No. 128770

In the

Supreme Court of Illinois

PML DEVELOPMENT LLC, an Illinois limited liability company,

Plaintiff-Appellant,

v.

VILLAGE OF HAWTHORN WOODS, a municipal corporation,

Defendant-Appellee.

On Leave to Appeal from the Appellate Court,
Second Judicial District, No. 2-20-0779.
There Heard on Appeal from the Circuit Court of the Nineteenth Judicial Circuit,
Lake County, Illinois, No. 15 CH 848.
The Honorable **Luis A. Berrones**, Judge Presiding.

REPLY BRIEF OF PLAINTIFF-APPELLANT

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ARGUMENT

PML replies below to the arguments raised by the Village, following the structure of PML's opening brief. Two factual matters raised by the Village, however, should be cleared up at the outset.

One is the claim that, because it was seeking specific performance, the Village could not prove up its damages for the non-conveyance of the property, so this Court now should remand to allow it to present its damage evidence. (Village Br. 13, 35.) In fact, over the five-year course of the litigation, the Village had the same opportunity as PML to plead, generate evidence, and prove up damages for any claim it wished to pursue, regardless of other remedies it may have been seeking. Among other times, as late as 2020, following trial but before the issuance of the trial court's decision, the Village could have used its motion to re-open proofs as a basis for submitting its damage evidence. Instead, the parties stipulated to three public documents the Village sought to introduce, following which the Village voluntarily withdrew its motion to re-open "as moot." (C8707.) No justification exists now for a remand to re-try the case due to the Village's neglect in submitting additional evidence. The Village's position is further discussed at pp. 10-12, *infra*.

The second matter regards the Village's claim it sought not to continue performance but to terminate the Agreement. (Village Br. 9, 17, 27, 32.) The argument not only runs contrary to the Village's admission otherwise in its appellate court brief (which the Village brushes aside as "error," *see* its footnote p. 32), but also has no basis in the record. The evidence on which the Village relies as proof, namely, its motion for appointment of a receiver in October of 2016, said nothing about terminating or rescinding the contract. Rather, that motion asked that the receiver perform PML's responsibilities under the

Agreement, including the payment of property taxes. (C995-1001.) In other words, the Village asked for a receiver to continue the Agreement, not terminate it. This point is addressed further at pages 7-9 *infra*.

I. THE SECOND DISTRICT APPELLATE COURT ERRED IN REJECTING THE FIRST-TO-BREACH PRINCIPLE BASED ON AN ELECTION-OF-REMEDIES REQUIREMENT

A. The Trial Court Applied the First-to-Breach Principle, Which Remains the Law of Illinois

PML's opening brief points out that the trial court's decision in favor of PML relied on a well-established legal doctrine in contract law, the first-to-breach principle. (PML Op. Br. 13-15.) The Village itself does not disagree. It notes that "Illinois has long recognized" that principle, and that it "is designed to protect a non-breaching party from the burden of continued performance under a contract that has already been materially breached by another party." (Village Br. 19.)

The parties are in accord on that point.

B. The Second District Relied on the Election-of-Remedies Doctrine, which Has Limited Application

But that is where agreement mostly ends. The Village asks that this Court "adopt . . . the appellate court's formulation of the first-to-breach rule." (Village Br. 19.) The appellate court, however, did not apply that rule, or any formulation of it. It applied a different rule because, it said, PML "elected" to continue the Agreement. (A14 ¶¶ 50, 51.) The Village then says the election relied on by the appellate court did not trigger the election-of-remedies doctrine, and that doctrine is nothing but a "strawman." (Village Br. 25.)

But the Village speaks hypocritically. PML's opening brief (p. 15) points out that one of the cases the Village quoted in its appellate court brief referred to the choice between

(a) abandoning and suing for damages, and (b) continuing and suing for damages – as "an aspect of election of remedies." *Emerald Investments Limited Partnership v. Allmerica Financial Life Insurance and Annuities Co.*, 516 F. 3d 612, 618 (7th Cir. 2008). Even now the Village acknowledges that *Emerald Investments* is good law because it "applied Illinois law" with reasoning "well-rooted in Illinois decision." (Village Br. 21.) The Village goes so far as to quote the same language from that decision it quoted in the appellate court, except for omitting the "aspect of election of remedies" language included in the Village's appellate court brief.

