favor of Navistar on its claim for declaratory judgment. A declaratory judgment claim requires a plaintiff with a tangible legal interest, a defendant with an opposing interest, and an actual

controversy between the parties concerning their interests. *Adkins Energy, LLC v. Delta-T Corp.*, 347 Ill. App. 3d 373, 376 (2004). An actual controversy exists where there is a concrete dispute allowing for an immediate and definitive determination of the parties' rights, the resolution of which will help terminate the entire controversy or a part of it. *Adkins Energy*, 347 Ill. App. 3d at 376. The purpose of the declaratory judgment process is to allow a court to address a dispute after it has arisen, but before the parties take steps that would give rise to a claim for damages or other relief. *Adkins Energy*, 347 Ill. App. 3d at 376.

¶ 39 Defendant first contends that the declaratory judgment claim was improper because it covers only past conduct. Defendant argues that there is simply a breach of contract and that Navistar is not seeking any guidance for its future conduct. Instead, according to defendant, Navistar was seeking ratification of its past conduct of not paying him any of his severance benefits. Defendant contends that, in other words, Navistar was seeking only an affirmation that it was right and defendant was wrong.

¶ 40 The doctrine of nonliability for past conduct bars a declaratory action in a situation where the conduct that makes a party liable has already occurred. *Adkins Energy*, 347 Ill. App. 3d at 378. The issue, then, is whether Navistar is seeking an affirmation for its past conduct, or whether it is seeking guidance for future conduct. We hold that Navistar is seeking guidance on whether it must pay benefits and legal fees under the ESA. It has alleged that compliance and fulfillment of the terms of the Waiver and Release is a condition precedent to the triggering of its obligations under the February ESA. While the trial court did adjudicate that defendant had breached the Waiver and Release, this was an appropriate ruling that offered guidance on whether Navistar's obligations pursuant to the ESA were still in force or whether Navistar could, without further penalty,

discontinue its payments under the ESA. Accordingly, we do not find that the trial court's declaration was an impermissible statement determining who had the right of it for completed past conduct, but it was a proper declaration of rights declared before the contract at issue was breached by the party seeking the declaration.

¶ 41 Next, defendant argues that Navistar's request for declaratory judgment improperly impacts other pending suits between the parties. According to defendant, "[d]eclaratory relief should not be granted where the relief sought by the plaintiff would impact or eliminate another suit pending between the parties." In support of this contention, defendant cites *Maryland Casualty Co. v. Peppers*, 64 Ill. 2d 187 (1976); *Krebs v. Mini*, 53 Ill. App. 3d 787 (1977); *Charleston National Bank v. Muller*, 16 Ill. App. 3d 380 (1974); and *Hudson v. Mandabach*, 22 Ill. App. 2d 296 (1959). We find the cases to be distinguishable, and therefore, we disagree with defendant's contention.

¶ 42 *Peppers* involved insurance indemnification. The injured party had filed suit against the insured four months before the insurance company filed its declaratory judgment action seeking to learn whether it had a duty to defend the insured. The court held that the judgment in the declaratory action was improper because it determined an ultimate fact in the underlying personal injury case. *Peppers*, 64 Ill. 2d at 196-97. Here, the trial court's determination that defendant breached the Waiver and Release does not constitute the determination of an ultimate fact related to underlying litigation. Accordingly, *Peppers* is inapposite.

¶ 43 In *Krebs*, the plaintiffs filed an action at law and an action seeking injunctive relief in the same court against the same defendant, based on the same operative facts. *Krebs*, 53 Ill. App. 3d at 791-92. The court held that declaratory relief was improper where there were pending two complaints involving the same parties and subject matter in the same court. *Krebs*, 53 Ill. App. 3d

at 792. Here, by contrast, there is no issue of multiple actions pending in the trial court against defendant. *Krebs* is distinguishable.

¶ 44 In *Muller* and *Hudson*, the court would not allow a declaratory judgment action where the same contract was before the multiple courts. *Muller*, 16 Ill. App. 3d at 382; *Hudson*, 22 Ill. App. 2d at 298. Here, there is no indication that multiple actions on the same contracts pend in different courts. These cases, too, are inapposite. Defendant has failed to support his contention and we reject it.

