No. 04-1454

IN THE APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

MIRIAM FISCH and JANE ALEXANDER, on behalf of the themselves and all others similarly situated, Plaintiffs-Appellants, v. LOEWS CINEPLEX THEATRES, INC., a Delaware Corporation, LOEWS THEATRE MANAGEMENT CORPORATION, a Delaware Corporation, individually and on behalf of all entities doing business as Loews Cinema; and LOEWS PIPER'S THEATRES, INC., an Illinois Corporation, Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County, County Department, Chancery Division No. 03 CH 03035 Hon. Peter Flynn

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ANSWER TO PLAINTIFFS-APPELLANTS' PETITION FOR REHEARING OR, IN THE ALTERNATIVE, REMAND FOR ATTORNEYS' FEES

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INTRODUCTION

Plaintiffs' "Petition For Rehearing Or, In The Alternative, Remand For Attorneys' Fees" is truly remarkable. It offers no argument that the Court erred in dismissing Plaintiffs' appeal as moot. Instead, it seeks approval of a meritless interpretation of the Court's opinion and requests, for the first time, a remand for attorneys' fees even though Plaintiffs have lost at every turn in this litigation. There simply is no reason for this Court to reconsider any aspect of its ruling in this case.

Fundamentally, Plaintiffs' Petition is completely improper. It does not argue points "overlooked or misapprehended" in the Court's mootness decision, as Supreme Court Rule 367(b) requires. And, in requesting a remand for attorneys' fees, it raises a previously unargued and thus waived point, in blatant violation of Supreme Court Rule 341(e)(7).

On the merits, Plaintiffs' effort to convince the Court to adopt their reading of the Court's opinion relies on a disregard for the Court's reasoning and a misstatement of the applicable legal standards. Nothing in the Court's opinion creates or recognizes a binding obligation on the Loews Defendants to permanently maintain their new "showtime" advertising practices. Nor does mootness demand such an obligation. Mootness requires only that recurrence of the challenged practice be unlikely, not that it be impossible or barred.

Plaintiffs' new request for a remand for attorneys' fees similarly relies on an upside-down view of the facts, the law, and basic appellate procedure. Even if they had not waived the issue, Plaintiffs are certainly not a "prevailing party"

in this litigation. The Circuit Court twice dismissed their complaint on the merits, and this Court rejected their arguments against mootness. Most importantly, Plaintiffs did not secure the kind of judicially enforceable change in the legal relationship of the parties necessary to earn "prevailing party" status. Indeed, the United States Supreme Court has expressly held that a defendant's unilateral, voluntary rescission of a challenged practice does not make the plaintiff a "prevailing party."

For these procedural and substantive reasons, there is no merit to Plaintiffs' "Petition For Rehearing Or, In The Alternative, Remand For Attorneys' Fees." The Loews Defendants, therefore, ask the Court to deny the Petition.

ARGUMENT

I. Rehearing Is Not Warranted To Consider The Meaning Or Correctness Of The Court's Decision.

Supreme Court Rule 367(b) requires that a petition for rehearing state "points claimed to have been overlooked or misapprehended by the court." Plaintiffs' Petition raises no such points. It does not even argue that the Court erred in dismissing Plaintiffs' appeal as moot. Instead, the Petition asks the Court to adopt Plaintiffs' view that the Court somehow held that the Loews Defendants permanently changed their "showtime" advertising practices. The proper interpretation of the Court's opinion is not an "overlooked or misapprehended" point subject to review on a petition for rehearing. But even if it were, the interpretation Plaintiffs advance is patently incorrect.

The Court's opinion nowhere says that the Loews Defendants bound themselves to permanently maintain their new "showtime" advertising

practices. To the contrary, the opinion expressly recognizes that "defendants have not signed a contract promising to continue this practice indefinitely." Slip Op. at 7-8. And that squares with the Loews Defendants' own briefs:

> Having prevailed below in this suit, of course, Loews had no legal obligation to make these changes. Loews simply made a business decision to change its pre-movie content practices based on customer suggestions. Although Loews therefore could reverse the changes or implement some other set of practices, Loews has no current plans to do so.

