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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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In re APPOINTMENT OF SPECIAL PROSECUTOR,	)	Appeal from the Circuit Court of McHenry County.
	)	
	)	No. 09-MR-142
	)	
(The County of McHenry, Petitioner-Appellant, v. Henry C. Tonigan, III, Thomas K. McQueen, and Quest Consultants International, Ltd., Respondents-Appellees).	)	Honorable Gordon E. Graham, Judge, Presiding.

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JUSTICE BURKE delivered the judgment of the court.  
Justices Zenoff and Schostok concurred in the judgment.

**ORDER**

*Held:* Section 3-9008 of the Code of Civil Procedure (55 ILCS 5/3-9008 (West 2010)) did not create a mathematical formula for determining the hourly compensation rate of a special prosecutor, so the trial court did not err in granting Special Prosecutors attorney fees based on a rate of \$250 per hour. However, the trial court abused its discretion in ordering the County to pay Quest Consultants International, Ltd. the fees it incurred in complying with a subpoena *duces tecum*. We therefore affirmed in part, reversed in part, and remanded the cause.

¶ 1 The County of McHenry (County) appeals the circuit court's orders requiring it to pay special prosecutors Henry C. Tonigan and Thomas K. McQueen (Special Prosecutors)<sup>1</sup> attorney fees. The

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<sup>1</sup>Tonigan was appointed as a special prosecutor, and McQueen was appointed as an assistant

County argues that the trial court improperly granted fees beyond what was allowed under statute. See 55 ILCS 5/3-9008 (West 2010). The County also argues that the trial court abused its discretion in the amount of fees it awarded to Quest Consultants International, Ltd. (Quest), the investigative company used by Special Prosecutors. We affirm in part, reverse in part, and remand.

¶ 2

## I. BACKGROUND

¶ 3 Special Prosecutors were appointed to investigate alleged misconduct by McHenry County State's Attorney Louis A. Bianchi and others in his office. Their appointment arose at the request of Amy Dalby, Bianchi's former secretary, who was charged in 2009 with stealing documents from the State's Attorney's office.

¶ 4 Dalby alleged that Bianchi required her to perform extensive political activities during her working hours. On April 23, 2009, Dalby requested the appointment of a special prosecutor to investigate the State's Attorney's office, arguing that there would be a conflict of interest if a member of the State's Attorney's office had to investigate his or her own supervisors and coworkers for possible criminal wrongdoing.

¶ 5 On June 10, 2009, the County filed a petition to intervene for the limited purpose of representing its financial interest, as the appointment of a special prosecutor would come at its expense. The trial court granted the County's motion on August 14, 2009. On September 4, 2009, the trial court entered an order approving the appointment of a special prosecutor. It also entered an order allowing the State's Attorney's Appellate Prosecutor's office to represent the County.

¶ 6 On September 18, 2009, the trial court appointed Special Prosecutors. They were appointed to investigate Dalby's allegations and prosecute if warranted. Special Prosecutors filed documents

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to the special prosecutor. Throughout this order, we refer to them jointly as Special Prosecutors.

with the trial court on October 13, 2009, stating that they accepted the appointments “at the rate of \$250 per billable hour.” On February 1, August 1, and December 16, 2010, the trial court ordered the County to pay Special Prosecutors their requested fees for the relevant time periods billed. According to Special Prosecutors, the County paid the fees as ordered each time.

¶ 7 On April 9, 2010, the trial court entered an order appointing various Quest employees as designated agents and investigators of the special grand jury. The order stated that they could issue subpoenas “for information or evidence to further criminal investigation on behalf of the special grand jury,” and they could receive material that was the subject of subpoenas and “act upon and disclose such material per the direction of” Special Prosecutors to other persons, agencies, laboratories, and law enforcement departments “in furtherance of our agents’ investigation of suspected violations of Illinois Criminal Law.”

¶ 8 On September 30, 2010, Special Prosecutors filed a petition to expand their investigation and prosecutorial authority based on additional allegations of wrongdoing by Bianchi that had come to light during their investigation, namely that Bianchi had interceded in two cases where he had ties to the defendants. The trial court granted the motion on October 1, 2010.