The Village also acknowledges that the election of remedies doctrine is one of "general application" and "may arise in a host of different factual and procedural circumstances." (Village Br. 26.) PML does not disagree and notes further that contract law is one primary area where Illinois courts find the doctrine applicable. PML, in fact, cited many contract cases in its opening brief, in addition to *Emerald Investments*, where the availability of a remedy turned on application of the doctrine. *See, e.g.*, *ICD Publications, Inc. v. Gittlitz*, 2014 IL App (1st) 133277 ¶ 80; *Quality Components Corp. v. Kel-Keef Enterprises, Inc*., 316 Ill. App. 3d 998, 1008-1011 (1st Dist. 2000); *Kenny Construction Co. v. Hinsdale Sanitary District*, 111 Ill. App. 3d 690, 698-99 (1st Dist. 1982). *See also Corbin on Contracts* Ch. 66 "Election of Remedies" (Matthew Bender 2022) (devoting multiple sections to discussion of the doctrine as applicable to contracts).

The instant case is a contract case where the appellate court ultimately rejected the remedy awarded PML because, in the court's view, PML had "elected" a different remedy. These are the precise circumstances in which other courts in Illinois apply the well-

established criteria for determining whether an election of remedies has been made. Those criteria plainly apply here.

C. The Second District Incorrectly Applied the Election-of-Remedies Doctrine to the Facts of This Case

The appellate court held, and the Village now argues, that the first-to-breach principle should not apply because PML did not terminate its performance when filing suit. Instead, they say, PML elected to continue the Agreement, which is inconsistent with a party being relieved of its obligations. (Village Br. 22-23, 27, 33-35; A14 ¶¶ 50-51.) The argument is based on the multiple forms of relief sought in PML's Complaint and during the course of the litigation.

The fundamental flaws both the appellate court and Village commit are that (a) the alternative forms of relief sought in a complaint do not constitute an election of remedies, and (b) PML was otherwise entitled to wait, and did wait, until the close of proofs to make its election of remedies. PML sets forth the legal authority for these propositions in its opening brief. (PML Op. Br. 16-17, 20-21.) The Village cites nothing to the contrary, and PML's authority stands undisputed.

Nor has the Village cited authority showing that a plaintiff must exercise the self-help remedy of unilaterally stopping performance – thereby putting itself at risk of being found in breach – lest it forfeit its first-to-breach remedy. (*See* PML Op. Br. 21.) To PML's knowledge, no case has ever so held. Rather, the case law permits a plaintiff to plead alternative remedies in a complaint, and then make an election following trial.

The Village's "must stop performance" argument also overlooks the bad faith nature of the Village's breaches throughout the litigation, as affirmed by the appellate court. (A11-13 ¶¶ 42-48.) Of course, the Village took a contrary position throughout the

litigation. As a result, the outcome of the case was uncertain, and PML sought interim mandamus/injunctive relief to deal with the mounting damages caused by the Village's continuing harm. (PML Op. Br. 17-18). As reflected by the trial court's order, PML's damages ultimately were based on its loss of revenues and increased costs stemming from the Village's bad faith interference. (*See* A39 ¶ 50(A), (B), (C).) Hence, had PML not sought the interim relief it did, PML's damages would have been much greater than they actually were. Under those circumstances, the shoe would have been on the other foot: the Village would be complaining that PML forfeited damages by breaching its duty to mitigate. (*See* PML Op. Br. 18.)

The Village argues in passing that, with the Agreement still in place throughout the litigation, the Village was caused "to materially change its position" and suffered "double compensation." (Village Br. 27.) For this brand new argument the Village provides no record cite. In the same paragraph, the Village references its motion to have a receiver appointed. That attempt, however, was unsuccessful and, in any event, did not involve a "change" in position. Even if allowed, the motion would have resulted in a continuation of the Agreement not its termination, as noted at the outset. (*See* pp. 1-2, *supra*.)