Defs.' Supp. Br. at 5-6 (citations omitted). The Court did not and could not rule that the Loews Defendants had agreed to binding and permanent changes in how they advertised "showtimes."

Indeed, the Court's opinion holds only that "defendants have satisfied their burden of establishing that their alleged wrongful behavior could not reasonably be expected to recur." Slip Op. at 8. The opinion never remotely suggests that only a binding, permanent change in practices could result in mootness. *See id.* at 5-8 (considering whether challenged conduct "could not reasonably be expected to recur" or "was not likely to recur"). The Court applied the correct standard. Mootness requires only that the challenged practice be unlikely to recur: recurrence need not be impossible or judicially barred. *See Sadler v. Creekmur*, 354 Ill. App. 3d 1029, 1040 (3d Dist. 2004), *appeal denied*, 833 N.E.2d 9 (Ill. 2005).

The *Beretta* and *Amoco Realty* decisions that Plaintiffs cite are not to the contrary. Both articulate a standard that deems a case moot if "the wrongful behavior could not reasonably be expected to recur." *City of Chicago v. Beretta U.S.A. Corp.*, 337 Ill. App. 3d 1, 22 (1st Dist. 2002), *rev'd on other grounds*, 213

Ill.2d 351 (2004); *Amoco Realty Co. v. Montalbano*, 133 Ill. App. 3d 327, 335 (2d Dist. 1985) (quoting *United States v. Concentrated Phosphate Export Ass'n, Inc.*, 393 U.S. 199, 203 (1968)). That, of course, is precisely the standard the Court's opinion applies. Slip. Op. at 5-8. And that is the standard under which numerous cases have found mootness despite a remote possibility of recurrence. *See, e.g.*, *Sadler*, 354 Ill. App. 3d at 1039-40 (moot despite possibility that defendants could resume effort to build challenged structure); *Duncan Publ'g, Inc. v. City of Chicago*, 304 Ill. App. 3d 778 (1st Dist. 1999) (moot despite possibility that defendant could ignore or delay responses to future FOIA requests); *People ex rel. Ulrich v. Stukel*, 294 Ill. App. 3d 193 (1st Dist. 1997) (moot despite possibility that defendant could deny future FOIA requests on similar grounds).

Put simply, the Court plainly and rightly determined that Plaintiffs' appeal was moot even though the Loews Defendants did not bind themselves to permanently maintain their new "showtime" advertising practices. Rehearing is unnecessary to clarify or correct that determination.

II. Plaintiffs Are Not Entitled To A Remand For Attorneys' Fees.

A. Plaintiffs Have Waived Any Right To A Remand For Attorneys' Fees.

In addition to seeking review of their interpretation of the Court's ruling, Plaintiffs also want the Court to remand this case so they can be awarded attorneys' fees. In the briefing on the mootness issue, however, Plaintiffs never requested—or even mentioned—a remand for attorneys' fees. Indeed, prior to their Petition for Rehearing, Plaintiffs submitted five other briefs to this Court,

and not one said a single word about any award of attorneys' fees to Plaintiffs. Their right to such relief thus cannot be a point "overlooked or misapprehended." Ill. Sup. Ct. R. 367(b). And, more importantly, their failure to raise the issue in their opening brief on mootness waived their right to do so in a petition for rehearing. Ill. Sup. Ct. R. 341(e)(7) ("Points not argued [in an opening brief] are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing."); *see also, e.g.*, *Anderson v. First Am. Group of Cos., Inc.*, 353 Ill. App. 3d 403, 415 (1st Dist. 2004) (claim raised for first time in petition for rehearing waived). Supreme Court Rules 341(e)(7) and 367(b) could not be clearer: a petition for rehearing may not raise new issues.

