2016 IL App (2d) 151041-U
No. 2-15-1041
Order filed August 15, 2016
Modified upon denial of rehearing September 16, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE DEPARTMENT OF TRANSPORTATION, Plaintiff-Appellee, v. V-6 CORPORATION; LEHMAN BROTHERS HOLDINGS, INC.; LEHMAN CAPITAL; BRIDGEVIEW BANK GROUP; CHARTER ONE BANK, N.A.; THE DEPARTMENT OF EMPLOYMENT SECURITY; STATE OIL COMPANY; NON-RECORD CLAIMANTS; and UNKNOWN OWNERS; Defendants (V-6 Corporation and State Oil Company, Defendants-Appellees; Bridgeview Bank Group, Defendant-Appellant).	)	Appeal from the Circuit Court of McHenry County. No. 09-ED-10 Honorable Michael T. Caldwell, Judge, Presiding.

PRESIDING JUSTICE SCHOSTOK delivered the judgment of the court.
Justices Hutchinson and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: Although the trial court erred in failing to take lien priority into account in distributing just compensation, appellant failed to carry its burden of showing that it was entitled to more than it received. Trial court's denial of motion to

disqualify attorney was not an abuse of discretion. Reviewing court would not reach the issue of attorney's liability for excess preliminary just compensation it received.

¶ 2 The plaintiff, the Department of Transportation (IDOT), filed condemnation proceedings on a portion of a parcel owned by one of the defendants, V-6 Corporation, which was subject to mortgages held by other defendants, including the Bridgeview Bank Group (Bridgeview) and State Oil Company. Proceeding under the statutory "quick take" provisions, IDOT deposited preliminary just compensation with the clerk of the court. The trial court granted the motions of Bridgeview, State Oil, and V-6, to withdraw the preliminary just compensation, subject to the condition that they reimburse IDOT if the final just compensation determined by the jury was less. The jury's determination was in fact less than the preliminary just compensation, and the trial court ordered Bridgeview, State Oil, and V-6 to reimburse IDOT for the excess withdrawn in proportion to the each party's share of the withdrawal. Bridgeview appeals, arguing that the trial court erred in distributing the just compensation, in allocating the repayment obligations, and in denying Bridgeview's motions to disqualify V-6's attorney. We affirm.

¶ 3 I. BACKGROUND

¶ 4 In 2004, V-6 bought about a half-acre of land (21,606 square feet) along Route 47 in Huntley (the Property). V-6 operated a gas station, auto repair shop, and a convenience store on the Property.

¶ 5 Between October 2006 and April 2007, V-6 granted Bridgeview four mortgages as security for various loans. The amount of the loans totaled $1,007,320. These security interests were recorded with the McHenry County Recorder no later than May 2007.

¶ 6 In August 2008, V-6 granted State Oil a mortgage as security for a $100,000 loan. The State Oil mortgage acknowledged that it was junior to the mortgages held by Bridgeview. State Oil recorded its mortgage in September 2008.

¶ 7 In April 2009, seeking to widen Route 47, IDOT filed a condemnation complaint seeking (1) a permanent easement over about half of the Property (10,498 square feet); and (2) two temporary easements of less than 5 years' duration on two other portions, for construction purposes. The area sought as a permanent easement included portions of the gas station and auto repair shop but did not include the convenience store. The complaint initially named V-6 and Bridgeview among the defendants.[1] IDOT later filed an amended complaint adding State Oil as a defendant.

¶ 8 In August 2009, IDOT moved for immediate vesting of the title to the condemned parcel pursuant to the "quick take" provisions of the Eminent Domain Act (Act) (735 ILCS 30/1-1-1 *et seq*. (West 2008)). See 735 ILCS 30/20-5-5 (West 2008). The trial court set October 15, 2009, for the hearing on the preliminary just compensation to be paid by IDOT.

¶ 9 A few days before the hearing, V-6 hired the law firm of Morrison & Morrison, P.C. (Morrison) to represent it, entering into a contingent fee agreement under which V-6 agreed to pay Morrison 22% of the amount by which the final just compensation exceeded $715,000. V-6

[1] Charter One Bank also held a lien on the Property, and it was named as a defendant. However, it failed to file an answer after being served and a default judgment was entered against it. Although Charter One later appeared and successfully moved to vacate the default judgment, that did not occur until after all of the preliminary just compensation had been distributed. Charter One never received any compensation from the amount paid in by IDOT. Although it is a party to this appeal, it has not filed any brief, and we do not refer to it further.

also agreed to pay expert witness fees, court costs, and other litigation expenses. (In January 2010, Morrison served notice that it claimed a lien with respect to these fees and costs.)