¶ 45 Defendant next argues that the relief sought by Navistar amounts to a forfeiture. Defendant notes that a forfeiture is a contractual provision stating that, under certain circumstances, one party must forfeit something to the other. Defendant further contends that his breach of the agreement did not result in any damages to Navistar, such that the nearly one-third of a million dollars he will forfeit bears no relation to the actual damages incurred. Defendant urges that the remedy sought in count I not be enforced.

¶ 46 Forfeitures are permitted only where the right to the forfeiture is shown clearly and unequivocally. *Parenti v. Wytmar & Co.*, 49 Ill. App. 3d 860, 869 (1977). In addition, a forfeiture provision will be construed against the employer (who is usually the drafter of the provision) and in favor of the employee. *Parenti*, 49 Ill. App. 3d at 869. We note initially, that defendant does not actually point to the language he claims constitutes the forfeiture provision. This failure should result in the forfeiture of the point on appeal, as defendant is obligated to provide citation to the record to support his contentions. Ill. Sup. Ct. R. 341(h)(7) (eff. Sept. 1, 2006); *Vilardo*, 406 Ill. App. 3d at 720.

¶ 47 In addition, we note that defendant's point, that the amount of the forfeiture should bear some relation to the damages incurred by the injured party, is not entirely accurately stated or borne out by the authority cited. Defendant cited *Hamming v. Murphy*, 83 Ill. App. 3d 1130, 1136 (1980), for the proposition that, "Where the contract does not specify a fixed sum or is not capable of a determination of the amount of damages without extrinsic evidence, they are considered to be unliquidated and the forfeiture clause will not be enforced." However, the quoted sentence from *Hamming* is part of a paragraph in which the court states that a forfeiture provision in a contract that specifies the amount to be forfeited will be upheld as a liquidated damages provision, while a provision that does not specify a fixed sum will not be enforced. *Hamming*, 83 Ill. App. 3d at 1136. The further point, that the provision will be upheld only if it bears a reasonable relationship to the actual damages incurred, arises in *Hamming*'s discussion of the enforceability of a liquidated damages provision. Defendant does not cite to any authority that states that any forfeiture clause is to be treated as if it were a liquidated damages provision. Thus, we believe that defendant's reliance on *Hamming* is at least a misrepresentation of its true import, and at worst, a misstatement of the law.

¶ 48 Further compounding the problems with this argument is the fact that the Waiver and Release conditioned itself on defendant fulfilling his obligation not to keep or disclose confidential information like that he retained and used to file his Sarbanes-Oxley suit. The Waiver and Release clearly specified that Navistar was to have the remedy of discontinuing severance payments if defendant did not comply with his obligations under that agreement. Defendant cannot claim that he was unaware of the rights given to both parties under the Waiver and Release.

¶ 49 As a result, this case bears substantial relationship to *Torrence v. Hewitt Associates*, 143 Ill. App. 3d 520 (1986). There, the court upheld a restrictive covenant protecting the employer's confidential information and its forfeiture provision because the employer had the right to protect its confidential information and the employee was aware of the forfeiture provision and the employer's intent to enforce the provision. *Torrence*, 143 Ill. App. 3d at 526. Likewise here. Navistar is entitled to try to protect its confidential information and defendant knew or should have known of Navistar's rights to enforce the Waiver and Release if defendant did not fulfill his obligations under it. Accordingly, we hold that the remedy sought by Navistar is not an unenforceable forfeiture.

¶ 50 Defendant next contends on appeal that the Waiver and Release was unenforceable because it was not supported by consideration and Navistar materially breached the Waiver and Release by terminating his employment on February 13, 2008, instead of on February 15, 2008. A valid contract consists of an offer, acceptance, and consideration. *Ross v. May Co.*, 377 Ill. App. 3d 387, 391 (2007). Consideration is a bargained-for exchange of promises or performances, and a bargained-for exchange exists if one party's promise induces the other party's promise or performance. *Ross*, 377 Ill. App. 3d at 291. The compromise of a disputed claim, even if the claim is not valid, will constitute sufficient consideration for the formation of a contract as long as the claim was made in good faith. *In re Estate of Herwig*, 237 Ill. App. 3d 737, 741 (1992).