It is equally clear, moreover, that the raise or waive principle expressed by those rules applies to a request seeking a remand for attorneys' fees. In *Lee v. Egan*, 184 Ill. App. 3d 852, 854 (1st Dist. 1989), this Court reversed an award of attorneys' fees granted by the Circuit Court based on a prior appeal because the prior appeal "merely affirmed the trial court" rather than affirming and remanding for an award of fees and costs. Significantly, the *Lee* court further explained, "In fact, we could not have [remanded for fees and costs] in light of the fact that that question was not before us since Egan did not raise it in her appellate brief." *Id.*; *see also Village of Lakemoor v. First Bank of Oak Park*, 136 Ill. App. 3d 35, 45 (2d Dist. 1985) (failure to request fees on appeal waives right to fees). Under *Lee* and Supreme Court Rules 341(e)(7) and 367(b), Plaintiffs' newly made request seeking a remand for attorneys' fees must be refused on waiver grounds.

B. Plaintiffs Are Not Entitled To Attorneys' Fees Even If They Preserved The Issue.

Plaintiffs now claim a right to attorneys' fees under the Illinois Consumer Fraud Act ("ICFA"). That law allows a court to award "reasonable attorney's fees and costs to the prevailing party." 815 ILCS 505/10a(c). Plaintiffs are not the "prevailing party" in this litigation, factually or legally.

Plaintiffs did not win a single disputed question in this litigation. The Circuit Court twice dismissed Plaintiffs' complaint for failure to state a claim. 4/16/04 Order (PA 112; R2 C306); 10/17/03 Order (R1 C186). This Court likewise rejected Plaintiffs' arguments against dismissing this appeal as moot. Slip Op. at 5-10. Moreover, the Loews Defendants never abandoned, conceded, or compromised their position that Plaintiffs did not and could not plead a private claim for injunctive relief under the ICFA. *See* Defs.' Supp. Br. at 1 ("Given that precedent and common sense both plainly require affirmance of the Circuit Court's dismissal of Plaintiffs' complaint, the Loews Defendants would certainly welcome a decision on the merits by this Court."). It is the Loews Defendants who should receive attorneys' fees, not plaintiffs.

Plaintiffs' suggestion that their suit caused the Loews Defendants to adopt their new "showtime" advertising practices is not even plausible. As Plaintiffs note, the Loews Defendants had fought this case "tooth-and-nail for two years" (Pet. at 2), including through full appellate briefing, by the time they announced their new practices. *See* Defs.' Supp. Br. at 2-5. Plus, Plaintiffs' suit stood dismissed with prejudice at the time of the announcement. 4/16/04 Order (PA 112; R2 C306). If Plaintiffs' suit motivated the change in practices,

the Loews Defendants certainly would not have waited to make the change until they had defended against the suit for two years, secured a Circuit Court dismissal, and fully briefed the appeal.

It is noteworthy, too, that although Plaintiffs now say that the Loews Defendants' new practices fully satisfied their prayer for relief (*see* Pet. at 2-3), they previously claimed, in briefing the mootness issue, that "Loews has not given Plaintiffs their remedy." Pls.' Supp. Reply at 4-6. In sum, there is no basis for concluding, as a factual matter, that Plaintiffs are the "prevailing party" in this litigation.

More importantly, the same is true as a legal matter. "Prevailing party" is a legal term of art. As Plaintiffs recognize (Pet. at 5), Illinois courts understand the term to require an "'alteration in the legal relationship of the parties'" that enjoys "'judicial *imprimatur.*'" *Melton v. Frigidaire*, 346 Ill. App. 3d 331, 337 (1st Dist. 2004) (quoting *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 605 (2001)).[1] Such alterations include court judgments, consent decrees, and certain court-approved settlements. *Id.* at 336-40. The key is that the resolution of the litigation must

