
**IN THE APPELLATE COURT OF ILLINOIS
FIFTH JUDICIAL DISTRICT**

MARK J. EAVENSON, D.C. d/b/a)
EAVENSON CHIROPRACTIC,)
individually and on behalf of others)
similarly situated,) Appeal from the Circuit Court of Third
) Judicial Circuit, Madison County
)
Plaintiff-Appellant,)
) No. 06-MR-574
v.)
) Hon. Ellar Duff
STATE FARM MUTUAL AUTOMOBILE)
INSURANCE COMPANY and STATE)
FARM LIFE INSURANCE COMPANY,)
)
Defendants-Appellees.)

BRIEF OF DEFENDANTS-APPELLEES

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ORAL ARGUMENT REQUESTED

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INTRODUCTION

This is an appeal from an order denying and dismissing a Petition To Select A Third Arbitrator that Plaintiff Mark J. Eavenson (“Plaintiff”) filed in Madison County circuit court against Defendants State Farm Mutual Automobile Insurance Company and State Farm Life Insurance Company (collectively, “State Farm”).¹ 1/10/07 Order (R. C00093; DA 318).² The circuit court dismissed the Petition, holding in accord with section 2-619(a)(3) of the Code of Civil Procedure that Plaintiff should make any request to appoint a third arbitrator through his already pending suit against State Farm, which the Illinois Supreme Court transferred from Madison County to Cook County in 2005.

¹ Although the two defendants are separate companies with different involvement in this case, the differences between the two are not material to this appeal. Solely for purposes of this appeal, therefore, we refer to them jointly as “State Farm.”

² In citing to the record on appeal, State Farm has used the conventions suggested in Ill. Sup. Ct. R. 341(h)(6). Citations to “DA” refer to State Farm’s Supplemental Separate Appendix filed with this brief. That appendix contains several items that come not from the record on appeal, but from court files in related suits. Such non-record court orders and litigant filings are subject to judicial notice. *See Primax Recoveries, Inc. v. Atherton*, 365 Ill. App. 3d 1007, 1012 (5th Dist. 2006) (“we may take judicial notice of a public record that is a part of the records of another court”); *see also Pfaff v. Chrysler Corp.*, 155 Ill. 2d 35, 71 (1992) (taking notice of orders by two other courts); *King v. N. Ind. Commuter Transp. Dist.*, 337 Ill. App. 3d 52, 56 n.2 (1st Dist. 2003) (taking notice of filings in different case).

1/10/07 Hrg. Tr. at 16-17 (R. R00016-17; DA 334-35). For the reasons explained below, the circuit court correctly dismissed the Petition To Select A Third Arbitrator. Affirmance thus is warranted. There is no jury verdict. The issues presented arise on the pleadings.

ISSUES PRESENTED

1. Whether the circuit court's dismissal order should be affirmed because Plaintiff's Petition To Select A Third Arbitrator is moot in the wake of the Cook County circuit court ruling that the parties' dispute will be litigated, not arbitrated.

2. Whether the circuit court's dismissal of Plaintiff's Petition To Select A Third Arbitrator under section 2-619(a)(3) of the Code of Civil Procedure should be affirmed as a proper exercise of discretion because an action between the same parties for the same cause was already pending in Cook County circuit court, having been transferred from Madison County to Cook County by the Supreme Court.

3. Whether the circuit court's dismissal order should be affirmed pursuant to section 2(c) of the Uniform Arbitration Act because Plaintiff sought to compel arbitration over issues involved in his pending Cook County action.

4. Whether the circuit court's dismissal order should be affirmed because the applicable insurance policy required that Plaintiff's Petition To Select A Third Arbitrator be filed in Cook County.

JURISDICTION

As explained below, the dismissed Madison County suit on appeal here is moot. *See pp. 23-25, infra.* This Court, therefore, is without jurisdiction to rule on the merits of the suit. *La Salle Nat'l Bank v. City of Chicago*, 3 Ill. 2d 375, 378-79 (1954). Subject to

that qualification, Plaintiff's brief correctly states the basis for the Court's jurisdiction over this appeal. *See* Pls.' Br. 3.

STATUTES INVOLVED

This case involves the construction of section 2(c) of the Uniform Arbitration Act (710 ILCS 5/2(c)) and section 2-619(a)(3) of the Code of Civil Procedure (735 ILCS 5/2-619(a)(3)). The texts of these statutes are set forth at pages DA 399-400 of State Farm's Separate Supplementary Appendix.

STATEMENT OF FACTS

Supreme Court Rule 341(i) provides that an appellee need not include a Statement of Facts unless "the presentation by the appellant is deemed unsatisfactory." Because of its many errors and omissions, we deem Plaintiff's statement of facts unsatisfactory and set forth the following statement of facts.

A. The Unsuccessful Efforts Of Plaintiff's Lawyers To Litigate MedPay Claims Against State Farm In Madison County.

In 2003, Plaintiff filed a putative class action called *Eavenson v. State Farm Life Insurance Co.* in Madison County. Compl. (DA 80-104).³ That suit—which underlies

³ Plaintiff's initial complaint named State Farm Life Insurance Company as the sole defendant. Compl. ¶ 23 (DA 87). State Farm Life promptly moved to dismiss, showing that it had absolutely nothing to do with Plaintiff's claim. *See* Defs.' 8/27/04 Mot. at 2 (DA 132). Plaintiff acknowledged that he sued State Farm Life "erroneously" (*see id.* at 3 (DA 133)), but then filed an amended complaint that named *both* State Farm Mutual Automobile Insurance Company (which issued the applicable insurance policy) *and* State Farm Life as defendants. 1st Am. Compl. ¶ 23 (DA 113).

the separate dismissed action on appeal before this Court—alleges that State Farm failed to pay the “full amount” of submitted medical treatment charges, relying on the policy provision limiting State Farm’s reimbursement obligation to reasonable and necessary charges. 1st Am. Compl. ¶¶ 16-18 (DA 111-12). On behalf of a putative class of (a) medical providers acting under patient claim assignments and (b) State Farm insureds, Plaintiff (a chiropractor) asserts claims for breach of contract, unjust enrichment, and violation of the Illinois Consumer Fraud and Deceptive Business Practice Act. *Id.* ¶¶ 53-77 (DA 121-27). State Farm categorically denies Plaintiff’s claims, including the assertion that his claims are suitable for class action treatment.

Plaintiff’s underlying 2003 suit is one of four such “MedPay” suits—so called because they seek payment based on insurance policies covering reasonable and necessary medical expenses—that Plaintiff’s lawyers have filed against State Farm in Madison County since 1999.⁴ The Illinois Supreme Court has ordered each and every one of the four cases transferred to Cook County pursuant to Rule 384. The circumstances that led the Supreme Court to transfer these cases to Cook County are important to fully understanding the context of this appeal.

⁴ Plaintiff’s lawyers below, Freed & Weiss LLC of Chicago and The Lakin Law Firm, P.C. of Madison County, eventually had a falling out and, in 2007, commenced litigation against each other. The pleadings in the litigation confirm that the Freed & Weiss and Lakin firms formed a “Partnership for the purposes of filing, prosecuting and settling or trying class action cases in Southern Illinois.” *Freed* Compl. ¶ 21 (DA 370); *see also Lakin Law Firm* Compl. ¶¶ 3-4 (DA 312) (alleging agreement to prosecute class actions).