¶ 10 At the October 15 hearing on the amount of preliminary just compensation to be paid, three witnesses testified: Lin Li and Neal Steffens, on behalf of IDOT; and Mohammad Rashid, the president of V-6. None of the other parties to the condemnation participated in the hearing. Li, an IDOT condemnation engineer, testified about the purpose of the takings sought. The permanent easement was required for the widening of Route 47. The purpose of the temporary construction easements was to allow IDOT to demolish the gas station and auto repair shop on the premises, which were rendered worthless by the taking of the permanent easement. Li testified that IDOT was taking a permanent easement rather than fee simple because IDOT could not take ownership of property that might be contaminated. Li did not know who would bear the cost of any environmental remediation if it was discovered that the gasoline storage tanks on the Property had leaked.

¶ 11 Steffens, an appraiser, testified that the fair market value of the entire Property, prior to the taking, was $900,000. He based this total on recent sales prices of comparable gas stations. Of this total, the parcel taken as a permanent easement had been worth $650,000 and the remaining land had been worth $250,000. However, the taking resulted in a decrease of $161,000 in the value of the remaining land. Further, the two temporary construction easements should be valued at $35,000. Thus, he believed that the total value of the taking was $846,000 ($650,000 for the portion permanently taken; $161,000 for the decrease in the value of the remaining land; and $35,000 for the temporary easements). Although Steffens calculated the value of the remaining land at $89,000, he agreed with the statement that, due to the narrow shape of the remainder, applicable zoning restrictions, and issues of access, it would be

considered "an uneconomic remnant," and its highest and best use after the taking would be consolidation with an adjacent property.

¶ 12 Rashid, the president of V-6, testified about the purchase price V-6 paid for the Property and the cost of the improvements V-6 made thereafter. He testified that, due to IDOT's taking of the permanent easement and demolition of the gas station and auto repair shop, V-6 would not be able to stay in business at that location. (In fact, V-6 was administratively dissolved by the Secretary of State in 2009.) He estimated the fair market value of the Property at $1.5 million, based on recent sales of comparable properties as well as a sales contract he had entered into with respect to the Property in August 2007 (which was not consummated). Because V-6 could not do anything with the land remaining after the taking, he put the amount of the taking at $1.5 million. On cross-examination, Rashid admitted that he was receiving relocation assistance from the State due to the loss of his business. Rashid also testified that mortgages on the Property were held by, among others, Bridgeview and State Oil. He thought that Bridgeview's liens totaled $977,000, and the State Oil mortgage secured a debt of $100,000. In addition, V-6 owed the State of Illinois in connection with unemployment insurance for the business. The liens on the Property totaled more than $1.2 million.

¶ 13 The trial court ruled that IDOT had shown the need for the taking and had conducted its negotiations in good faith. The trial court set the preliminary just compensation at $1.2 million.

¶ 14 On November 19, 2009, IDOT deposited $1.2 million with the clerk of court. On December 16, 2009, the trial court entered an order vesting IDOT with title to the easements it had requested.

¶ 15 After IDOT deposited the preliminary just compensation with the clerk, three of the defendants filed motions to withdraw some or all of that sum, pursuant to section 20-5-20 of the

Act (735 ILCS 30/20-5-20 (West 2008)). Bridgeview sought essentially all of the money deposited by IDOT, arguing that its mortgages were senior to all others and totaled $1,117,975. To support its calculations of this total, Bridgeview attached as exhibits to its motion: copies of the mortgages; copies of payoff letters with respect to each mortgage, all of which were dated December 8, 2009; and billing statements from its attorney supporting a request of $10,157 in attorney fees and costs due under the mortgages. Bridgeview stipulated that, "[i]n the event that an Order is entered at a later date requiring refund of any part of the amount withdrawn," it would refund any amount so ordered.

¶ 16 State Oil sought to withdraw the sum of $136,807.92, the full amount due to it under its mortgage and supply contract with V-6. It supported its calculation of the total amount due by attaching an affidavit from its vice president, who testified based on his personal knowledge regarding the computerized accounting system maintained by State Oil in the regular course of its business and that the system showed the total due as well as all of the inputs into that total. State Oil asked the trial court to determine the relative priorities of the parties seeking to withdraw any portion of the preliminary just compensation, and stipulated that if the just compensation finally determined was less than the preliminary just compensation it would refund any amount ordered.

¶ 17 V-6 first argued that Bridgeview and State Oil were not entitled to any of the preliminary just compensation, although it did not provide any legal basis for this argument. It sought permission to withdraw all of the preliminary just compensation for its own use, including the payment of $106,700 in attorney fees expended in trying the issue of the proper amount of preliminary just compensation. In the alternative, V-6 argued that Bridgeview and State Oil should only be permitted to withdraw 49% of the total amount of their liens, as only 49% of the

Property was being taken, and Bridgeview and State Oil would continue to hold liens on the remaining 51% of the Property even after the taking. Like the others, V-6 stipulated that it would return any amounts ordered by the trial court in the event that just compensation was finally determined to be less than the preliminary just compensation paid by IDOT.