¶ 51 Defendant contends that the consideration identified by Navistar below, namely offering to pay defendant his severance in 10 days rather than waiting six months to pay it, was illusory, because the May and December ESAs already obligated Navistar to pay defendant's severance within 10 days. Defendant reasons that, because a preexisting duty to perform cannot constitute consideration,

citing to *Johnson v. Maki & Associates, Inc.*, 289 Ill. App. 3d 1023, 1028 (1997), the Waiver and Release fails for lack of consideration.

¶ 52 Initially, we note that, defendant's argument, insofar as it relies on the validity of either or both the May and December ESAs, does not stand because defendant executed the February ESA. By so doing, defendant is implicitly rejecting his position that either or both the May and December ESAs were or are effective. Further, we need not determine the validity of the various ESAs, because, notwithstanding defendant's implicit rejection of his position that either or both the May and December ESAs were or are in effect, we discern consideration in the form of a settlement of a dispute between the parties. At the time the February ESA was signed, defendant maintained that he had previously executed the December ESA, which was valid and in full force. Navistar, on the other hand, maintained that it had not received defendant's signed copy of the December ESA. The Waiver and Agreement recited that Navistar was giving defendant the opportunity to execute an ESA (as its position at that time was that defendant did not have a valid, executed ESA on file, so he was not entitled to the benefits of the December ESA unless he executed the February ESA). The parties, then, disagreed over whether there was an ESA in place for defendant. This is seen in defendant's deposition, where he testified that Navistar management disputed his assertion that he had submitted a signed copy of the December ESA to Navistar. Thus, at the time the Waiver and Release was signed, the parties disputed whether defendant was covered by an ESA. In compromise of the dispute, as set forth in the Waiver and Release, Navistar agreed to allow defendant to execute a copy of the December ESA previously circulated (it became the February ESA), and in exchange for Navistar's promise to abide by the February ESA, defendant was to execute the Waiver and Release

and abide by its terms. Accordingly, we hold that the mutual promises by the parties constituted sufficient consideration to support the validity of Waiver and Release.

¶ 53 Defendant argues that the discussion of the legal consequence of the ESAs means that the arbitrators should have resolved the issue as the ESA was subject to arbitration. This argument is misplaced regarding defendant's contentions about the Waiver and Release. First, the validity and scope of the ESAs is not at issue; rather, the enforceability of the Waiver and Release is under consideration. Additionally, the effectiveness of which particular ESA is also not at issue, because, even if they were all valid or invalid, there was still a dispute between the parties whether defendant was covered by the provisions of any ESA. Further, the court had the responsibility of determining the validity and scope of the Waiver and Release because there is no arbitration clause in the Waiver and Release, so the fact that the ESAs were to be evaluated by the arbitrators is immaterial to the evaluation of the Waiver and Release.

¶ 54 Defendant also argues that the December ESA was enforceable, so the execution of the February ESA was unnecessary and cannot constitute consideration. We disagree. As we noted above, the parties disputed whether defendant was eligible to receive any severance payments and benefits under any ESA. The fact that defendant argues that the December ESA was in effect does not negate or diminish the dispute, especially as defendant admitted, in his deposition, that, at the time the Waiver and Release was executed, the parties disputed that defendant had successfully executed and was eligible for the benefits provided by the December ESA. Thus, we reject defendant's argument on that point.

¶ 55 Defendant argues that, for a compromised dispute to constitute consideration, the dispute that is resolved must be currently in litigation, or there must be a current threat to litigate the dispute.

Defendant cites *F.H. Prince & Co., Inc. v. Towers Financial Corp.*, 275 Ill. App. 3d 792, 799 (1995), noting that the compromised dispute involved a pending, legally enforceable claim against a subsidiary insurer. *F.H. Prince*, however, is broader than defendant claims, and its analysis covers any situation in which a party parts with a right he might have otherwise enforced. *F.H. Prince*, 275 Ill. App. 3d at 798-99, quoting *Hamilton Bancshares, Inc. v. Leroy*, 131 Ill. App. 3d 907, 913 (1985). Here, the dispute identified was whether defendant was even eligible to receive the severance and benefits set forth in the ESAs. This was compromised by extending to defendant the opportunity to ensure that he was eligible for the benefits set forth in the December ESA by allowing him to execute a copy of the December ESA long after the time for executing that agreement had expired. One or the other party would have been able to enforce its rights legally, and thus, the settlement of that dispute by allowing defendant to tardily execute the ESA amounts to consideration. In accord with *F.H. Prince*, 275 Ill. App. 3d at 799, we reject defendant's contention that a compromised dispute must involve ongoing litigation or the imminent threat of litigation.