In 1999, a putative class action called *Snead v. State Farm Mutual Automobile Insurance Co.* was filed in the Circuit Court of Cook County. *Snead* Compl. (DA 4-24). A MedPay case, *Snead* alleged that State Farm systematically denies medical treatment claims as unreasonable or unnecessary. *Id.* ¶ 9 (DA 6). Although the circuit court has dismissed with prejudice all but one of *Snead*'s claims and has before it a pending motion to strike the already-once-stricken class allegations, *Snead* to this day remains on the Cook County circuit court docket. 12/7/06 Order (R. C00063-64; DA 286-87).⁵

Shortly after *Snead* was filed, Plaintiff's lawyers filed their first Madison County copycat MedPay case, *Siler v. State Farm Mutual Automobile Ins. Co.*, in 1999. *Siler* Compl. (DA 25-41). In light of the prior pending *Snead* case in Cook County, State Farm moved pursuant to Supreme Court Rule 384 to transfer *Siler* to Cook County. 7/3/00 Mot. (DA 42-47). In August 2000, the Supreme Court granted State Farm's motion and transferred *Siler* to Cook County for consolidation with *Snead*. 8/25/00 Order (R. C00031-32; DA 48-49). Rather than litigate in Cook County, Plaintiff's lawyers promptly dismissed the *Siler* case with prejudice, after being rebuffed in their effort to obtain a dismissal without prejudice while a potentially dispositive State Farm motion was pending. 5/31/01 Mot. (DA 50-53); 8/3/01 Agreed Order (DA 54).

Plaintiff's lawyers waited almost four years. Then, in 2003, Plaintiff's lawyers filed two more copycat MedPay class action complaints in Madison County: *Jones v. State Farm Fire & Casualty* and, Plaintiff's underlying suit, *Eavenson v. State Farm*. See

⁵ State Farm categorically denies the allegations in *Snead* and all of the MedPay cases later consolidated with it.

Jones Compl. (DA 55-79); *Eavenson* Compl. (DA 80-104). State Farm filed another Rule 384 motion seeking transfer of the cases to Cook County. Defs.' 2/23/05 Mot. (DA 142-48). State Farm argued, among other things, that "in light of [the Supreme] Court's prior Rule 384 order transferring *Siler* to Cook County . . . if *Eavenson* and *Jones* were allowed to proceed in Madison County, it would suggest that class action lawyers can evade [the Supreme] Court's orders simply by waiting until the dust settles and then trying again." Defs.' 2/23/05 Explanatory Suggestions at 15 (DA 165). In April 2005, the Supreme Court granted State Farm's motion and transferred both *Jones* and *Eavenson* to Cook County for consolidation with *Snead*. 4/6/05 Order (R. C00033-34; DA 172-73).

In the wake of the transfer order, the Cook County circuit court dismissed *Jones* with prejudice under sections 2-615 and 2-619 of the Code of Civil Procedure. 5/1/06 Order (DA 195). And in *Eavenson*, the circuit court found that both parties waived their rights to demand arbitration and ordered that Plaintiff respond to State Farm's long-pending dismissal motion. 12/7/06 Order (R. C00063-64; DA 286-87); 12/7/06 Hrg. Tr. at 6-7 (R. C00070-71; DA 293-94). Plaintiff appealed that ruling to the First District, where his appeal is currently pending. 1/5/07 Notice of Appeal (Defs.' Ex. 1; DA 315-17).

With *Jones* dismissed and *Eavenson* going badly for them, in early 2007 Plaintiff's lawyers filed yet another putative MedPay class action against State Farm in Madison County, *Bemis v. State Farm Fire & Casualty Co.* *Bemis* Compl. (DA 338-61). As it had with *Siler*, *Jones*, and *Eavenson*, State Farm filed a Rule 384 motion to transfer *Bemis* to Cook County. 5/30/07 Mot. (DA 384-90). The Supreme Court again granted State Farm's motion. 6/26/07 Order (DA 397-98). Thus, the Supreme Court has

transferred to Cook County all four of the Madison County MedPay cases that Plaintiff's lawyers have filed against State Farm.

B. Plaintiff's Resistance To Arbitration Pursuant To The Terms Of The Applicable Insurance Policy.

In 2004, while this case still was pending in Madison County, State Farm responded to Plaintiff's amended complaint by moving to compel arbitration and, in the alternative, to dismiss. Defs.' 8/27/04 Mot. (DA 131-37). Plaintiff refused to arbitrate, and also refused to respond to State Farm's motion.

Instead, Plaintiff pursued extensive discovery supposedly intended to support his position that the arbitration provision in the insurance policy was unconscionable and too narrow to allow resolution of his claims. State Farm responded to Plaintiff's discovery requests, but Plaintiff was dissatisfied and filed a motion to compel production of additional information. Pl.'s 2/16/05 Mot. (DA 138-41). In March 2005, the Madison County court denied Plaintiff's motion and ordered him to respond to State Farm's motion. 3/23/05 Order (DA 171). When Plaintiff nonetheless continued to press his discovery demands after the April 2005 transfer, the Cook County court granted State Farm's motion to quash the discovery and again ordered Plaintiff to answer State Farm's motion. 2/24/06 Order (R. C00035; DA 184).

At that point, Plaintiff changed tactics and, on March 16, 2006, filed a purported "Consent to Arbitration." Pl.'s 3/16/06 Consent (DA 186-87). The relevant insurance policy provides for binding arbitration of only a single narrow issue: "whether or not the medical expenses were reasonable and necessary, with the amount due being equal to the reasonable and necessary medical expenses only." Krause Policy at 10 (R. C00088; DA 2). Plaintiff's "Consent to Arbitration," however, did not consent to arbitration of that

narrow issue. Rather, the “Consent to Arbitration” specifically “consented” only to “arbitration of the claims herein” (Pl.’s 3/16/06 Consent (DA 186))—the same claims that Plaintiff had previously argued “the arbitration clause will not permit resolution of” (Pl.’s 11/14/05 Mem. at 3 (DA 176) (emphasis added)). The Consent to Arbitration further stated that Plaintiff’s “consent” was “without prejudice to any other rights he may have.” Pl.’s 3/16/06 Consent (DA 186). And finally, the Consent to Arbitration did not propose a stay of litigation pending arbitration. *Id.* (DA 186-87)

Concerned that Plaintiff would continue to litigate while pursuing an arbitration far broader than the one allowed by the relevant insurance policy, State Farm (on April 11, 2006) moved for an order staying litigation pending arbitration of the narrow issue subject to arbitration under the policy: the reasonableness and necessity of the claimed medical expenses. Defs.’ 4/11/06 Mot. (DA 188-94). Over Plaintiff’s strong objection, the circuit court granted State Farm’s motion on June 29, 2006 (not June 20, as Plaintiff asserts). 6/29/06 Order (R. C00036; DA 196). The resulting order stayed proceedings in *Eavenson* pending arbitration and limited the arbitration to the single issue identified in the applicable policy. *Id.* (“The arbitrators’ decision shall be limited to whether or not the medical expenses were reasonable and necessary, with the amount due being equal to the reasonable and necessary medical expenses only.”).