¶ 9 On February 16, 2011, the Appellate Prosecutor’s office filed a petition requesting clarification of its role in representing the County. The petition stated that it was the office’s understanding that its representation of the County concluded when Special Prosecutors were appointed, but it had thereafter received notice of a motion for interim attorney fees. At a hearing on February 23, 2011, the trial court clarified that the Appellate Prosecutor’s office was still representing the County’s financial interests. The trial court stated the office had “dropped the ball” by not appearing at prior hearings on fee requests despite being properly noticed.

¶ 10 On March 2, 2011, Special Prosecutors filed a notice of a motion for interim fees for the period of September 1, 2010, to November 30, 2010. A hearing was held on the motion on March 14, 2011. Tonigan sought \$21,789.74 for over 87 hours worked, including expenses, and McQueen sought a total of \$48,120.60 for over 131 hours of work, out of pocket expenses, and \$10,000 that was erroneously excluded from an order for a prior, uncontested bill. Special Prosecutors sought payment, as with previous bills, at a rate of \$250 per hour.

¶ 11 The County, as represented by the Appellate Prosecutor's office, stated that it did not want to get into detail about the actual billing, but had "a position with regard to the bills in general." The County cited section 3-9008 of the Counties Code (55 ILCS 5/3-9008 (West 2010)), which allows the appointment of special prosecutors. Section 3-9008 stated<sup>2</sup> in relevant part that a special prosecutor "shall be paid by the county he serves not to exceed in any one period of 12 months, for the reasonable amount of time actually expended in carrying out the purpose of such appointment, the same compensation as provided by law for the State's attorney of the county, apportioned, in the case of lesser amounts of compensation, as to the time of service reasonably and actually expended." *Id.* The County asked that the trial court apply the statute, which required that the fees be "apportioned" appropriately. The County stated that there was no case law analyzing the term "apportioned." When the trial court responded that the County was not providing it with "much help," the County stated that it was not giving the trial court "much help other than to indicate that there is a cap of about \$166,500 that needs to be apportioned based upon the amount of time actually spent." The County agreed that the limit applied to an annual basis. The trial court stated that

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<sup>2</sup>As we later discuss, section 3-9008 was recently amended. See Pub. Act 97-982 (eff. Aug. 17, 2012) (amending 55 ILCS 5/3-9008 (West 2010)).

Special Prosecutors were not near the limit for the State's Attorney's salary on an annual basis, and it entered an order requiring the County to pay the fees.

¶ 12 On April 1, 2011, the County filed a motion to reconsider the March 14, 2011, award of attorney fees. The County argued that the fees were not "apportioned" as required by statute. A hearing on the motion to reconsider took place on April 14, 2011. At the hearing, the County argued that section 3-9008 required that compensation for a special prosecutor be apportioned based upon the State's Attorney's actual salary. The County argued that the use of the word "apportioned" contemplated a pro rata determination based on the time actually expended, rather than just that the total bills be under the yearly salary. The County argued that the McHenry County State's Attorney's \$166,508 salary should be divided by 52 weeks, then by 35 hours per week, resulting in a figure of \$91.50 per hour. The County alternatively argued that the fees should be awarded based on a percentage of time Special Prosecutors billed based on a workweek of seven hours per day.

¶ 13 In response, Special Prosecutors cited *People ex rel. Barrett v. Board of Commissioners of Cook County*, 11 Ill. App. 3d 666, 669 (1973), which held that for special prosecutors appointed for reasons other than a vacancy, the award of fees was within the trial court's discretion. The County countered that the *Barrett* court properly applied the statute in effect at the time of that decision, but the statute had since been amended and required apportionment for all special prosecutors. The trial court denied the County's motion to reconsider, stating that it was relying on *Barrett* and that the County had failed to make its current apportionment argument at the March 2011 hearing.

¶ 14 The County filed a notice of an interlocutory appeal on April 25, 2011, seeking review of the March 2011 fee award and the denial of its motion to reconsider. We dismissed the appeal for lack of jurisdiction in an unpublished order. *In re Appointment of Special Prosecutor*, 2011 IL App (2d)

110399-U. The County subsequently filed a motion in the trial court to stay the attorney fee order until it could obtain appellate review over the issue, and the trial court granted the motion.