¶ 56 Defendant argues that the December ESA was enforceable and in effect despite Navistar's position that it had not received a signed copy of the December ESA from defendant. This argument is irrelevant in light of defendant's admission that the parties disputed whether the December ESA was in effect. It is the existence of a good faith dispute and the steps taken to compromise that good faith dispute that constitute consideration. Here, Navistar, apparently in good faith, abandoned its position that defendant was not eligible for any benefits or severance under the ESA, and defendant, also apparently in good faith, abandoned his position that he was eligible for them under the December ESA. By signing the February ESA, both parties compromised their positions and agreed to be bound by the terms of that document. This includes the provision that the just-signed

document (the February ESA) superceded any other ESAs previously executed by the parties. Thus, defendant agreed to relinquish his claim that the December ESA was in force; Navistar relinquished its claim that defendant was not covered by any ESA.

¶ 57 Defendant next argues that the consideration supporting the Waiver and Release failed because Navistar did not extend his termination date with pay, as promised in the Waiver and Release. Defendant argues that he has not received the extra two days of pay promised under the Waiver and Release, and he was not allowed to attend work for those two days. Navistar counters that defendant revoked his acceptance of the Waiver and Release, constituting a breach and thereby freeing it of its obligation to extend his termination by two days and to pay him additional salary equivalent to two days. Defendant is conflating the failure to perform an obligation with the consideration supporting the formation of the contract. As we have noted above, the consideration for the Waiver and Release was each party's promise to relinquish and compromise its position: defendant relinquished his claim that the May and December ESAs or both of the were properly executed and in effect, and Navistar relinquished its claim that defendant had not properly executed an ESA and none were in effect. Defendant is not properly complaining that the consideration failed, because each party fulfilled its consideration upon executing the Waiver and Release, because each party abandoned its previous position. The Waiver and Release, however, required Navistar to perform the acts of extending defendant's employment by two days, extending his pay by two days, and calculating his postemployment benefits from the two-days-later termination date. Defendant argues that Navistar did not perform these acts, so defendant is really arguing that Navistar breached the Waiver and Release, not that the consideration for the Waiver and Release failed. Because we have already determined that the compromised dispute over defendant's eligibility for severance and

benefits under the ESA constituted sufficient consideration to support the Waiver and Release agreement, we need not consider this contention any further.

¶ 58 Defendant also contends that Navistar breached the Waiver and Release by terminating him on February 13, 2008, instead of February 15, 2008. We note that this is actually the contention that defendant attempted to raise in his immediately preceding argument, in which he claimed this constituted a failure of consideration. This contention, however, is belied by the February 14, 2008, severance letter summing up his benefits and noting that his termination date was as of February 15, 2008. The letter from Navistar clearly manifests an intent to consider February 15, 2008, as defendant's termination date. While, on February 13, 2008, defendant was asked to turn in his keys and his access to the company email was terminated, these actions were not inconsistent with the termination letter in which defendant was promised salary and benefits until February 15, 2008, and post-termination benefits accruing from February 15. Further, defendant's reentry into the building on February 16, 2008, shows that Navistar had not irrevocably barred defendant from the premises. In light of these facts in the record, as a matter of law, no reasonable person could conclude that Navistar terminated defendant before February 15, 2008.

¶ 59 Defendant next contends on appeal that the trial court erred in finding the Waiver and Release to be unambiguous. Defendant points to the phrase "belonging to" as facially ambiguous, which should have prevented summary judgment from entering in favor of Navistar. Defendant also contends that, at the February 13, 2008, meeting, Navistar's counsel, Bunge was present and informed defendant that the only documents he needed to return were confidential or privileged documents. According to defendant, this explanation modifies "belonging to" so that his retention

of documents that he did not deem to be confidential or privileged no longer can be said to violate the provisions of the Waiver and Release.