C. The Failure of Plaintiff’s Arbitrator To Participate In The Arbitrator Selection Process.

The arbitration provision of the applicable insurance policy states, “Each party shall select a competent and impartial arbitrator. These two shall select a third one.” Krause Policy at 10 (R. C00088; DA 2). The insurance policy does not impose a deadline for the selection of the party arbitrators. But once the parties have selected their

arbitrators, the insurance policy requires the two party-selected arbitrators to “agree on the third one within 30 days.” *Id.*

On August 1, 2006 (not August 2, as Plaintiff asserts), State Farm selected former Illinois Supreme Court Justice Benjamin Miller as its arbitrator. 8/1/06 Ltr. (DA 197). In connection with his “Consent to Arbitration,” Plaintiff already had selected an attorney named Bob Perica as his arbitrator. 3/16/06 Ltr. (DA 185). Plaintiff’s brief asserts that, following Justice Miller’s appointment, “[s]everal e-mails and letters were sent between the arbitrators and the communications show they did not reach a decision on a third neutral arbitrator despite suggestions submitted by both parties.” Pl.’s Br. 9. That is not true. The uncontested record actually shows that Mr. Perica completely failed to participate in the arbitrator selection process throughout the entire 30-day period allowed for that task.

On August 2 and August 8, Mr. Perica promised to promptly supply a list of potential third arbitrators during telephone calls from Justice Miller. 8/30/06 Miller Aff. ¶¶ 7-10 (Defs.’ Ex. 13, p. 1; DA 198). When Justice Miller did not receive the twice-promised list by August 18, he sent to Mr. Perica a list of four proposed arbitrators, requesting that he choose one or more from the list and noting that “[t]he 30 days within which we are to appoint a third arbitrator is passing.” *Id.* ¶ 11 (Defs.’ Ex. 13, p. 2; DA 199); 8/18/06 E-mail (Defs.’ Ex. 13, p. 7; DA 204); 8/18/06 Ltr. (Defs.’ Ex. 13, p. 9-10; DA 206-07). On August 25, 2006, Justice Miller sent to Mr. Perica another note, expressing concern that Mr. Perica still had not joined the arbitrator selection process and reminding him, “We have until August 31 to make a selection.” 8/30/06 Miller Aff. ¶ 12 (Defs.’ Ex. 13, p. 2; DA 199); 8/25/06 E-mail (Defs.’ Ex. 13, p. 8; DA 205); 8/25/06 Ltr.

(Defs.' Ex. 13, p. 11; DA 208). Mr. Perica did not respond. 8/30/06 Miller Aff. ¶ 14 (Defs.' Ex. 13, p. 2; DA 199); 11/27/06 Miller Aff. ¶ 2 (Defs.' Ex. 14, p. 1; DA 239). Thus, throughout the entire 30-day period for selection of the third arbitrator, Mr. Perica neither proposed any candidates nor responded to Justice Miller's suggestions.

D. State Farm's Motion To Lift The Stay Of Judicial Proceedings And Plaintiff's Petition To Select A Third Arbitrator.

By August 31, 2006, State Farm had come to the view that arbitration was not going to expeditiously resolve the parties' dispute but rather would embroil the parties in litigation of a wide array of collateral issues. Defs.' 8/31/06 Mot. at 5 (R. C00041; DA 213). Disputes over who would appoint a third arbitrator, who should be the third arbitrator, and the scope of the arbitration loomed. *Id.* On August 31, State Farm therefore withdrew its arbitration request and asked the Circuit Court to lift the litigation stay and compel Plaintiff to respond to the pending dismissal motion. *Id.* at 5-6 (R. C00041-42; DA 213-14). State Farm contended that Plaintiff had waived his right to arbitration and that it was free to do the same under the circumstances. *Id.* at 6-8 (R. C00042-44; DA 214-16).

Plaintiff delayed his formal written response to State Farm's motion until October 13, 2006. Pl.'s 10/13/06 Opp'n (DA 220-26). Meanwhile, Mr. Perica tried to restart the arbitrator selection process, despite having completely refused to participate in that process during the provided 30-day period. 9/1/06 Ltr. (Defs.' Ex. 14, p. 15; DA 253). Surprisingly, in light of Justice Miller's repeated written warnings to him about the 30-day deadline, Mr. Perica claimed that he "was totally unaware of any time limit or deadlines related to the subject arbitration." 9/7/06 Ltr. (Defs.' Ex. 14, p. 18; DA 256). On that basis, Mr. Perica belatedly proposed three potential arbitrators. 9/1/06 Ltr.

(Defs.' Ex. 14, p. 15; DA 253); 9/7/06 Ltr. (Defs.' Ex. 14, p. 18; DA 256). Justice Miller responded that Mr. Perica had failed to take any action during the 30-day period allowed for selecting a third arbitrator, that it would be inappropriate to proceed with the selection process under the circumstances, and that none of the suggested arbitrators were acceptable in any event. 9/5/06 Ltr. (Defs.' Ex. 14, p. 16-17; DA 254-55); 9/13/06 E-mail (Defs.' Ex. 14, p. 19; DA 257).

Then, on September 14, 2006, Plaintiff initiated the case here on appeal by filing in Madison County a Petition To Select A Third Arbitrator. Pl.'s 9/14/06 Pet. (R. C00003-05; DA 217-19). Without disclosing that Mr. Perica had failed to participate in the arbitrator selection process during the entire 30-day period allowed for that process, the Petition asserted that a Madison County judge should appoint a third arbitrator because the parties had been "unable to agree" on a candidate. *Id.* ¶ 7 (R. C00004; DA 218). In light of the pending proceedings in Cook County, State Farm obtained permission from the Madison County court to postpone its answer to Plaintiff's Petition until the Cook County court completed its deliberations. 11/2/06 Order (R. C00019; DA 227); 11/17/06 Order (R. C00020; DA 238).

E. Plaintiff's Failure To Seize A Second Chance To Reach Agreement On Selection Of A Third Arbitrator.

Following briefing and argument on State Farm's motion, the Cook County circuit court on November 8, 2006 ordered the party-selected arbitrators to take an additional 14 days to choose a third arbitrator. 11/8/06 Order (Pl.'s Ex. C, Ex. C; DA 228); 11/8/06 Hrg. Tr. at 5-7 (R. C00082-84; DA 233-35). The court's order further provided, "If a third arbitrator is not selected within that time, State Farm's motion will be granted (absent exigent circumstances)." 11/8/06 Order (Pl.'s Ex. C, Ex. C; DA 228).

The court added that it did not “really care what Madison County does concerning the third arbitrator because of the fact that if Perica does not engage in these discussions in the next 14 days, it won’t matter because there won’t be any arbitration.” 11/8/06 Hrg. Tr. at 5-6 (R. C00082-83; DA 233-34).

Over the following 13 days, Mr. Perica reoffered the three potential arbitrators to whom Justice Miller previously objected and proposed three new candidates, all six of whom Justice Miller rejected over concerns about their neutrality. 11/9/06 Fax (Defs.’ Ex. 14, p. 20; DA 258); 11/9/06 E-mail (Defs.’ Ex. 14, p. 21; DA 259); 11/17/06 Fax (Defs.’ Ex. 14, p. 23; DA 261); 11/27/06 Miller Aff. ¶ 9 (Defs.’ Ex. 14, p. 1-2; DA 239-40); 11/21/06 Ltr. (Defs.’ Ex. 14, p. 24-25; DA 262-63). Meanwhile, Justice Miller reoffered the four individuals he had previously proposed (none of whom Mr. Perica had ever addressed) and suggested two more potential arbitrators, former Chief Judge of the Cook County Circuit Court Donald O’Connell and former Appellate Court Justice Mel Jiganti. 11/9/06 E-mail (Defs.’ Ex. 14, p. 21; DA 259); 11/16/06 Ltr. (Defs.’ Ex. 14, p. 22; DA 260); 11/27/06 Miller Aff. ¶¶ 9, 11 (Defs.’ Ex. 14, p. 1-2; DA 239-40); 11/21/06 Ltr. (Defs.’ Ex. 14, p. 24-25; DA 262-63). On November 22, 2006—the deadline for selecting the third arbitrator—Mr. Perica faxed Justice Miller a letter regarding the six potential arbitrators proposed by Justice Miller, stating without any further elaboration:

So far I have rejected all of your potential arbitrators for the following reasons: One, I do not know them and no one I know knows them. Second, I am aware of one potential conflict, and third, all of your submissions have done exclusively defense work.