[1] The relevant cases from Illinois courts involve federal statutes that allow the "prevailing party" attorneys' fees. *Melton*, 346 Ill. App. 3d at 335 (Magnuson-Moss Warranty Act); *Bruemmer v. Compaq Computer Corp.*, 329 Ill. App. 3d 755, 767-69 (1st Dist. 2002) (same). Illinois courts, however, do look to case law regarding analogous attorneys' fees provisions in federal statutes when interpreting the ICFA's attorneys' fees provision. *See Haskell v. Blumthal*, 204 Ill. App. 3d 596, 600-02 (4th Dist. 1990) (looking to ERISA and federal civil rights law precedents); *see also Door Sys., Inc. v. Pro-Line Door Sys., Inc.*, 126 F.3d 1028, 1029-30 (7th Cir. 1997) (Posner, C.J.) (considering civil rights law, Copyright Act, and ERISA precedents); *cf. Melton*, 346 Ill. App. 3d at 335 (applying ICFA precedent to Magnuson-Moss Warranty Act).

give the "prevailing party" new, judicially enforceable rights against other parties to the litigation.

Here, of course, there is no court judgment, consent decree, or settlement granting Plaintiffs rights of any kind. As noted above, this litigation has not resulted in the Loews Defendants being judicially barred from doing anything. Plaintiffs say they are nonetheless the "prevailing party" because the Loews Defendants changed their "showtime" advertising practices to give notice regarding the duration of pre-movie content and Plaintiffs' prayer for relief requested an injunction requiring such notice. What Plaintiffs do not and cannot say, however, is that this litigation gave them a judicially enforceable right to compel the Loews Defendants to change their prior practices, maintain their new practices, or take any other action. Changing their "showtime" advertising practices was a voluntary business decision for the Loews Defendants. And although they have no plans to do so and practical considerations would discourage such a step, the Loews Defendants are not barred from reverting to their prior practices. Plaintiffs cannot be the "prevailing party."

Indeed, in *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, the U.S. Supreme Court expressly rejected the suggestion that "a plaintiff is a 'prevailing party' if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct." 532 U.S. at 601, 610. The *Buckhannon* Court thus ruled that a plaintiff who challenged—under two federal civil rights statutes—a

West Virginia law that the state legislature repealed during the litigation—mooting the plaintiff's challenge—was not entitled to attorneys' fees as a "prevailing party." The Court reasoned that the plaintiff's "catalyst theory" would "allo[w] an award where there is no judicially sanctioned change in the legal relationship of the parties." *Id.* at 605. The Court also rejected, as "entirely speculative and unsupported by any empirical evidence," the notion that without the "catalyst theory" defendants would unilaterally moot cases to avoid attorneys' fees. *Id.* at 608-09. Finally, the Court noted that "catalyst theory" claims would "result in a second major litigation" requiring "analysis of the defendant's subjective motivations in changing its conduct," a result to be avoided in establishing standards for awarding attorneys' fees. *Id.* at 609-10. *See also Bruemmer*, 329 Ill. App. 3d at 767-69 (under *Buckhannon*, plaintiff who accepted tender of prayer amount was not "prevailing party").

Buckhannon is well-reasoned and rightly decided. There is no reason for this Court to accept Plaintiffs' invitation to reject *Buckhannon* and allow Plaintiffs to pursue a "catalyst theory" to obtain attorneys' fees. Accordingly, Plaintiffs' request seeking a remand for attorneys' fees should be refused, even assuming Plaintiffs did not waive their right to such relief.

CONCLUSION

For the foregoing reasons, the Loews Defendants ask that the Court deny Plaintiffs' "Petition For Rehearing Or, In The Alternative, Remand For Attorneys' Fees."

December 30, 2005

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Daniel J. Delaney, an attorney, hereby certify that on December 30, 2005, I caused three copies of the foregoing **ANSWER TO PLAINTIFFS-APPELLANTS' PETITION FOR REHEARING OR, IN THE ALTERNATIVE, REMAND FOR ATTORNEYS' FEES** to be served by messenger delivery upon:

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