The only other arguable change in position reflected in the Village's brief appears to be the mandamus for issuance of grading permits. (*See* Village Br. 23 (referencing the "mandamus relief to compel the Village to issue or extend permits").) By definition, an order of mandamus does not mark a "change" in position but just the opposite. A mandamus order requires that the respondent comply with a clear presently-existing duty. *McFatridge v. Madigan*, 2013 IL 1133676 ¶ 17 (stating that mandamus relief is available only where there is "a clear duty of the public officer to act"). Accordingly, the trial court's

orders required nothing more than that the Village maintain and follow through with – not change – the obligations to which the Village already had agreed. Significantly, the Village does not argue here, nor did it in the appellate court, that the orders were issued erroneously.

The Village also does not demonstrate, nor has it ever demonstrated or even argued throughout this litigation, that it has been held responsible for double compensation. To be sure, the Village's brief in this Court complains about the award of damages to PML. (Village Br. 35-40.) But nowhere in the damage section of its brief does it claim it has been required to pay for the same damage more than once. Its suggestion that "excused performance and damages" amount to "double compensation" (Village Br. 27) is manifestly wrong. A plaintiff's right to excused performance and damages are the very forms of relief to which a plaintiff is entitled under the first-to-breach principle, as recognized in both *Chicago Washed Coal* (Village Br.19-20 (quoting case)) and *Emerald Investments* (Village Br. 21 (quoting case)).

In sum, in rejecting the first-to-breach rule based on PML's supposed "election" to continue the Agreement, both the appellate court and Village fail to comport with the requirements of the election-of-remedies doctrine.

II. EVEN IF THE SECOND DISTRICT CORRECTLY APPLIED THE ELECTION-OF-REMEDIES DOCTRINE, IT ERRED IN DISALLOWING PML'S RECOVERY OF DAMAGES

A. If the Election-Of-Remedies Doctrine Is Found Inapplicable, the Legal Analysis to Be Applied Is Now Undisputed, And Both Parties Should Be Allowed Damage Recovery

The Village's legal analysis of what occurs when one party continues a contract notwithstanding another party's material breach does not differ significantly from PML's. It acknowledges, for example, that "PML correctly articulates the rule of law set forth in

Dustman [*v. Advocate Aurora Health, Inc.*, 2021 IL App (4th) 210157]" (Village Br. 28), to the effect that continuation of a contract by the victimized party to the contract keeps the contract alive, although the victimized party can itself become liable for breach (Village Br. 29-31). The Village, in fact, buys into the "partial breach" case law to such an extent that it argues that it, and not PML, ought to be able to recover damages. (Village Br. 31-35.) Only the Village should recover, so it says, because PML's continuation of the contract converted the Village's material breaches into partial ones, while the Village itself never "'elected' to continue under the Agreement," thereby allowing it to recover for PML's breaches. (Village Br. 32.)

The Village again demonstrates its hypocrisy. Its election to continue the Agreement manifests itself throughout the trial and appellate court processes:

(a) The most obvious manifestation is the Village's admission in its appellate court brief that "both parties elected to proceed" (Village 8/9/21 2d Dist. Br. p. 29), as pointed out in PML's opening brief (p. 22). While the Village says in a footnote parenthetical that the statement "was in error" (Village Br. 32 n.12), it was not. The statement was a part of the Village's broader argument that where both parties proceed following a breach, "Illinois courts have sometimes permitted both parties" to recover damages, so that it, too, should be allowed recovery. (Village 8/9/21 2d Dist. Br. p. 29.) For such proposition, the Village cited *Insureone Independent Insurance Agency, LLC v. American Agencies General Agency, Inc.*, 2012 IL App (1st) 092385, a case also relied on by PML. (*Id.*) Without acknowledging that

both sides elected to proceed, the Village could not have made the argument it did.