11/22/06 Fax Ltr. (Defs.' Ex. 14, p. 26; DA 264). Although the deadline had been reached, Mr. Perica proposed four new potential arbitrators in his letter and a fifth on the following Monday, each of whom Justice Miller concluded would not have been suitable. *Id.*; 11/27/06 Miller Aff. ¶¶ 14-15 (Defs.' Ex. 14, p. 2; DA 240).

F. Plaintiff's Short-Lived Agreement To A Third Arbitrator And The End Of The Parties' Incipient Arbitration.

On November 28, the parties appeared before the Cook County court to report on whether the party-selected arbitrators had chosen a third arbitrator. Plaintiff's brief says that at the hearing "there was a dispute as to why the choice of a third arbitrator could not be arrived at" and "[t]he court gave the parties until December 6, 2006 to reach a decision." Pl.'s Br. 9-10. That account of the status hearing is not accurate. What actually happened was that Plaintiff's lawyers agreed to accept two of the arbitrators proposed by Justice Miller—Judge O'Connell and Justice Jiganti—leading the court to order the party arbitrators to engage one of those agreed-to arbitrators.

At the hearing, State Farm's counsel related that Mr. Perica had rejected Judge O'Connell and Justice Jiganti because he did not know them and no one he knew knew them. 11/28/06 Hrg. Tr. at 6 (Pl.'s Ex. C, Ex. E at 6; DA 271). Plaintiff's lawyers immediately interjected that they knew Judge O'Connell and Justice Jiganti and that either of those former judges was acceptable as the third arbitrator:⁶

[MR. ROIN:] Two of Justice Miller's suggested arbitrators were former Judge Donald O'Connell, Former Appellate Justice Mel Jiganti.

⁶ Mr. Roin is State Farm's Counsel. Messrs. Harte and Sweetnam represented Plaintiff.

And they were apparently rejected because no one knows who they are.

And they don't know how to find out who they are.

* * *

MR. HARTE: Excuse me, your Honor, I know Don O'Connell and I know Mel Jiganti. In fact, I hired his daughter so –

THE COURT: So what was the objection to either one of those?

MR. SWEETNAM: I don't know if we have one.

MR. HARTE: We didn't have any.

* * *

MR. SWEETNAM: Your Honor, we will except [*sic*] either one.

* * *

THE COURT: All right. You said right now that either one, O'Connell or Jiganti is acceptable to you.

MR. SWEETNAM: Yes.

MR. HARTE: Absolutely.

Id. at 6-11 (Pl.'s Ex. C, Ex. E at 6-11; DA 271-76).

Based on Plaintiff's agreement to accept Judge O'Connell or Justice Jiganti as the third arbitrator, the Cook County court ordered the party-selected arbitrators to attempt to secure the participation of one or the other former judge to fill out the arbitration panel. 11/28/06 Order (Pl.'s Ex. C, Ex. F; DA 265). The court also ordered the parties to report back a week later, on December 7, 2006. *Id.*

The next day, November 29, Justice Miller telephoned Mr. Perica to discuss approaching Judge O'Connell or Justice Jiganti. 12/6/06 Miller Aff. ¶ 4 (Defs.' Ex. 15,

p. 1; DA 284). Mr. Perica, however, flatly refused, saying he did not agree with the Cook County court's November 28 order. *Id.* Justice Miller indicated that he would contact Judge O'Connell or Justice Jiganti himself. *Id.* The following day, he telephoned Judge O'Connell, who agreed to serve as a third arbitrator. *Id.* ¶ 5 (Defs.' Ex. 15, p. 1; DA 284). Justice Miller then telephoned and left a message for Mr. Perica about a joint communication with Judge O'Connell regarding the arbitration. *Id.* ¶ 6 (Defs.' Ex. 15, p. 1; DA 284). Mr. Perica never responded. *Id.*

Instead, on December 1, 2006, Plaintiff filed a motion seeking reconsideration of the order—to which he previously agreed—requiring the party-selected arbitrators to attempt to secure Judge O'Connell or Justice Jiganti as a third arbitrator. Pl.'s 12/1/06 Mot. (DA 280-83). Surprisingly, in light of the express discussion at the November 28 hearing of Mr. Perica's rejection of Judge O'Connell and Justice Jiganti (*see* 11/28/06 Hrg. Tr. at 6, 9-11 (Pl.'s Ex. C, Ex. E at 6, 9-11; DA 271, 274-76)), Plaintiff's motion claimed that his lawyers had been "unaware" that Mr. Perica had rejected Judge O'Connell and Justice Jiganti as arbitrators when they agreed to both former judges at the November 28 hearing. Pl.'s 12/1/06 Mot. at 2 (DA 281). Even more surprisingly, given that Mr. Perica had rejected Judge O'Connell and Justice Jiganti because he did not know them (11/22/06 Fax Ltr. (Defs.' Ex. 14, p. 26; DA 264)), Plaintiff's motion claimed that his lawyers now "respect[ed]" and "agree[d] with" Mr. Perica's decision to reject Judge O'Connell and Justice Jiganti as arbitrators. Pl.'s 12/1/06 Mot. at 2 (DA 281). Having done an about-face on Judge O'Connell and Justice Jiganti, Plaintiff's motion claimed there was an impasse and demanded that the Cook County court allow a Madison County judge to select the third arbitrator. *Id.* at 2-3 (DA 281-82).

When the parties appeared on December 7, the Cook County court put an end to the arbitration misadventure. The court found that Plaintiff clearly waived his right to arbitration, and that State Farm was entitled to do so as well:

There's no question in my mind that the . . . Eavenson parties waived arbitration a long time ago. I think that at this juncture, based on all that's transpired, that State Farm has the right to waive arbitration pursuant to my reading of the case law.

12/7/06 Hrg. Tr. at 6-7 (R. C00070-71; DA 293-94). The court therefore granted State Farm's motion, vacated the June 29, 2006 stay of judicial proceedings, ordered Plaintiff to respond to the pending motion to dismiss, and denied Plaintiff's motion to reconsider. 12/7/06 Order (R. C00063-64; DA 286-87).

G. Dismissal Of Plaintiff's Petition To Select A Third Arbitrator.

Notwithstanding the December 7, 2006 order of the Cook County circuit court returning his suit to litigation, Plaintiff insisted on going forward with his Madison County Petition To Select A Third Arbitrator. 12/8/06 Order (R. C00021; DA 301). State Farm, therefore, answered the Petition on December 19, 2006. 12/19/06 Answer (R. C00022-30; DA 302-10). State Farm's answer showed that the Petition was moot because the Cook County court's December 7 order ended the parties incipient arbitration, and that any such Petition could properly be filed only in Cook County pursuant to the applicable insurance policy, section 2-619(a)(3) of the Code of Civil Procedure, and section 2(c) of the Uniform Arbitration Act. *Id.* at 4-7 (R. C00025-28; DA 305-08).