¶ 18 On February 23, 2010, the trial court heard oral argument on the motions to withdraw and issued its ruling. It ruled that Bridgeview and State Oil together could withdraw 80% of the preliminary just compensation ($960,000) plus any interest that had accrued thereon, and V-6 could withdraw the remaining 20% ($240,000). Bridgeview and State Oil were to divide their 80% *pro rata*. The trial court made no finding as to the amount of the liens held by Bridgeview and State Oil, and it gave no indication of its reason for directing that those parties share 80% of the fund while V-6 received the remaining 20%. The written order, which was drafted by Bridgeview's attorney, provided that Bridgeview was to receive $854,400 plus the accrued interest, while State Oil was to receive the remaining $105,600. The order provided that the unsatisfied portion of the liens held by Bridgeview and State Oil would remain as liens on the portion of the Property not being taken. The trial court rejected Morrison's argument that it was entitled to first-priority payment as the attorney that had "procured" the preliminary just compensation. However, at IDOT's request, the court specified that V-6's portion of the preliminary just compensation would be paid jointly to V-6 and Morrison, and that IDOT would have no further liability with respect to Morrison's attorney lien. The order stated that "[t]he funds distributed by this order are subject to refund *** in the event preliminary just compensation exceeds the final compensation."

¶ 19 Bridgeview moved for a finding of immediate appealability pursuant to Illinois Supreme Court Rule 304(a) (Ill. S. Ct. R. 304(a) (eff. Feb. 6, 2010)). All of the other parties opposed the

motion, arguing that, by its nature, the order distributing the preliminary just compensation was not a final order and thus could not be appealed. The trial court denied the motion.

¶ 20 The clerk of court paid Bridgeview and State Oil the amounts specified in the order, and issued a check for $223,183.17 to both V-6 and Morrison, representing the amount of $240,000 minus delinquent taxes that V-6 owed to McHenry County. Thereafter, Rashid endorsed the check on behalf of V-6, and Morrison deposited the check in its client trust account. Rashid requested that $114,926 be paid to one of its creditors, Computers & Toners Center Corporation, as payment of a debt. Morrison made this payment as requested.

¶ 21 The case proceeded to trial on the issue of just compensation. A jury trial was held in October 2013, and the jury set just compensation at $999,042. Both V-6 and Bridgeview moved for a new trial, claiming certain errors. The trial court granted this request. A second trial was held in February 2015. This time, the jury determined that just compensation for the taking was $910,000. The bulk of this amount, $602,500, was compensation for the damage done to the Property through the taking and demolition of the gas station and auto repair shop. The jury valued the taking of the permanent easement at $280,000 and the temporary easements at $27,500. At both trials, the only active participants were IDOT and V-6, each of whom presented expert witness testimony regarding the value of the Property.

¶ 22 According to V-6 and Morrison, they modified their retainer agreement prior to the start of the second trial. Under the modified agreement, Morrison would keep the remainder of V-6's withdrawal from the preliminary just compensation (about $108,257) as payment for legal services already rendered and litigation expenses advanced by Morrison. In return, Morrison would continue to represent V-6 without charge in the second jury trial and posttrial proceedings.

¶ 23 Bridgeview filed a motion for distribution of the final award of just compensation, arguing that the amount of its liens exceeded the final just compensation and those liens had priority over all other claims, and thus it was entitled to the entire $910,000. Recognizing that IDOT was entitled to repayment of $290,000—the difference between the final verdict and the $1.2 million in preliminary just compensation that IDOT had already paid—Bridgeview argued that State Oil and V-6/Morrison should repay all of the funds they had received (a total of $345,600): IDOT would receive $290,000, and Bridgeview should receive the remaining $55,600.

¶ 24 V-6 opposed this motion, arguing that Bridgeview was not entitled to all of the just compensation because it still had liens on half of the Property that remained after the taking. Further, Morrison had earned an attorney fee equal to all of the funds remaining in its client trust account from the preliminary distribution, and Morrison could not be ordered to pay back the money it had received because it had not applied for preliminary just compensation and was not a party to the condemnation action. In response, Bridgeview filed two more motions, seeking to add Morrison as a party and hold it liable for repayment, and to disqualify Morrison from representing V-6 on the ground that its financial interests were in conflict with the interests of V-6. IDOT filed a brief agreeing with Bridgeview that Morrison could be required to refund the payment it had received from V-6. The trial court denied both of Bridgeview's motions.