¶ 15 On October 13, 2011, Special Prosecutors filed a notice of a motion for interim fees for the period of December 1, 2010, to September 30, 2011. Again, Special Prosecutors sought payment at the rate of \$250 per hour. Tonigan sought \$60,937.50 for over 243 hours worked, plus \$520.64 for expenses. McQueen sought \$136,249.50 for 545 hours of work, plus \$6,891.19 for expenses. Special Prosecutors additionally asked for \$91,896.10 for Quest for its investigative services.

¶ 16 The trial court held a hearing on the motion on January 12, 2012. At the hearing, Special Prosecutors stated that they had reduced their fee request by about \$4,250 in response to questions that the County auditor had raised. Regarding the hourly rate of pay, they noted that the McHenry County State's Attorney had requested that attorney David O'Connor be appointed as a special prosecutor, at a rate of \$300 per hour, to investigate the Dalby case. Special Prosecutors also provided a copy of O'Connor's final fee petition wherein he billed accordingly. Special Prosecutors argued that their rate was lower than that of O'Connor and that they also did not charge for travel time. Special Prosecutors reiterated their position that section 3-9008 did not impose an hourly rate restriction.

¶ 17 On the subject of Quest, Special Prosecutors argued as follows. It hired Quest because the Illinois State Police and Lake County Sheriff declined to assist them in their investigation. Also, Quest was appointed by the trial court as an agent of the grand jury. Special Prosecutors obtained search warrants to obtain information from seven or more computers and the County's e-mail server. Daniel Jerger of Quest served as their forensic expert, and he was responsible for maintaining custody of the seized electronic information and making discovery-related copies of those items.

Grand jury subpoenas were served by “Quest agents capable of interviewing the witness at the time of being subpoenaed in an effort to understand what the witness’s testimony would be before the grand jury.” Trial subpoenas were sent through the sheriff’s office. During the trial, Jerger was on the witness stand almost an entire day and provided the foundation for almost all of Special Prosecutors’ exhibits. Less than one week before trial, Quest received a subpoena for all of its office records on the case, and it was ultimately required to produce about 537 pages of documents, which Jerger handled.

¶ 18 The County argued that O’Connor was appointed in another case, and even if the County did not object then, it had not waived its objection in this case. The County restated its argument that under section 3-9008, Special Prosecutors should be paid \$91.50 per hour. The County further argued that this apportionment should also apply to the interim fees already paid.

¶ 19 On the subject of Quest, the County argued that the service of subpoena documents showed that Quest oftentimes sent two or three agents at a time to serve a subpoena. The County stated that Quest had billed \$23,441.25 for serving subpoenas, and it was objecting to this amount because there was no showing that there was not a less reasonable or less expensive alternative. The County argued that Jerger sought a total of \$102,312.50 in fees, based on a rate of \$250 per hour, but his activity was almost worthless from an evidentiary standpoint because he was not able to “lay out” what Special Prosecutors had alleged in their case. The County argued that billings showed Jerger doing clerical work, preparing reports from witnesses he did not even interview, and doing discovery compliance. The County asserted that such work could have been done at a much lower rate. It agreed that Quest should be paid for 79.75 hours of work, totaling \$19,937.50, that it confirmed was work Jerger had done in conjunction with the County’s IT administrator.

¶ 20 The trial court issued its ruling on January 26, 2012. It stated as follows. The case's circumstances were unique and rare in that a seated State's Attorney was indicted while in office. A grand jury returned two indictments that resulted in two criminal trials. It did not believe that the *Barrett* decision had been changed by any subsequent modification of the statute, and that case still stood for the payment of fair and customary fees and costs to a special prosecutor. Also, as a special prosecutor, Tonigan was governed by the same statutes applicable to State's Attorneys, which gave him authority to procure services so he could perform the duties of his office. There were certain amounts in the Quest bill that the trial court did not understand and did not get an explanation for, and it was reducing the Quest bill by these amounts, totaling \$2,462.23. The trial court awarded Tonigan \$60,687.50 in fees and \$520.64 in expenses; it awarded McQueen \$132,249.50 in fees and \$6,891.19 in expenses, and it awarded Quest \$87,854.36.