At the January 10, 2007 hearing on Plaintiff's Petition To Select A Third Arbitrator, Judge Ellar Duff of the Madison County circuit court agreed that Plaintiff

could not pursue his Petition in Madison County. 1/10/07 Hrg. Tr. at 16-17 (R. R00016-17; DA 334-35). In particular, Judge Duff ruled that “[t]he Petition to Select a Third Arbitrator should have been filed in the pending matter in Cook County” because “it involves the same parties, the same occurrences, the same cause of action, et cetera” as Plaintiff’s underlying 2003 suit, which Supreme Court transferred from Madison County to Cook County. *Id.* at 17 (R. R00017; DA 335). Judge Duff therefore denied Plaintiff’s Petition and dismissed the suit. 1/10/07 Order (R. C00093; DA 318). Plaintiff appealed Judge Duff’s January 10, 2007 order on January 31, 2007. 1/31/07 Notice of Appeal (R. C00094; DA 362-64).

STANDARD OF REVIEW

As noted, the Madison County circuit court dismissed Plaintiff’s suit because it “involves the same parties, the same occurrences, the same cause of action, et cetera” as Plaintiff’s underlying suit pending in Cook County. 1/10/07 Hrg. Tr. at 16-17 (R. R00016-17; DA 334-35). Although the court did not expressly cite the statute, those are the criteria for dismissal under section 2-619(a)(3) of the Code of Civil Procedure, which provides for dismissal when “there is another action pending between the same parties for the same cause.” 735 ILCS 5/2-619(a)(3).

Section 2-619(a)(3) dismissals are not subject to the usual rule, cited by Plaintiff (at 6), that requires *de novo* review of rulings on motions to dismiss. Instead, those “inherently procedural” decisions are reviewed for an abuse of discretion. *Kapoor v. Fujisawa Pharm. Co.*, 298 Ill. App. 3d 780, 785-86 (1st Dist. 1998). Thus, an appellate court “will reverse the trial court’s decision on a section 2-619(a)(3) motion to dismiss only if it abused its discretion.” *Id.* at 786. And such an abuse of discretion exists only

“where [the] ruling is arbitrary, fanciful, or unreasonable, or where no reasonable person would take the view adopted by the trial court.” *Crichton v. Golden Rule Ins. Co.*, 358 Ill. App. 3d 1137, 1150 (5th Dist. 2005).

In addition, it is well established that an appellate court “may affirm the circuit court upon any grounds appearing in the record, without regard to whether such grounds were relied upon by the circuit court or whether its reasoning was correct.” *Hawkes v. Casino Queen, Inc.*, 336 Ill. App. 3d 994, 1005 (5th Dist. 2003). Here, there are three additional, independent reasons to affirm the circuit court’s dismissal of Plaintiff’s Petition To Select A Third Arbitrator.

ARGUMENT

Plaintiff’s brief completely ignores section 2-619(a)(3) of the Code of Civil Procedure. Indeed, his brief makes no mention at all of the circuit court’s on-the-record reason for its decision dismissing Plaintiff’s Petition to Select a Third Arbitrator. That telling omission waives Plaintiff’s right to challenge the circuit court’s reliance on section 2-619(a)(3) in dismissing Plaintiff’s Petition. Ill. Sup. Ct. R. 341(h)(7) (“Points not argued are waived and shall not be raised in the reply brief, in oral argument, or on a petition for rehearing.”). On that ground alone, affirmance is warranted. *In re Marriage of Jerome & Martinez*, 255 Ill. App. 3d 374, 391 (5th Dist. 1994) (affirming based in part on waiver).

Instead of addressing the circuit court’s actual reasoning, Plaintiff’s brief exclusively argues that the arbitration provision of the applicable insurance policy supposedly designates Madison County as the forum in which a third arbitrator must be selected if the party-selected arbitrators cannot agree on a candidate. Pl.’s Br. 7-12. He

is wrong; the relevant provision actually directed Plaintiff's Petition to Cook County, where the arbitration was at the time pending. *See* Part IV, *infra*. Section 2(c) of the Uniform Arbitration Act likewise required Plaintiff to file his Petition in Cook County, given that Plaintiff's Cook County action involved the issues allegedly referable to arbitration. *See* Part III, *infra*. Finally, the circuit court did not remotely abuse its discretion in dismissing Plaintiff's Petition under 735 ILCS 5/2-619(a)(3) because the Petition involved the same parties and same cause as the pending Cook County action. *See* Part II, *infra*.

The Court need not reach any of these points, however. Plaintiff's Petition had to be dismissed for a more basic reason. In the wake of the December 7, 2006 Cook County circuit court decision returning the parties' dispute to litigation, there no longer is an arbitration for which to select a third arbitrator. Plaintiff's Petition, therefore, is moot. *See* Part I, *infra*.

In addition to the above-mentioned independent grounds for affirming the dismissal of Plaintiff's Petition To Select A Third Arbitrator, affirmance also is warranted in deference to the Supreme Court's repeatedly expressed position that Plaintiff's lawyers must pursue their MedPay suits against State Farm, including the underlying suit here, in Cook County, not Madison County. Plaintiff and his lawyers obviously do not like the Supreme Court's Rule 384 transfer orders. They want to be before a Madison County court, and they apparently thought they could game the arbitration provision of the applicable insurance policy to circumvent the transfer order and return their case to Madison County. But their effort to do so failed, both in Cook

County and in Madison County. There is no reason for this Court to breathe new life into Plaintiff's manipulative effort to evade the Supreme Court's transfer order.

I. Plaintiff's Petition To Select A Third Arbitrator Is Moot.

Plaintiff's Petition To Select A Third Arbitrator had to be dismissed, most fundamentally, because the Petition is moot. The jurisdiction of an Illinois court depends on the existence of an actual, live controversy. *La Salle Nat'l Bank v. City of Chicago*, 3 Ill. 2d 375, 378-79 (1954). Thus, suits raising matters "that the parties are no longer in a position to care about" must be dismissed for lack of jurisdiction because they are "moot". *Lo v. Provena Covenant Med. Ctr.*, 356 Ill. App. 3d 538, 540 (4th Dist. 2005). Mootness exists when "events occur which make it impossible for a court to grant effectual relief" (*Keefe-Shea Joint Venture v. City of Evanston*, 364 Ill. App. 3d 48, 60 (1st Dist. 2005)), or when "there is no longer an entitlement to relief" (*In re Marriage of Brackett*, 309 Ill. App. 3d 329, 337 (2d Dist. 1999)), or when the suit "poses a hypothetical question" (*Adams v. Bath & Body Works, Inc.*, 358 Ill. App. 3d 387, 399 (1st Dist. 2005)). Each of those three circumstances is present here.