¶ 25 On September 22, 2015, after briefing and oral argument on the issue of who should be required to make repayment, the trial court rejected Bridgeview's priority argument, and instead ordered all of the parties that received preliminary just compensation to contribute *pro rata* to the repayment of the $290,000. Achieving the full amount of repayment required each party to refund 24% of whatever amount it had received earlier. Thus, Bridgeview was ordered to repay

$206,480; State Oil was to repay $25,520; and V-6 was to repay $58,000. The order did not place any repayment obligation on Morrison. All payments were to be made to the clerk of court by November 3, 2015.

¶ 26 State Oil paid the amount ordered on October 30, 2015. As of November 10, 2015, neither Bridgeview nor V-6 had made any payment, and the trial court entered judgment against each of them in the amounts previously ordered. Bridgeview tendered the amount of the judgment plus statutory interest the following day. The record does not disclose any payment by V-6.

¶ 27 II. ANALYSIS

¶ 28 Bridgeview appeals, raising several arguments. Its primary argument is that the trial court erred in failing to take the senior priority of Bridgeview's liens into account when distributing the just compensation, and that as a result of that priority Bridgeview should have received all of the just compensation, because its liens were greater than the final just compensation award. It also raises various arguments aimed at Morrison, contending that Morrison should have been held liable to repay the excess preliminary just compensation received by V-6, and that Morrison should have been disqualified from representing V-6 on the basis of a conflict of interest. We begin with the issue of whether Bridgeview was entitled to a greater share of the just compensation than it received.

¶ 29 A. Distribution of Just Compensation

¶ 30 Pursuant to section 10-5-90 of the Act, a trial court must distribute just compensation "among all persons having an interest in the property *according to the fair value of their legal or equitable interests*." (Emphasis added.) 735 ILCS 30/10-5-90 (West 2012). The trial court must apply this standard to the facts of the case before it, a task that necessarily involves the exercise

of the trial court's discretion in determining the fair value of those interests. Thus, "[t]he standard of review applicable to eminent domain proceedings is whether the trial court abused its discretion, acted arbitrarily, exceeded the bound of reason, and ignored the applicable law." *Department of Transportation v. Bolis*, 313 Ill. App. 3d 982, 985 (2000).

¶ 31 Bridgeview argues that, in determining the proper distribution of the just compensation, a trial court must take into account the priority of the liens or other security interests held by the various persons having an interest in the property taken. Illinois law supports this proposition. See *Chicago Land Clearance Comm'n v. Narodski*, 57 Ill App. 2d 302, 304 (1965) (trial court should have distributed the just compensation first to those lienholders with senior priority; "the standing of the lienholders among themselves should remain unaffected by the condemnation judgment"); see also *Village of Clarendon Hills v. Mulder*, 278 Ill. App. 3d 727, 736 (1996) (the principle of "first in time, first in right" applies to the distribution of just compensation). Accordingly, we have no difficulty in concluding that the trial court erred insofar as its distribution of the just compensation was based on a rejection of priority principles among the defendants.

¶ 32 The effect of a partial taking is also relatively clear. Our supreme court has explained that a partial taking transforms the nature of the interest held by a mortgagee or other lienholder as follows: where the mortgagee initially held only a mortgage lien on the property, after the taking the governmental entity owns the property free and clear of the mortgage and the mortgagee instead holds an equitable lien on the just compensation award that is commensurate with the amount of its lien. *City of Chicago v. Salinger*, 384 Ill. 515, 519 (1943). "Under such circumstances the mortgagee is entitled to priority of payment to such portion of the award as is necessary to satisfy his lien." *Id.* Further, "the property not taken remains subject to the

mortgage lien." *Id*. at 520. Thus, a lienholder has the right to payment from the just compensation award according to priority rules, and if the lien is not fully satisfied from the award, the lienholder has a mortgage lien upon the remaining property to the extent of the unsatisfied portion of the lien. *Id*.; see also *Department of Transportation v. New Century Engineering & Development Corp.*, 97 Ill. 2d 343, 350 (1983) ("the mortgagee, although losing his mortgage lien upon the condemned property, under the law of this State, had an equitable lien upon the award for the land that was taken in the condemnation proceeding, as well as a mortgage lien upon the remainder of the land as security for his debt").