(b) The Village repeatedly sought specific performance of the Agreement in the trial court, relief that is the exact opposite of contract termination. Importantly, it sought specific performance following the close of evidence as part of the post-trial briefing when requesting conveyance of the property and enforcement of other contract terms. (*See* C5361-82.) In its reply/response brief in the appellate court, the Village itself refers to these post-trial arguments as seeking "specific performance" when trying to convince the court that it had not abandoned its contract counterclaims. (Village 2/16/22 2d Dist. Reply/Response Br. p. 23; *see also* Village Br. in this Court, at 13 and 35, referring again to its request for "specific performance" in the post-trial briefing.) The relief it sought post trial, moreover, was a continuation of the specific performance it requested earlier in 2016 and again in 2017 when filing summary judgment motions seeking to enforce contract terms. (C839-45, C2320-29; *see also* Village Br. in this Court, at 10, and Village 8/9/21 2d Dist. Br. p. 12, referring to these motions as seeking "specific performance.") The Village's efforts reflect its intention for the contract's continuation, not termination, through to the very end of the litigation.

(c) The Village also admitted its election to allow continuation of the Agreement when stating in its opening post-trial brief:

> The parties do not dispute that the Development Agreement is a valid and enforceable contract.

(C5358.) It made its intention even clearer in its trial court reply brief when stating:

> And ***the Village demonstrated that it has allowed this project to go forward despite those numerous breaches*** [by PML].

(C8680 (emphasis added).) These statements flatly contradict the Village's current arguments.

(d) As noted at the outset (*see* p. 1, *supra*), the Village's motion for appointment of a receiver, if relevant at all to the "partial breach" issue, provides further evidence of the Village's intention to move forward with contract performance, not termination. (*See* Village Br. 9, 17, 27, 32.) The motion, rather than seeking termination or recission of the Agreement, asked for enforcement, and it was filed simultaneously with the Village's 2016 motion seeking specific performance referenced in (b) above. (C995-1001.) Even if the receiver motion could be construed as an attempt to terminate, however, the attempt was not a serious one. The Village did not pursue an interlocutory appeal of the denial of its motion (*see* C2034 (denial order)); it abandoned the concept of a receiver by the time of the post-trial briefing in 2020; it did not raise the denial of its motion as error in the appellate court; nor does it do so in this Court.[1] The Village's receivership motion therefore has little significance regarding the damages it now seeks.

[1] The Village listed the denial order in its notice of appeal to the appellate court (*see* Village 8/9/21 2d Dist. Br. at A28), but did not otherwise pursue the matter.

With these actions and statements by the Village, it cannot argue in good faith that it did not continue the contract following any claimed breaches by PML. Because it continued, PML has a right to damages.

No further issue remains regarding the error in the Second District's application of *Chicago Washed Coal* to find that neither party may recover damages. As a result, if this Court determines that the Second District correctly found that PML elected to proceed with the Agreement, the Court should find further that both parties so elected, such that each party is entitled to recover from the other the damages proved at trial.

B. The Village Waived Its Right to a Second Trial on Damages

The only other argument made by the Village directed to the recovery of damages following a partial breach concerns the Village's damages. PML's opening brief pointed out the unfairness of the appellate court's disposition in terms of the disparity it created in the parties' damages proved during trial: over $5.3 million for PML versus under $300,000 for the Village. (PML Op. Br. 28-29.) The Village does not question the accuracy of PML's figures, nor does it argue that the evidence offered at trial establishes its right to anything more. The Village nonetheless contends this Court should remand for another trial on damages. It seeks another trial so it can prove up damages in connection with the non-conveyance of the property. (Village Br. 35.)

As earlier noted (p. 1, *supra*), the Village offered no evidence of damages regarding the lack of conveyance of the property. It failed to do so despite ample opportunities:

- The Village claims, for example, that PML breached the Agreement by failing to convey as early as January of 2016. (Village Br. 32.) With trial not commencing until June of 2019, the Village had some three-and-a-half years after the claimed breach and prior to trial to amend its pleading and

prepare witnesses to prove up whatever damages it may have had. Even though the Village sought specific performance, nothing barred the Village from asking for damages as an alternative form of relief in the event the specific performance remedy became unavailable.