The selection of a third arbitrator is not "effectual relief" because there is no arbitration between the parties. On December 7, 2006, the Cook County circuit court definitively ruled that the parties' dispute will be litigated, not arbitrated, by lifting the prior stay of litigation pending arbitration and ordering Plaintiff to respond to State Farm's pending motion to dismiss. 12/7/06 Order (R. C00063-64; DA 286-87). The Cook County court, State Farm, and Plaintiff all understood that the December 7 order removed the case from arbitration and, as a consequence, made irrelevant any question regarding appointment of a third arbitrator. At the November 8, 2006 hearing on State Farm's motion to lift the stay of litigation, the court stated: "[T]ruthfully, I don't really

care what Madison County does concerning the third arbitrator because of the fact that if Perica does not engage in these discussions in the next 14 days, it won't matter because there won't be any arbitration. Got it?" 11/8/06 Hrg. Tr. at 5-6 (R. C00082-83; DA 233-34). Counsel for Plaintiff responded, "Understood." *Id.* at 6 (R. C00083; DA 234). In light of the December 7 order providing that the case will be litigated, not arbitrated, selecting a third arbitrator serves no purpose.

Plaintiff, moreover, no longer has any entitlement to seek the appointment of a third arbitrator. The December 7, 2006 Cook County order rested on a finding that Plaintiff waived his right to demand arbitration under the applicable insurance policy. 12/7/06 Order (R. C00063-64; DA 286-87); 12/7/06 Hrg. Tr. at 6 (R. C00070; DA 293) ("There's no question in my mind that the . . . Eavenson parties waived arbitration a long time ago."). That waiver necessarily extends to Plaintiff's right to request that a court select a third arbitrator. Any such request, therefore, is moot.

Finally, because the December 7 order sends the case to litigation, not arbitration, the central question posed by the Petition To Select A Third Arbitrator—namely, the identity of a third arbitrator—is utterly hypothetical. The question becomes relevant only if there is an arbitration. The Cook County circuit court's December 7 order forecloses that possibility. 12/7/06 Order (R. C00063-64; DA 286-87). The court below, of course, had no authority to "review or disregard" that order. *People ex rel. Phillips Petroleum Co. v. Gitchoff*, 65 Ill. 2d 249, 257 (1976) ("One circuit judge may not review or disregard the orders of another circuit judge in the judicial system of this State."). Indeed, deference to the Cook County court's order is particularly important here, where

the Supreme Court specifically transferred Plaintiff's underlying suit from Madison County to Cook County.

In analogous circumstances, the Illinois Appellate Court has not hesitated to find mootness. For instance, in *DHR International, Inc. v. Winston & Strawn*, 347 Ill. App. 3d 642, 647, 649 (1st Dist. 2004), the Appellate Court found that an effort to disqualify the attorney representing an opponent in an arbitration was moot because the arbitration had already occurred. Similarly, in the instant case, questions concerning the appointment of a third arbitrator are moot because the Cook County court has ruled that there will be no arbitration. In *Adams v. Bath & Body Works, Inc.*, 358 Ill. App. 3d at 399, the Appellate Court dismissed as moot a cross-appeal arguing "a hypothetical question" that would arise only if a circuit court dismissal order were reversed. Likewise, in this case, Plaintiff's Petition demanded that the Madison County court appoint a third arbitrator for an arbitration that could occur only if the order precluding that arbitration were reversed.

In short, the relevant precedents leave no doubt that Plaintiff's Petition To Select A Third Arbitrator is moot. Accordingly, the dismissal of the Petition should be affirmed on mootness grounds.

II. The Circuit Court Did Not Abuse Its Discretion In Dismissing Plaintiff's Petition To Select A Third Arbitrator Under 735 ILCS 5/2-619(a)(3).

Affirmance is also warranted on the independent ground that the circuit court did not abuse its discretion in dismissing Plaintiff's Petition To Select A Third Arbitrator pursuant to section 2-619(a)(3) of the Code of Civil Procedure. Section 2-619(a)(3) provides for dismissal of an action if "there is another action pending between the same parties for the same cause." 735 ILCS 5/2-619(a)(3). "The purpose of this section is to

further judicial economy by avoiding duplicative litigation.” *Doutt v. Ford Motor Co.*, 276 Ill. App. 3d 785, 788 (1st Dist. 1995). Plaintiff’s Petition plainly warranted dismissal under section 2-619(a)(3).

The parties to the Petition proceedings in Madison County and the parties to the underlying putative class action pending in Cook County are identical. In each, Mark Eavenson is suing State Farm Mutual and State Farm Life. *Compare* 1st Am. Compl. ¶¶ 12, 23 (DA 110, 113), *with* Pl.’s 9/14/06 Pet. (R. C00003-05; DA 217-19). The Madison County action thus is between the “same parties” as the prior-filed Cook County action.

The Madison County action also is “for the same cause” as the Cook County action. In determining whether two actions are “for the same cause” under section 2-619(a)(3), “[t]he crucial inquiry is whether the two actions arise out of the same transaction or occurrence, not whether the legal theory, issues, burden of proof or relief sought materially differs between the two actions.” *Overnite Transp. Co. v. Int’l Bhd. of Teamsters*, 332 Ill. App. 3d 69, 76 (1st Dist. 2002); *see also Kapoor v. Fujisawa Pharm. Co.*, 298 Ill. App. 3d 780, 786, 790 (1st Dist. 1998) (describing “same cause” inquiry). Plaintiff’s Madison County and Cook County actions both have their genesis in Plaintiff’s allegation that State Farm failed to pay Plaintiff what it allegedly owed him under the applicable insurance policy. *Compare* 1st Am. Compl. ¶ 1 (DA 105), *with* Pl.’s 9/14/06 Pet. ¶¶ 1-2 (R. C00003; DA 217). And the facts on which Plaintiff has been litigating his underlying suit in Cook County and the First District—namely, the policy language regarding the arbitration and the efforts of the parties and their arbitrators to agree on a third arbitrator—are the very same facts on which Plaintiff has been litigating this suit in Madison County and this Court. *Compare* Pl.’s 10/13/06 Opp’n (DA 220-26);

Pl.'s 12/1/06 Mot. (DA 280-83); Pl.'s 1st Dist. Br. 6-9 (DA 393-96), *with* Pl.'s 9/14/06 Pet. ¶¶ 4-7 (R. C00003-04; DA 217-18); 1/10/07 Hrg. Tr. at 13-14 (R. R00013-14; DA 331-32); Pl.'s Br. 4-6, 7-10. It thus is beyond dispute that Plaintiff's Madison County and Cook County actions "arise out of the same transaction or occurrence" and, therefore, are "for the same cause."

Moreover, Plaintiff's Madison County Petition is precisely the kind of duplicative litigation that section 2-619(a)(3) exists to bar. The Cook County court has already devoted substantial time and effort to considering and deciding arbitration issues related to the parties' dispute, ultimately ruling that there will be no arbitration. *See* pp. 10-19, *supra*. Obviously disappointed with having to litigate the merits of his claims in Cook County, Plaintiff wants to use his Madison County suit to effectively relitigate the arbitration issues on which he lost in Cook County. That is the definition of multiplicity, vexation, and harassment. Furthermore, the relief Plaintiff seeks in Madison County—appointment of a third arbitrator—would be available to him in his Cook County action. Indeed, as we explain below, the Cook County circuit court is the only court that could appoint a third arbitrator for the parties' dispute. *See* Parts III & IV, *infra*.

Comity, too, favors dismissal under section 2-619(a)(3). As already noted, "[o]ne circuit judge may not review or disregard the orders of another circuit judge" in Illinois. *Gitchoff*, 65 Ill. 2d at 257. But that is exactly what Plaintiff seeks by asking a Madison County court to appoint an arbitrator for an arbitration that a Cook County court has ruled will not occur. Finally, a dismissal causes Plaintiff no prejudice: Plaintiff could pursue his Petition as a motion in the Cook County action—the venue chosen by the Supreme Court.