¶ 60 By contrast, Navistar argues and the trial court agreed that defendant clearly understood the meaning of "belonging to" and this understanding was confirmed by the fact that defendant did, in fact, return the documents "belonging to" Navistar when he was ordered by the court to do so. Navistar also argues that defendant admitted in his deposition that he understood "belonging to" and that he did not raise the ambiguity at that time or before the court until arguing Navistar's motion for summary judgment.

¶ 61 While the interpretation of a contract is generally well-suited to a decision by summary judgment, where the contract contains an ambiguity, its meaning must be ascertained by considering extrinsic evidence, so summary judgment in such a circumstance would be inappropriate. *William Blair & Co., LLC v. FI Liquidation Corp.*, 358 Ill. App. 3d 324, 334 (2005). A contract term is ambiguous if it is reasonably susceptible to more than one meaning, either through the indefiniteness of the language or the language having multiple meanings. *William Blair & Co.*, 358 Ill. App. 3d at 334. A term is not ambiguous simply because the parties disagree about the meaning of the term. *William Blair & Co.*, 358 Ill. App. 3d at 334. Whether a contract is ambiguous is a question of law for the trial court to determine. *William Blair & Co.*, 358 Ill. App. 3d at 334.

¶ 62 We hold that the trial court did not err in determining that the Waiver and Release was unambiguous. The phrase "belonging to" has the common and generally accepted meaning of possession. *People v. Gordon*, 5 Ill. 2d 91, 96 (1955) ("belong" is defined to mean "to be the property of," or ownership); *People ex rel. Gill v. Lake Forest University*, 367 Ill. 103, 109 (1937) ("belong" primarily means "property of;" belonging to an entity rather than a place means title or

ownership); *Bragg v. City of Chicago*, 73 Ill. 2d 152, 154 (1874) ("The work 'belong' itself implies ownership, and one definition of its meaning, as given by lexicographers, is, 'to be the property of'"). While defendant can find foreign authority to demonstrate that, occasionally, "belonging to" will mean less than ownership, he does not consider the Illinois cases and the fact that the Illinois cases uniformly hold that "belong" means ownership or property of. As a result, defendant's claim is unpersuasive. Additionally, we note that, in interpreting contractual language which is not specifically defined, we are to use the term's common and generally accepted meaning while placing that language into its context in light of the contract as a whole. *Dean Management, Inc. v. TBS Construction, Inc.*, 339 Ill. App. 3d 263, 269 (2003). Accordingly, because in Illinois, "belonging to" is unambiguous, we determine that the trial court's holding that the language was unambiguous was not in error.

¶ 63 Defendant contends that the fact the trial court referenced defendant's own understanding of the term "belonging to" undermines Navistar's claim that the phrase is unambiguous. We note, however, that the trial court's reference to defendant's understanding of "belonging to" was to confirm its conclusion that the contract was not ambiguous, not to make the determination as to ambiguity in the first place. As a result of our determination, we need not address defendant's remaining contentions as they are based on extrinsic evidence.

¶ 64 Defendant last argues on appeal that the trial court erred in holding that he waived his affirmative defenses of fraud and duress. Defendant argues that, in response to Navistar's motion for more particulars in the affirmative defenses, defendant moved to amend the affirmative defenses *instanter*, which the trial court granted. Defendant notes that, thereafter, Navistar filed an answer

to the defenses. Defendant concludes that the trial court should have considered the affirmative defenses which would have precluded entry of summary judgment.

¶ 65 Navistar argues that, while defendant might have filed for leave to amend his affirmative defenses *instanter*, defendant never actually filed a copy of the amended affirmative defenses with the court. We agree with this contention. It is well established that leave to amend is not effective until the amendment is actually made. See *Wisconsin Central Ry. Co. v. Wieczorek*, 151 Ill. 579, 583 (1894) ("until the amendment was in fact made, the declaration, in all respects, remained the same as though no leave to amend it had been given"). We note particularly that defendant does not dispute that he never actually filed his amended affirmative defenses with the court; likewise, defendant does not dispute the effect of such a failure. Accordingly, we hold that the trial court did not err in holding that defendant has waived his amended affirmative defenses, because defendant did not actually file them with the court.

¶ 66 We now turn to Navistar's cross-appeal. Navistar first contends on appeal that the trial court improperly denied its motion to stay arbitration and granted defendant's motion to compel arbitration. Navistar argues that paragraph 7 of the February ESA authorizes all of the claims raised by Navistar to be adjudicated in the trial court and that the claims are not subject to arbitration.