¶ 33 However, the effect of these general principles upon the distribution of the just compensation award in this case is far from clear, given the factual differences between this case and the above cases. For instance, this case not only involves a partial taking but multiple lienholders. *Salinger* involved only one lienholder, and the primary question before the supreme court was a different issue entirely: the effect of a foreclosure upon property that was partially condemned. (The mortgagee in *Salinger* was also the purchaser of the property at foreclosure.) Thus, the *Salinger* court did not address the manner in which the just compensation award for a partial taking should be distributed among multiple lienholders. A further complication is that here the majority of the jury's award ($602,500 of the total $910,000 awarded) was compensation for the damage done to the Property, not for the value of that portion of the property that was taken. The legal effect of this fact is unclear. The appellees argue that, because of these differences, Bridgeview was not entitled to receive all of the just compensation awarded in this case. Unfortunately, none of the parties have provided us with any case law involving comparable circumstances.

¶ 34 One of the few things that emerges with relative clarity, however, is the key importance of the amount of the liens held by the various parties in determining whether those parties received the appropriate share of the just compensation award. Indeed, Bridgeview's arguments rely on two points: that its liens were senior in priority, and that the amount of those liens exceeded the portion of the final just compensation award that it received. However, although Bridgeview has adequately established the first point, for the reasons discussed below, it has not established the second.

¶ 35 IDOT contends that Bridgeview cannot be heard to argue that it did not receive appropriate just compensation, because Bridgeview failed to put forward any admissible evidence regarding the amount of its liens. IDOT points out that the sole evidence put forward by Bridgeview on this point was the payoff letters, which are hearsay. (Bridgeview also submitted copies of the notes related to the liens, but those state only the amounts of the loans at their inception, not the balance still owing at the time of the taking.) IDOT further contends that Bridgeview failed to establish that the payoff letters come within a hearsay exception such as for business records. Our review of the record shows that IDOT is correct.

¶ 36 Hearsay is an out-of-court statement that is offered to establish the truth of the matter asserted. Ill. R. Evid. 801(c) (eff. Jan. 1, 2011); *In re Estate of DeMarzo,* 2015 IL App (1st) 141766, ¶ 19. Hearsay is inadmissible unless the statement falls within a hearsay exception. Ill. R. Evid. 802 (eff. Jan. 1, 2011); *Estate of DeMarzo,* 2015 IL App (1st) 141766, ¶ 19.

¶ 37 There is a hearsay exception for business records. A document may be admissible as a business record if the document was kept in the course of regular business activity and the document was created at or near the time of the transaction it documents. Ill. R. Evid. 803(6) (eff. Apr. 26, 2012); see also Ill. S. Ct. R. 236(a) (eff. Aug. 1, 1992). These elements may be

established through the testimony of the custodian of such records or another person with knowledge of the practices of the business. *Bayview Loan Servicing, LLC v. Szpara*, 2015 IL App (2d) 140331, ¶ 42.

¶ 38 Bridgeview first submitted the payoff letters as exhibits to its motion to withdraw preliminary just compensation. That motion was verified by John Polster, the general counsel of Bridgeview. His verification stated that he had reviewed the motion, knew its contents, and that the matters stated in the motion were true and correct. However, he did not say that he had reviewed any of the relevant files and documents, or otherwise had any personal knowledge of the matters stated in the motion. Further, the motion did not identify the basis for the payoff amounts stated therein or state that the records upon which the payoff amounts were based were maintained by Bridgeview in its regular course of business. Accordingly, his verification did not establish that the payoff letters came within the hearsay exception for business records.

¶ 39 Bridgeview again submitted the payoff letters as exhibits to its motion regarding the distribution of the final just compensation. This time, the letters were accompanied by the affidavit of Kathleen Cacioppo, a paralegal administrator for Bridgeview. Cacioppo averred that she had "personal knowledge regarding the contents of this declaration, including certain documents that Bridgeview keeps in the ordinary course of business." She further stated that the payoff letters had been prepared by one of Bridgeview's loan servicing administrators on December 8, 2009, and that the letters accurately reflected the amount due and owing as of that date.

¶ 40 Bridgeview argues that Cacioppo's affidavit was sufficient to establish that the payoff letters were business records. After carefully considering the matter, we must disagree. Cacioppo never stated that the payoff letters were among the "certain documents that Bridgeview

keeps in the ordinary course of business." She did not state that it was the regular practice of Bridgeview to create such payoff letters. Finally, she failed to identify any basis, such as her own review of the relevant files relating to Bridgeview's loans to V-6, or Bridgeview's use of a computerized accounting system, for her statement that the payoff letters accurately reflected the amount due and owing as of the date they were created.