The circuit court correctly recognized that the Supreme Court’s order transferring Plaintiff’s underlying suit to Cook County effectively resolved these equitable factors—which a court may consider under section 2-619(a)(3) (*see Kapoor*, 298 Ill. App. 3d at 789-90)—in favor of dismissing Plaintiff’s new Madison County suit. If the Supreme Court believed Plaintiff’s underlying suit had to be transferred to Cook County for consolidation with the similar, but distinct, *Snead* case, no claimed prejudice or other equitable factor could allow Plaintiff to pursue a new Madison County suit over matters at issue or already decided in the suit transferred to Cook County. Put differently, allowing Plaintiff to cull out a small part of his Cook County suit and move it to Madison County would contradict the Supreme Court’s order transferring that suit from Madison County to Cook County. That is why the circuit court, in explaining its dismissal ruling, emphasized the significance of the Supreme Court’s transfer order. 1/10/07 Hrg. Tr. at 16-17 (R. R00016-17; DA 334-35).

In short, the statutory and equitable factors all favor dismissal under section 2-619(a)(3) of the Code of Civil Procedure. The circuit court accordingly was right, and plainly did not abuse its discretion, in concluding that the pendency of Plaintiff’s previously transferred suit warranted dismissal of Plaintiff’s Petition To Select A Third Arbitrator.

The relevant precedents confirm this conclusion. In *Tambone v. Simpson*, 91 Ill. App. 3d 865, 868 (2d Dist. 1980), the Appellate Court affirmed a dismissal under the identically worded predecessor to section 2-619(a)(3) because the “purposes [of the section] would not be served” if the plaintiff “were permitted to cull out a small section of a larger complaint and bring a second action based on the same factual circumstances.”

The Appellate Court again affirmed a section 2-619(a)(3) dismissal in *Doutt v. Ford Motor Co.*, 276 Ill. App. 3d at 790, where the trial court recognized that the plaintiffs' strategy of filing suit in Illinois to avoid a potentially adverse ruling in Pennsylvania was "an obvious case of forum shopping." In *Terracom Development Group, Inc. v. Village of Westhaven*, 209 Ill. App. 3d 758, 765 (1st Dist. 1991), the Appellate Court similarly concluded that a circuit judge properly exercised his discretion under section 2-619(a)(3) to dismiss a suit that "merely attempted to circumvent" the order of a federal court that previously rejected the claims raised in the state suit. The circumstances that required affirmance in each of these cases are present here. In "an obvious case of forum shopping," Plaintiff's Madison County Petition "culls out" a part of the arbitration issue raised in the Cook County action, in order "to circumvent" the Supreme Court's Rule 384 transfer order and the Cook County rulings concerning arbitration. Thus, as in *Tambone*, *Doutt*, and *Terracom*, the circuit court's section 2-619(a)(3) dismissal should be affirmed.

III. The Uniform Arbitration Act Requires Plaintiff To File His Petition To Select A Third Arbitrator in Cook County.

The Uniform Arbitration Act also warrants affirming the circuit court's dismissal order. Section 2(c) of that law provides, "If an issue referable to arbitration under the alleged agreement is involved in an action or proceeding pending in a court having jurisdiction to hear applications under subdivision (a) of this Section, the application [to compel or stay arbitration] shall be made therein." 710 ILCS 5/2(c). Subdivision (a) allows for applications to compel arbitration, which may be filed in any circuit court, subject to the quoted portion of section 2(c). 710 ILCS 5/2(a), (c). Thus, section 2(c) requires that an application to compel arbitration be made in a court action involving an issue allegedly referable to arbitration, if such an action is pending.

There is no doubt that, in this case, there is a pending court action involving an issue allegedly referable to arbitration. Plaintiff's Cook County suit expressly involves both the "reasonable and necessary" expense issue that the applicable policy makes referable to arbitration and the broader set of issues encompassed within the "claims" that Plaintiff apparently hopes to arbitrate. *See* 1st Am. Compl. ¶¶ 1-6 (DA 105-08); Pl.'s 3/16/06 Consent (DA 186-87); Krause Policy at 10 (R. C00088; DA 2). Indeed, Plaintiff admits that "the underlying cause of action is in a different county" than his Petition. Pl.'s Br. 11.

Plaintiff's Petition also is, in effect, a motion to compel arbitration. On December 7, 2006, the Cook County circuit court ruled that the parties' dispute would be litigated, not arbitrated, when it granted State Farm's motion to lift the previous stay of litigation and compel Plaintiff to answer the pending motion to dismiss. 12/7/06 Order (R. C00063-64; DA 286-87); 12/7/06 Hrg. Tr. at 6-7 (R. C00070-71; DA 293-94). It was clear to all involved that if the court granted State Farm's motion, "there won't be any arbitration." 11/8/06 Hrg. Tr. at 5-6 (R. C00082-83; DA 233-34). By thereafter asking a Madison County court to select a third arbitrator, Plaintiff was necessarily asking that court to order an arbitration, for appointing a third arbitrator serves no purpose unless there is going to be an arbitration.

That Plaintiff disguised his request for an order effectively compelling arbitration as a Petition To Select A Third Arbitrator is of no consequence. "[T]he character of a motion should be determined from its content, and a court is not bound by the title of a document given by a party." *Savage v. Mui Pho*, 312 Ill. App. 3d 553, 559 (5th Dist. 2000). Plaintiff's Petition, in content and in context, sought to compel arbitration.

As a disguised application to compel arbitration, Plaintiff's Petition had to be filed in Plaintiff's pending Cook County suit, pursuant to section 2(c) of the Uniform Arbitration Act. Because the Petition was instead filed as a new action in Madison County, it had to be dismissed.

IV. The Applicable Insurance Policy Requires That Plaintiff's Petition To Select A Third Arbitrator Be Filed in Cook County.

The three reasons already addressed each independently compel affirmance of the circuit court's dismissal order. But even if one ignored those grounds and focused solely on Plaintiff's purported reason for reversal, it is clear that the circuit court's dismissal order should be affirmed. Plaintiff's only argument on appeal is that, in accord with state and federal policies favoring arbitration and making arbitration agreements irrevocable, the express language of the applicable insurance policy designated Madison County, where Plaintiff resides, as the proper forum for Plaintiff's Petition To Select A Third Arbitrator. Pl.'s Br. 7-12. That argument simply misreads the relevant policy provision. The relevant provision actually required Plaintiff to file his Petition in Cook County

The insurance policy at issue provides that if the two party-selected arbitrators are "unable to agree on the third one within 30 days, either party may request a judge of a court of record in the county in which the arbitration is pending to select a third one." Krause Policy at 10 (R. C00088; DA 2) (emphasis added). Plaintiff claims that because the arbitration "was to take place" (Pl.'s Br. 12) in the "county in which the person making the claim resides unless the parties agree to another place" (Krause Policy at 11 (R. C00089; DA 3)), the arbitration was pending in Madison County. That plainly is not correct.