¶ 67 The primary objective in interpreting a contract is to give effect to the intent of the parties. *Hensley Construction, LLC v. Pulte Home Corp.*, 399 Ill. App. 3d 184, 192 (2010). The best indication of the parties' intent is the language of the contract, given its plain and ordinary meaning, and considering the contract as a whole. *Hensley Construction*, 399 Ill. App. 3d at 192. When interpreting a contract, every provision must be given meaning, if possible, because it is presumed

that every clause in a contract was inserted deliberately and for a purpose. *River Plaza Homeowner's Ass'n v. Healey*, 389 Ill. App. 3d 268, 277 (2009).

¶ 68 Paragraph 7 of the February ESA provides, pertinently:

> "In the event that any of the foregoing restrictions are violated [subparagraphs (a) through (e) set forth the employee's obligations], [Navistar] shall be entitled, in addition to any other remedies and damages available under law, equity, or otherwise, to recoup, offset, suspend, or terminate any or all separation payments and benefits previously paid or otherwise subsequently owed to the Executive under this Agreement, to injunctive relief from any court of competent jurisdiction to restrain the violation of such restrictions, an/or to prevent any threatened violation by the Executive, and/or by any person or persons acting for, or in concert with, the Executive in any capacity whatsoever."

Paragraph 9 of the February ESA provides, pertinently, that, "[e]xcept as provided in paragraph 7, any controversy or claim arising out of or relating to this Agreement or the alleged breach hereof shall be settled by arbitration."

¶ 69 In our view, paragraph 7 is a "carve out" of the general arbitration clause of paragraph 9. In other words, disagreements over the interpretation of the February ESA will be arbitrated unless they fit into the paragraph 7 exception. Paragraph 7 authorizes injunctive relief and declaratory actions to be heard by the trial court. Injunctive relief is separately provided for ("[Navistar] shall be entitled *** to injunctive relief"). Declaratory relief is implied by the remedies expressly listed by the provision: "[Navistar] shall be entitled *** to recoup, offset, suspend, or termination any or all separation payments and benefits." Based on this reading, we do not believe that the trial court erred

in sending the ESA-related controversies to arbitration and in denying Navistar's motion to stay arbitration or granting defendant's motion to compel arbitration.

¶ 70 Navistar views that any controversy arising out the violation of the paragraph 7 restrictions should be adjudicated in court. This would include the Executive's obligation for confidentiality, cooperation, non-competition, non-solicitation, and non-disparagement. In other words, if the Executive breached the ESA, his breach would be adjudicated in the trial court. We believe this reading effectively nullifies the arbitration clause and renders it meaningless. Such a reading contravenes the well-settled rules of contract interpretation. See *Healey*, 389 Ill. App. 3d at 277 (a contract should be interpreted to give every provision meaning). Paragraph 9 provides that "any controversy or claim arising out of or relating to this Agreement or the alleged breach hereof" should be adjudicated by arbitration. Navistar's reading would remove any breach of the agreement by the executive, which is too broad. Instead, by limiting the judicial claim to declaratory actions and injunctive proceedings, all of the provisions of the agreement are given effect. Accordingly, we reject Navistar's interpretation.

¶ 71 Navistar also argues that defendant's breach of the confidentiality provisions of the ESA by retaining and using certain documents results in the removal of this action from arbitration. Navistar reasons that paragraph 7 declares that the confidentiality restrictions (subparagraphs 7(a) - 7(e)) are a "condition precedent to [Navistar's] willingness to enter into this Agreement and pay the consideration set forth in this Agreement." Navistar contends that the breach of the confidentiality restrictions (subparagraphs 7(a) - 7(e)) means that the contract was extinguished because a condition precedent to the contract had failed. If the contract is extinguished, then defendant has no arbitration rights whatsoever.

¶ 72 We disagree. We note that Navistar does not cite any authority to support its proposition that the breach of a condition precedent results in the extinction of the contract, in violation of Supreme Court Rule 341(h)(7), and has thereby forfeited this contention. *Vilardo*, 406 Ill. App. 3d at 720. Forfeiture notwithstanding, we believe that Navistar misreads the provision. The clause declaring that the confidentiality restrictions (subparagraphs 7(a) - 7(e)) are a "condition precedent to [Navistar's] willingness to enter into this Agreement and pay the consideration set forth in this Agreement," is reciting the consideration supporting the contract. Under this clause, defendant is required to promise not to engage in any activities covered by the confidentiality restrictions in exchange for Navistar's promise to enter into the agreement and to pay the benefits specified. Accordingly, we reject Navistar's contention on this point.