- The trial itself took place over a six-month period, during the course of which the Village still could have amended, prepared witnesses, and submitted relevant evidence of its damages based on non-conveyance.
- If a relevant change in circumstances occurred post trial, the 11-month period between the close of evidence in January of 2020 and the issuance of the court's decision in November gave the Village yet a further opportunity to prepare its damage evidence and submit it in the form of a supplemental post-trial filing with the court. In fact the Village made a motion to reopen the record without objection from PML based on what the Village claimed was a change in circumstances. (C8686-8706 (supplemental filing).) But it then withdrew its motion as moot without making any offer of proof of damages. (C8707 (order).)
- Even after the trial court's decision, the Village could have filed a post-judgment motion pursuant to 735 ILCS 5/2-1203 to make a record of any further change in circumstances that it thought relevant to its damages, along with an offer of proof. Or it could have filed a petition for relief pursuant to 735 ILCS 5/2-1401 for a similar purpose. But it never did.

The Village has never argued that it was prevented from taking advantage of any of these opportunities to prove up damages. Nor has it argued that the trial court

erroneously failed to consider any evidence it submitted relating to conveyance of the property. Given the Village's inability to develop a concept plan and decide what was to be done with the property, it appears the Village did not attempt to prove up damages because it had none that were provable.[2]

In any event, by failing to take advantage of any of these opportunities and submit evidence, and further failing to raise any claim of error, the Village has waived the right to present further evidence. *Sylvester v. Chicago Park District*, 179 Ill. 2d 500, 507 (1997) (stating that the defendant "waived its contention [regarding plaintiff's injury] by failing to present evidence . . . of this fact in the trial court. . . . It is required that the points argued on appeal be commensurate with the issues presented at trial" (quoting case in part, internal quotes and cites omitted); *Land v. Board of Education*, 325 Ill. App. 3d 294, 306, 306 (1st Dist. 2001), *rev'd in part on other grounds*, 202 Ill. 2d 414 (2002) (finding that "the plaintiffs have failed to present any competent evidentiary matter to support the assertion [regarding matter in controversy]. . . . Therefore, the claim is waived"); *Skokie Gold Standard Liquors, Inc. v. Joseph E. Seagram & Sons, Inc.*, 116 Ill. App. 3d 1043, 1061 (1st Dist. 1983) ("there can be no error in failing to receive evidence that was never offered").

The Village's remand request to prove further damages should therefore be rejected.

[2] The evidence demonstrates that for much or all of the duration of the Agreement, the Village had no idea what to do with the property. As noted in PML's opening brief (p.4), the trial court found the Village still had not finalized its concept plan as of February of 2018. (A28 ¶ 18B.) Earlier, but still more than two years after the parties entered into the Agreement in October of 2012, the Village mayor is quoted in an email as saying that the Village's only plan was that the property remain "open space" for "no definitive period." (R1701-02 pp. 46:14-47:3.)

III. THE VILLAGE'S ARGUMENTS GOING TO PML'S DAMAGES HAVE NO MERIT

In the last section of its brief, the Village attacks the damages awarded PML. The points raised were not addressed by the appellate court, which limited its analysis to finding that neither PML nor the Village is entitled to recover damages. Nor do the points raised bear upon the matters addressed in Parts I and II above that provide the bases for this Court's grant of review. The Court may therefore find it unnecessary to address these additional arguments. PML nonetheless responds to the Village's arguments in light of the possibility that this Court may wish to dispose of them at this time.

A. The New Business Rule Has No Application

As its main argument the Village contends PML is not entitled to recover lost profits under the "new business rule" as set forth in *Ivey v. Transunion Rental Screening Solutions, Inc.*, 2022 IL 127903. (Village Br. 37-38.)

In *Ivey* the Court characterized the rule as "simply an application of the general principle that a plaintiff alleging breach of contract bears the burden to establish damages with reasonable certainty." *Id*. at ¶ 30. The Court further observed that "evidence of past profits is not the *sine qua non* of proving damages," and, moreover, "there is no inviolate rule that a new business can never prove lost profits." *Id.* at ¶ 31.