¶ 41 Bridgeview cites *JP Morgan Chase Bank, N.A. v. East-West Logistics, LLC*, 2014 IL App (1st) 121111, and *US Bank, N.A. v. Avdic*, 2014 IL App (1st) 121759, as similar cases in which bank employees' affidavits were held sufficient to establish that mortgage-related documents were admissible as business records. In *East-West Logistics*, the bank employees' affidavits at issue included statements that the employee had personally reviewed the relevant loan files; that the bank maintained a computerized system of accounts; describing how information was entered into the computerized system; that the data was entered shortly after payments and other relevant information were received by the bank; and that the bank relied upon the accuracy and completeness of the computerized system of accounts in its regular course of business. By comparison, Cacioppo's affidavit lacks any such statements. Similarly, in *Avdic*, 2014 IL App (1st) 121759, ¶ 26, the bank employee's affidavit averred that she had duties reviewing and analyzing loan records for the bank; she maintained records for each loan serviced; she was familiar with the defendant's loan; and she had personal knowledge that it was within the regular course of business to record the information at issue at or near the time of the occurrence. Again, Cacioppo's affidavit lacks any similar statements. Thus, neither of these cases assists Bridgeview here.

¶ 42 Bridgeview notes that a trial court's decisions regarding the admission of evidence must be reviewed under the deferential abuse of discretion standard, and it argues that the trial court

here "did not abuse its discretion when it admitted into evidence Bridgeview's payoff letters." The trouble with this argument is that the record does not show that the trial court ever did, in fact, admit Bridgeview's payoff letters into evidence. Bridgeview's own actions in filing the payoff letters as exhibits to their motions are not the same as a trial court determination that the letters were admissible evidence. Further, the record does not show that the trial court ever adopted the figures stated in the payoff letters when issuing its orders. The February 2010 order permitting Bridgeview to withdraw a portion of the preliminary just compensation does not contain any finding as to the amount of Bridgeview's liens. (The order was drafted by Bridgeview's attorney, and the amounts to be paid to Bridgeview and State Oil appear to be the product of some agreement by those two parties: the transcript of the hearing does not reflect that the trial court participated in any way in the calculation of these amounts.) Similarly, the September 2015 order contains no determination of the amount owed to Bridgeview. Thus, nothing in the record demonstrates any implicit finding by the trial court as to the amount of Bridgeview's liens or any implied ruling that the payoff letters were admissible evidence on that issue.[2]

[2] In its petition for rehearing, Bridgeview argued that Rashid's testimony—that the "amount of [Bridgeview's] mortgage" was "977" (presumably, this meant $977,000)—constituted separate evidentiary support for its argument that its liens totaled more than $910,000 at the time of the taking. We note that Bridgeview never mentioned this testimony in its appellate briefs, thereby forfeiting the argument. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016) ("Points not argued are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing."). Even if the argument were not forfeited, the meaning of Rashid's brief testimony is unclear, and to the extent that any meaning can be gleaned, Rashid appears to us to

¶ 43 Bridgeview also argues that we should not consider the lack of admissible evidence regarding the amount of its liens, for several reasons. First, it argues that IDOT cannot raise this shortcoming because IDOT did not file any cross-appeal from the trial court's distribution orders. This argument misconceives the nature of a cross-appeal and the effect of an appellee's failure to file one. "[I]n the absence of a cross-appeal, a reviewing court is confined to those issues raised by the appellant and will not consider those urged by the appellee." *Stevens v. Village of Oak Brook*, 2013 IL App (2d) 120456, ¶ 41. Here, however, IDOT is not raising a new issue, it is simply pointing out a flaw in Bridgeview's argument on an issue that Bridgeview raised, *i.e.*, whether Bridgeview received an appropriate share of the just compensation. Thus, the lack of a cross-appeal by IDOT does not bar its argument.

¶ 44 Bridgeview also argues that IDOT forfeited its argument regarding the inadmissibility of the payoff letters by failing to object to the letters as hearsay in the trial court. The purpose of requiring a contemporaneous objection to evidence in the trial court is to provide an opportunity to address or remedy an evidentiary issue. *Dubey v. Public Storage, Inc.*, 395 Ill. App. 3d 342, 350 (2009) (purpose of rule is "to ensure that the trial court has the opportunity to correct the perceived error"). Here, that purpose was served, in that the accuracy of the amounts stated in the payoff letters was in fact challenged in the trial court, albeit by V-6 rather than IDOT.

¶ 45 During the oral argument on the motions to withdraw the preliminary just compensation, V-6 objected to Bridgeview's statements about the amount of the liens, stating that Bridgeview had previously told V-6 a different amount. V-6 then requested an evidentiary hearing on the

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be stating only his understanding of the initial amount of the Bridgeview mortgages, not the balance still owing at the time of the taking. Accordingly, Rashid's testimony does not assist Bridgeview here.

issue of the amount of Bridgeview's liens. Bridgeview opposed this request, arguing that it was not necessary and that V-6 should have filed a written objection. Later, in its response to Bridgeview's motion to allocate the final just compensation, V-6 again contended that Bridgeview had failed to submit admissible evidence of the amount of its liens (or the value of the remaining Property). V-6 also challenged the accuracy of the amounts stated in the Cacioppo affidavit, asserting that there was no showing as to how V-6's $125,000 mortgage grew to the $523,598 Cacioppo averred was now due, and no basis for the more than $50,000 in costs and attorney fees claimed by Bridgeview.