To begin with, the relevant provision asks where the arbitration “is pending,” not where the arbitration hearing will at some future time take place, and not where the claimant resides. Krause Policy at 10 (R. C00088; DA 2) (emphasis added). If the forum county for selecting a third arbitrator and the forum county for conducting the arbitration hearing were supposed to be the same in all instances—as Plaintiff claims—then why does the policy use different language to identify the proper forum for each task? *Contrast id.* (“If unable to agree on the third one within 30 days, either party may request a judge of a court of record in the county in which the arbitration is pending to select a third one.”), *with id.* at 11 (R. C00089; DA 3) (“The arbitration shall take place in the county in which the *person* making the claim resides unless the parties agree to another place.”). The policy easily could have directed that “either party may request a judge of a court of record in the county in which the person making the claim resides, unless the parties agree to another place, to select a third one.” Or the policy could have directed that “either party may request a judge of a court of record in the county in which the arbitration will take place to select a third one.” That the policy opted for the “is pending” language indicates that the forum county for selecting a third arbitrator will sometimes be different from the county in which the claimant resides or the arbitration “was to take place.” *See Taracorp, Inc. v. NL Indus., Inc.*, 73 F.3d 738, 744 (7th Cir. 1996) (under Illinois law, “when parties . . . use such different language . . . it is reasonable to infer that they intend this language to mean different things”).

Moreover, as Plaintiff acknowledges, “[t]he location of where the arbitration was to take place was not expressly set out in writing.” Pl.’s Br. 10. It could have been held in Madison County, Cook County, or any other agreed-to locale. And the fact (cited by

Plaintiff at 10) that Justice Miller represented that State Farm would cover travel expenses to Madison County for a third arbitrator “should such travel become necessary” (12/6/06 Miller Aff. ¶ 7 (Defs.’ Ex. 15, pp. 1-2; DA 284-85)), is not to the contrary. His representation merely recognized the possibility that some or all of the arbitration hearing could occur in Madison County. Being unknown, the county in which the arbitration “was to take place” could not have been the required forum for a request to appoint a third arbitrator.

Here, no matter where the parties’ aborted arbitration “was to take place” in the future, it is beyond dispute that the arbitration was pending in Cook County during the entire time Plaintiff pursued his Petition To Select A Third Arbitrator. The Supreme Court transferred Plaintiff’s underlying 2003 suit from Madison County to Cook County on April 6, 2005, more than a year before Plaintiff filed his Petition. 4/6/05 Order (R. C00033-34; DA 172-73); Pl.’s 9/14/06 Pet. (R. C00003-05; DA 217-19). Illinois law provides that when a case is transferred, it is to “proceed and be determined as if it had originated” in the forum to which it was transferred. Ill. Sup. Ct. R. 187(c)(1); Ill. Sup. Ct. R. 384(c)(5). Here, that means Plaintiff’s underlying suit and any issue arising from that suit—including arbitration of the parties’ dispute—“is pending” in Cook County.

In addition, the Cook County circuit court expended substantial time and effort actually considering and ruling on arbitration issues. *See* pp. 10-19, *supra*. The court entered the original stay of litigation pending arbitration. 6/29/06 Order (R. C00036; DA 196). It worked to facilitate the selection of a third arbitrator. 11/8/06 Order (Pl.’s Ex. C, Ex. C; DA 228); 11/28/06 Order (Pl.’s Ex. C, Ex. F; DA 265). And it ultimately ruled that Plaintiff had waived his right to arbitration and that State Farm could do the same.

12/7/06 Order (R. C00063-64; DA 286-87); 12/7/06 Hrg. Tr. at 6-7 (R. C00070-71; DA 293-94). Indeed, the Cook County court was in the midst of this work when Plaintiff filed his Madison County Petition. Pl.'s 9/14/06 Pet. (R. C00003-05; DA 217-19); 11/8/06 Hrg. Tr. at 5-6 (R. C00082-83; DA 233-34). Plainly, for purposes of determining the proper forum for Plaintiff's Petition, the parties' arbitration was pending in Cook County. Accordingly, the Petition was erroneously filed in Madison County and had to be dismissed.

Plaintiff's invocation (at 7, 11) of precedents recognizing that arbitration is favored and that arbitration agreements are irrevocable does nothing to impeach that conclusion. State Farm's reading of the policy provision regarding selection of a third arbitrator is more faithful to those principles than Plaintiff's reading, for State Farm's reading better respects the language of the relevant arbitration provision, as we have shown. *See pp. 31-33, supra.*

Plaintiff's real complaint seems to be that the Cook County circuit court, not the Madison County circuit court, is deciding issues in his underlying suit and that, in doing so, the Cook County circuit court ordered the parties to litigate, not arbitrate, their dispute. But the Supreme Court's Rule 384 transfer order requires that a Cook County court decide matters in Plaintiff's underlying case. *See 4/6/05 Order (R. C00033-34; DA 172-73); Ill. Sup. Ct. R. 187(c)(1); Ill. Sup. Ct. R. 384(c)(5).* The Supreme Court's order must be respected by the parties and the lower courts alike. *People v. Denson*, 139 Ill. App. 3d 914, 926 (2d Dist. 1985) ("It is fundamental that the appellate court is without authority to overrule the supreme court, or to modify its decisions."). As for the Cook County circuit court's ruling that the parties must litigate instead of arbitrate, that

decision is not a subject of the present appeal, which concerns only the Madison County dismissal of Plaintiff's Petition To Select A Third Arbitrator. 1/31/07 Notice of Appeal (R. C00094; DA 362-64). Plaintiff's First District appeal will consider and resolve whatever objections Plaintiff has to the rulings of the Cook County circuit court. 1/5/07 Notice of Appeal (Defs.' Ex. 1; DA 315-17).⁷

⁷ In any event, neither the irrevocability of arbitration agreements nor the favored status of arbitration casts any doubt on the Cook County circuit court's determination that the parties' dispute must be litigated because each party waived its right to demand arbitration. 12/7/06 Order (R. C00063-64; DA 286-87); 12/7/06 Hrg. Tr. at 6-7 (R. C00070-71; DA 293-94). The "well settled rule" is that "a contractual right to arbitrate can be waived like any other contractual right." *Schroeder Murchie Laya Assocs., Ltd. v. 1000 West Lofts, LLC*, 319 Ill. App. 3d 1089, 1095 (1st Dist. 2001). And the relevant precedents confirm the correctness of the Cook County court's waiver finding. *Id.* at 1094-99 (affirming, on waiver grounds, denial of motion to compel); *Yates v. Doctor's Assocs., Inc.*, 193 Ill. App. 3d 431, 439-41 (5th Dist. 1990) (same); *Schwarz v. Buell*, 137 Ill. App. 3d 29, 34 (5th Dist. 1985) (reversing, on waiver grounds, order compelling arbitration); *Fu Chin Printing Co. v. Lord Label & Mfg. Co.*, 40 Ill. App. 3d 829, 831-32 (2d Dist. 1976) (reinstating, on waiver grounds, suit sent to arbitration). But, again, this is a matter for Plaintiff's First District appeal, not his appeal to this Court.

CONCLUSION

For the foregoing reasons, the circuit court properly dismissed Plaintiff's Petition To Select A Third Arbitrator. Accordingly, State Farm asks that the Court affirm the circuit court's January 10, 2007 dismissal order.

August 2, 2007

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rule 341(a) and (b). The length of this brief, excluding the appendix, is __ pages.

Joseph P. Whyte

CERTIFICATE OF SERVICE

I, Joseph P. Whyte, an attorney, hereby certify that I caused three copies of the foregoing **BRIEF OF DEFENDANTS-APPELLEES** and the accompanying **SEPARATE SUPPLEMENTARY APPENDIX OF DEFENDANTS-APPELLEES** to be placed with the U.S. Postal Service on August 2, 2007, for first class mail delivery to the following:

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