¶ 73 Navistar's final argument on appeal is that the trial court erred in granting summary judgment in favor of defendant on counts III through VII on the basis that the damages pleaded by Navistar, namely defendant's attorney fees and expenses incurred in the arbitration in this matter, were not recoverable. Navistar first asserts that it is entitled to nominal damages based on *Hydrite Chemical Co. v. Calumet Lubricants Co.*, 47 F.3d 887 (7th Cir. 1995) and *Automed Technologies v. Microfil, LLC*, No. 04—C—5596 (N.D. Ill., June 7, 2006). Navistar also cites to the concurring and dissenting opinion in *Vance Pearson, Inc. v. Alexander*, 86 Ill. App. 3d 1105 (1980). We note the patent inadequacy of the citations in support of the proposition that, if a breach of contract is proved, the plaintiff is entitled to at least nominal damages. The federal cases, of course, are not precedential (and the district court case is not to be cited), and the citation to a dissent does not represent the judgment of the court. We further note that Navistar could have cited Illinois authority in its surreply brief but did not, instead choosing to devote half of that brief to calling defendant a liar and other

ad hominem attacks (which we note were not relevant or helpful to its position) under the guise of "clearing up the factual record." We do not choose to ignore the proposition, however, because it is a correct and valid point of law and Navistar did provide authority supporting it (albeit wholly unsatisfactory authority). See *Hentze v. Unverfehrt*, 237 Ill. App. 3d 606, 612 (1992) (where a breach of contract is proved, but a proper basis for damages is not established, the plaintiff is entitled only to nominal damages). Accordingly, we hold that Navistar is entitled to at least nominal damages in counts III through counts VII of the amended complaint.

¶ 74 Next, Navistar asserts it is entitled to the attorney fees and expenses defendant incurred in arbitration as damages. Generally a party is not entitled to recover attorney fees as damages. *Sorenson v. Fio Rito*, 90 Ill. App. 3d 368 , 371-72 (1980). In certain circumstances, however, where the attorney fees were caused by the wrongful act of the defendant and it involved the plaintiff in litigation with others, the plaintiff may be able to recover its attorney fees from that litigation with others as damages proximately caused by the defendant. *Sorenson*, 90 Ill. App. 3d at 72. Thus, under the right circumstances, Navistar could, in principle, allege as its damages, the attorney fees it was forced to advance to plaintiff in the arbitration proceedings.

¶ 75 This case, however, does not have the right circumstances. Navistar premises its argument regarding damages on the success of its previous argument, that arbitration should not have been available at all for issues arising from the February ESA. Navistar states: "Because Navistar was erroneously forced to arbitrate the issue of [defendant's] severance payments, [citation], it has now been charged more than $600,000 in arbitrator's fees on top of the claims by [defendant's] lawyers for their own huge fee awards (*i.e.*, $700,000)." However, as we have determined above, the trial court did not erroneously compel arbitration in this matter. Accordingly, the advancement of fees

is firmly rooted in the February ESA, and Navistar may (and did) contest the propriety of expending these funds in the arbitral forum. Because Navistar tied its claim for damages on appeal to the success of its argument regarding the propriety of arbitration, and because we resolved Navistar's arbitration argument against it, we hold that its damages argument must also fail. Further, the expenses are being incurred under the terms of a contract, which serves to distinguish this situation from that in *Sorenson*.

¶ 76 As a result, we hold that the trial court properly granted summary judgment on counts III through VII in favor of defendant, but we remand the cause with instructions to the trial court to enter an award of nominal damages on each of counts III through VII, as Navistar is entitled only to nominal damages for the underlying breach of contract claims.

¶ 77 For the foregoing reasons, we affirm the judgment of the circuit court of Du Page County and remand the matter to allow the trial court to enter nominal damages in favor of Navistar on counts III through VII of the amended complaint.

¶ 78 Affirmed and remanded with directions.