The Court also noted two circumstances under which the rule has no application. One, based on *Milex Products, Inc. v. Alra Laboratories, Inc.*, 237 Ill. 3d 177 (2d Dist. 1992), is where a new business venture seeks to market a product that is shown already "to have an established market" that makes the proof of lost profits "reasonably certain." 2022 IL 127903 ¶ 33. The other related circumstance is where the new business's claim is

supported by testimony from another company in the same business with relevant comparable data. *Id.* ¶ 37.

If this Court decides to address the damages issue, it should reject the Village's attempt to bar PML's damages based on the new business rule for several reasons.

First, the trial court based its damage calculations on PML's expert evidence and report, which was prepared by Gleeds, USA, a civil engineering firm. A complete copy of the report appears in the record at C4429-62. Gleeds' vice president, Will Burton, a civil engineer, testified to key parts of the report. (*See, e.g.*, R2139-52.) The Village made no objections at trial to the Gleeds testimony and documents coming into evidence. It therefore forfeited any objection to the court's consideration of the evidence. *Babikian v. Mruz*, 2011 Ill. App (1st) 102579 ¶ 13 ("Failure to object at trial results in forfeiture of the issue on appeal").

Second, the trial court did not base its determination of damages on "lost profits." Rather, the court identified three categories of damages, two of which – constituting the bulk of overall damages – consisted of additional ***costs*** caused PML by the Village's bad faith interference. (*See* A39 ¶ 50(A), (B), (C).) These costs damages arose from the court's earlier finding that "[t]he Village's breach of contract resulted in PML incurring damages." (A32 ¶ 30(B).) None of the "new business rule" cases relied on by the Village apply the rule to provable increased costs caused by the defendant. *See, e.g., Ivey*, 2022 IL 127903 at ¶ 37 (observing that the plaintiff "did not present evidence of ***revenues*** of a similar product or a similar business in a similar market" (emphasis added)). The rule simply has no application.

Third, the rule likewise does not apply to the third category of damages, which was for lost revenue resulting from discounts PML had to offer customers to entice them to continue using the land fill despite the Village's interference. (*See* A39 ¶ 50(A); R608-14 pp. 102:8-108:15 (reason for discount); R1091-92 pp. 14:10-15:7 (customer testimony).) The calculation was based on the discount of $0.23 per cubic yard of fill from the actual price PML had been charging, multiplied by the number of yards subject to the discount, resulting in a damage component of $268,223.70. (R2121-72 pp. 33:18-34:13 (Burton testimony); *see also* plaintiff's demonstrative exhibit 1.5 at C5707 taken from the Gleeds report.) In accordance with *Ivey*, these damages are based on PML's actual experience with the same product on this very project, thus assuring "reasonable certainty."

Fourth, the two costs categories, amounting to $4,898,161 and $183,293, in addition to not representing "profits," likewise comported with the "reasonable certainty" required by *Ivey*. (A39 ¶¶ 50(B) and (C).) They did so because in determining damages, Gleeds (a) independently verified PML's originally budgeted costs with the use of historical cost data from the local and other areas, and (b) compared those verified figures to the actual costs necessary to complete the project. (R2314-28 pp. 96:11-110:13 (testimony by Gleeds' director of estimating, Charl Neser, identified at R2307-09 pp. 89:2-92:2); C5705 (chart summarizing reasonable costs versus actual costs).) The results are shown on an exhibit referenced by the trial court and used to determine the difference between the reasonably budgeted costs and actual costs for "Land Purchase & Design" and "Site Preparation, Topsoil & Clay Work." (PX-D 1.2, *see* C5705.) The Gleeds' figures therefore were not speculative and produced a basis for the trial court's calculation of damages amounts.

In sum, the damages allowed by the trial court were fully supported by the record.

B. The Village's Arguments Going to Specific Evidentiary Issues Are For Naught

Apart from its reliance on the new business rule, the Village makes a series of evidence-related claims. It argues, for example, that some of the damages materials submitted by PML were documents for a different but related company, DA Development. (Village Br. 36.) The argument has no substance. PML explained in the trial court the DA Development name on some of the documentation, noting that PML uses the same accounting software as DA Development, and the software sometimes automatically generates DA's name on some of PML's documents. (C3916-17.) The information submitted, however, all related to PML. (C3918.) The Village submitted nothing to the contrary, and the trial court overruled its objection raised as a motion in limine. (R244.) The issue did not thereafter arise.