¶ 46 As noted, the purpose of requiring a contemporaneous objection is to provide the trial court with the opportunity to remedy a possible evidentiary error. *Id*. Here, the trial court had that opportunity, although it did not take it. (The trial court did not rule on the request for an evidentiary hearing, nor did it make any finding regarding the amount of Bridgeview's liens. Rather, without explicitly resolving these issues, it permitted Bridgeview and others to withdraw a portion of the preliminary just compensation.) Under these circumstances, the purpose of requiring a contemporaneous objection was served, and we decline to find the objection forfeited.

¶ 47 We note that many of the problems apparent in the record in this case could have been prevented had the trial court granted V-6's request for an evidentiary hearing regarding the amount of Bridgeview's liens. There was a clear factual dispute on this point, and generally, an evidentiary hearing is required in order to resolve such disputes. See *Workforce Solutions v. Urban Services of America, Inc.*, 2012 IL App (1st) 111410, ¶ 41 (where multiple parties claimed an interest in an asset, it was reversible error not to conduct an evidentiary hearing; each party's interest must be shown through evidence, not merely the arguments of counsel). Indeed,

even if the trial court believed an evidentiary hearing was not necessary, it should have rendered a ruling on the issue rather than taking refuge in the use of percentages and the term "*pro rata*." Nevertheless, the failure to hold an evidentiary hearing does not result in reversal here, because Bridgeview (the sole appellant) argued below that the trial court should *not* conduct such a hearing. Under the doctrine of invited error, "a party cannot complain of error which that party induced the court to make or to which that party consented. The rationale behind this well-established rule is that it would be manifestly unfair to allow a party a second trial upon the basis of error which that party injected into the proceedings." *In re Detention of Swope*, 213 Ill. 2d 210, 217 (2004) (citing *McMath v. Katholi*, 191 Ill. 2d 251, 255 (2000) and *People v. Segoviano*, 189 Ill. 2d 228, 240-41 (2000)). Accordingly, although we urge the trial court in the future to promptly resolve such factual disputes on the basis of admissible evidence, we do not reverse its ultimate determination here.

¶ 48 In summary, Bridgeview cannot successfully argue that the trial court erred in allocating the just compensation when the record contains no admissible evidence of the amount of Bridgeview's liens. Bridgeview has not carried its burden of demonstrating that the trial court abused its discretion in distributing the just compensation. We therefore reject Bridgeview's arguments that it should have received a greater share of that compensation.

¶ 49 B. Remaining Arguments Regarding Morrison

¶ 50 Bridgeview argues that the trial court also erred in denying the motion to hold Morrison liable to repay some portion of the preliminary just compensation and denying the motion to disqualify Morrison as V-6's attorney. We view these issues as largely moot, and in any case find no error in the trial court's rulings.

¶ 51 We first address Bridgeview's argument that Morrison is liable for some or all of V-6's repayment obligation. Bridgeview's argument rests on the language of section 20-5-35 of the Act, which states that, "[i]f the amount withdrawn from deposit [of preliminary just compensation] by any interested party *** exceeds the amount finally adjudged to be just compensation *** due to that party, the court shall order that party to refund the excess to the clerk of the court ***." 735 ILCS 30/20-5-35 (West 2012). Bridgeview argues that, as Morrison and V-6 were joint payees on the check issued as a result of V-6's application to withdraw preliminary just compensation, Morrison was an "interested party" who received a portion of the withdrawal, and both Morrison and V-6 should be have been ordered to refund the excess.

¶ 52 In response, Morrison notes that at the close of the hearing on the withdrawals of preliminary just compensation, IDOT requested that its name be added to the check to clarify that IDOT bore no further responsibility with respect to Morrison's attorney lien. Morrison further argues that, despite its name being on the check, the withdrawal was treated as belonging to V-6. It was deposited in Morrison's client trust account, not the firm's own account, and at V-6's direction was used to pay two of V-6's creditors: a vendor to whom V-6 owed money, and Morrison. Further, the payment to Morrison was made pursuant to a modification of the retainer agreement reached after the first jury trial, in which V-6 agreed that the amount remaining in the client trust account would be paid to Morrison in settlement of past legal fees, expert witness fees, and other litigation costs advanced by Morrison, and Morrison would represent V-6 (which was unable to pay any further fees) without charge in the second jury trial and any further proceedings. The record contains evidence of all of these assertions.