The Village further argues that PML provided the trial court with only "samples" of its cost invoices. (Village Br. 36-37.) It overlooks that the full set of documents was available to the Village and that Gleeds audited PML's full general ledger, tracing all costs back to their invoices. (R2144-48 pp. 6:6-10:9.) Sampling is permitted by the rules of evidence. Ill. R. Evid. 703, 705, 1006.

The Village also contends that PML could not have incurred the costs it claims because PML's "general ledger" shows costs below the $9.34 million in total costs claimed by PML. (Village Br. 37.) The $9.34 million in costs are reflected on one of the demonstrative exhibits prepared by Gleeds. (*See* C5705 (graphic representation).)[3] The

[3] The $9.34 million figure is the total of the "actual" cost figures on the chart.

"general ledger" referred to by the Village is actually entitled "Vendor Ledgers" and did not reflect all PML costs involved with the project. (E2863-3139 (vendor ledgers).) Overhead, rent, engineering, wetland-related, labor, and other costs were accounted for separately. (*See, e.g.*, E1447-89 (certain engineering costs); E1395 (sample geotechnical engineering invoice); E1139-1376 (erosion control costs); E1377-1489 (more engineering costs); E1490-1590 sample of equipment costs); E1857-2650 (sample of labor costs).) Although the Gleeds' experts reviewed the general ledger, they included all of PML's actual invoices – or at least those over $1000 – in their analysis to establish their appropriateness and connection to the project. (R2152-2160 pp. 14:21-22:22.) They also investigated whether each cost was incurred due to the Village's conduct, PML's management of the project, or some other factor. (R2066-67 pp. 109:6-110:4; R2075-76 pp. 118:12-119:4; R2100-2102 pp. 143:2-145:18; R2112-14 pp. 155:19-157:9; C5710.) The Village therefore is mistaken in its contention.

The Gleeds analysis stands unrebutted and thus provided a firm basis for the trial court's calculation of PML's damages.

CONCLUSION

As evident from its brief, the Village itself does not support the result reached in the appellate court. That court's judgment should be reversed to the extent it determines that neither PML nor the Village is entitled to damages.

For the reasons set forth herein and in PML's opening brief, PML continues to believe the appellate court further erred in refusing to apply the first-to-breach principle. If this Court finds otherwise, then the appellate court's error lies in its refusal to allow both sides to recover damages in accordance with the evidence presented at trial. Either way this Court should (a) reverse the appellate court judgment and affirm the trial court

judgment on PML's breach-of-contract claim against the Village, (b) find that PML is entitled to recover damages proved against the Village either by virtue of the first-to-breach principle or under the partial-breach doctrine, (c) affirm the appellate court judgment in favor of PML on the Village's counterclaim, and (d) remand the case back to the appellate court for consideration of the extent of PML's damages over and above those awarded by the trial court, in accordance with PML's cross appeal.

Dated: February 3, 2023

Respectfully Submitted By

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b) and Rule 315(h). The length of this brief, excluding the pages contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), contains 18 pages.

/s/Don R. Sampen
Don R. Sampen

NOTICE OF FILING and PROOF OF SERVICE

In the Supreme Court of Illinois

PML DEVELOPMENT, LLC,	)	
	)	
Plaintiff-Appellant,	)	
v.	)	No. 128770
	)	
VILLAGE OF HAWTHORN WOODS,	)	
	)	
Defendant-Appellee.	)	

The undersigned, being first duly sworn, deposes and states that on February 3, 2023, the Reply Brief of Plaintiff-Appellant was electronically filed and served upon the Clerk of the above court. On February 3, 2023, service of the Reply Brief will be accomplished electronically through the filing manager, Odyssey EfileIL, to the following counsel of record:

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Within five days of acceptance by the Court, the undersigned states that 13 paper copies of the Reply Brief bearing the court's file-stamp will be sent to the above court.

/s/ Don R. Sampen
Don R. Sampen

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

/s/ Don R. Sampen
Don R. Sampen