¶ 53 We think that, despite Morrison's involvement in procuring and holding V-6's portion of the withdrawal, Morrison has a valid argument that it is no more liable to refund the payment it

received from V-6 than is the other creditor whom V-6 chose to pay with the funds from the withdrawal. As the trial court commented in denying this motion:

> "V-6 and only V-6 took a risk when they withdrew the funds. V-6 knew or had reason to know that the final compensation for this real estate was *** undetermined and it was seriously contested by the State. Having done that, it is V-6 that took the risk and V-6 alone that has the liability here."

However, we need not resolve this issue, as it is moot. It is undisputed that IDOT's right to be made whole for the excess preliminary just compensation it paid is superior to any priority attaching to Bridgeview's liens. At this point, IDOT is still owed $58,000 (the amount owed by V-6, which remains unpaid). Any liability of Morrison for V-6's repayment obligations could be no greater than the liability of V-6 itself. Thus, any amounts paid by Morrison would benefit IDOT alone. Because, even if we were to accept Bridgeview's arguments, any benefit would accrue only to IDOT and not to Bridgeview, resolving this issue could not confer any effective relief to Bridgeview. Thus, the issue is moot. See *Steinbrecher v. Steinbrecher*, 197 Ill. 2d 514, 522-23 (2001) (an appeal is moot when "the reviewing court cannot grant the complaining party effectual relief"). "Courts of review will generally not consider moot or abstract questions because our jurisdiction is restricted to cases which present an actual controversy." *Id*. Further, as IDOT acknowledges, it filed no cross-appeal and thus cannot seek relief in this court on its own behalf. See *General Auto Service Station v. Maniatis*, 328 Ill. App. 3d 537, 544 (2002) ("in the absence of a cross-appeal, an appellee will not be permitted to challenge or to ask the reviewing court to modify a portion of the trial court's order"). Accordingly, we decline to render any opinion regarding Bridgeview's argument that Morrison was liable for some or all of V-6's repayment obligations.

¶ 54 We next address the motion to disqualify Morrison. In the motion, Bridgeview argued that, because Morrison was potentially liable for part or all of V-6's repayment obligations, Morrison was subject to a conflict of interest and should be disqualified from representing V-6 pursuant to Rule 1.7 of the Illinois Rules of Professional Conduct (Ill. R. Prof. Conduct 1.7 (eff. Jan. 1, 2010)). (As stated above, we make no determination of this issue.) In response, Morrison submitted an affidavit from Rashid stating that he had been fully advised about the alleged conflict; he was offered the opportunity to consult with other counsel but did not wish to; and he voluntarily waived the conflict and consented to Morrison's continuing representation. The trial court denied the motion on several grounds: that the motion was untimely, having been made after the trial was over and judgment had been entered; that there was no evidence that, at any point, Morrison had performed in any way as a less-than vigorous advocate for V-6's interests; and that in any case Morrison was not liable for any of V-6's repayment obligation, and thus there was no conflict of interest.

¶ 55 On appeal, Bridgeview argues that a conflict of interest may not be waived unless the attorney also reasonably believes that it will not adversely affect his representation of his client. Ill. R. Prof. Conduct 1.7(b)(1) (eff. Jan. 1, 2010). Here, Bridgeview argues, the conflict did affect Morrison's representation of V-6 because Morrison's argument that it was not liable to repay any of V-6's withdrawal advanced Morrison's interests to the detriment of V-6's interest in lessening its own liability. But Bridgeview's argument assumes facts not in evidence: that V-6, which has had no legal existence since 2009, has any remaining interest in the extent of its liability to IDOT; or that, if Morrison were forced to disgorge any of the attorney fees it received from V-6, Morrison would not look to V-6 to make up that loss. In the latter case, V-6's unpaid

debts would remain the same regardless of any payment by Morrison. Thus, Bridgeview has not shown that the conflict adversely affected Morrison's representation of V-6.

¶ 56 The party seeking disqualification of another party's attorney bears the burden of establishing a basis for disqualification. *In re Marriage of Stephenson*, 2011 IL App (2d) 101214, ¶ 19. The trial court's ruling on a motion to disqualify will not be disturbed absent an abuse of discretion. *Id*. ¶ 20. A trial court abuses its discretion only when its ruling is arbitrary, fanciful, or unreasonable, or no reasonable person would take the view adopted by the trial court, or when its ruling rests on an error of law. *People v. Olsen*, 2015 IL App (2d) 140267, ¶ 11. Under the circumstances present here, we cannot say that the trial court abused its discretion in denying Bridgeview's motion to disqualify.

¶ 57 III. CONCLUSION

¶ 58 For the reasons stated, the judgment of the circuit court of McHenry County is affirmed.

¶ 59 Affirmed.