¶ 21 On February 24, 2012, the trial court entered findings pursuant to Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010) that there was no just reason for delaying enforcement or appeal of the March 2011 and January 2012 fee orders. The County filed a notice of appeal of the March 2011 fee order and the April 2011 denial of its motion to reconsider the fee order. It filed a separate notice of appeal of the January 2012 fee order. We subsequently granted Special Prosecutors' motion to consolidate the appeals.

¶ 22

## II. ANALYSIS

¶ 23

### A. Special Prosecutors' Compensation

¶ 24 On appeal, the County first argues that the trial court misinterpreted section 3-9008 by refusing to limit and apportion Special Prosecutors' compensation. Special Prosecutors respond that: (1) the County forfeited its argument as to the March 2011 fee award because the County did not

raise its mathematical apportionment argument until the motion to reconsider; (2) section 3-9008 provides the trial court the discretion to determine a reasonable and appropriate hourly rate for special prosecutors, subject only to the cap set forth in the statute and the limitation that compensation may be made only for the time they reasonably devote to their duties; and (3) the County is estopped from relying on its current construction of section 3-9008 because the County affirmatively intervened in the action to represent its interests in the compensation, failed to thereafter object to the hourly rate, and paid several interim fees without objection, and Special Prosecutors detrimentally relied on these actions because they accepted their engagements and rendered services based on the County's manifested position that their hourly rate was lawful and appropriate.

¶ 25 We find the issue of statutory interpretation dispositive, so we turn to that issue. The fundamental rule of statutory construction is to ascertain and give effect to the legislature's intent. *Wisnasky-Bettorf v. Pierce*, 2012 IL 111253, ¶ 16. The best indication of that intent is the statute's language when given its plain and ordinary meaning. *Nowak v. City of Country Club Hills*, 2011 IL 111838, ¶ 11. Statutory construction is a question of law that we review *de novo*. *Id.*

¶ 26 Section 3-9008 provided for the appointment of special prosecutors in two scenarios: (1) if the "State's attorney is sick or absent, or unable to attend, or is interested in any cause or proceeding" and (2) "in case of a vacancy of more than one year in any county in the office of State's attorney, by death, resignation, or otherwise \*\*\*." 55 ILCS 5/3-9008 (West 2010). The statute further stated in relevant part:

"Any attorney appointed for any reason under this Section shall possess all the powers and

discharge all the duties of a regularly elected State's attorney under the laws of the State to the extent necessary to fulfill the purpose of such appointment, and *shall be paid by the county he serves not to exceed in any one period of 12 months, for the reasonable amount of time actually expended in carrying out the purpose of such appointment, the same compensation as provided by law for the State's attorney of the county, apportioned, in the case of lesser amounts of compensation, as to the time of service reasonably and actually expended.*" (Emphasis added.) 55 ILCS 5/3-9008 (West 2010).

¶ 27 The County argues that the trial court mistakenly relied on *Barrett*, 11 Ill. App. 3d 666, in interpreting section 3-9008. The statute in effect at the time of *Barrett* was slightly different than the version at issue here in that the last sentence stated:

*"Such attorney so appointed shall possess all the powers and discharge all the duties of a regularly elected state's attorney under the laws of the State, and shall be paid by the county he serves the same compensation as provided by law for the state's attorney of the county, apportioned as to the time of service."* (Emphasis added.) Ill. Rev. Stat. 1970, ch. 14, ¶ 6.

In *Barrett*, the trial court appointed a law firm as a special prosecutor based on the State's Attorney having a conflict of interest. *Barrett*, 11 Ill. App. 3d at 667. The trial court determined that \$50 per hour was a reasonable fee for the services and ordered Cook County to pay the bill of \$3,500. *Id.* at 668. Cook County's Board of Commissioners appealed, arguing as relevant here that the fees were unreasonably high and did not conform to the statute. *Id.* at 669.

¶ 28 The appellate court noted that the statute provided for the appointment of a special prosecutor in two situations, those being if the state's attorney is sick/absent/interested, or if there was a vacancy. The court stated that in the latter situation, the statute provided that the special prosecutor

would be paid the same compensation as that for the county's state's attorney, apportioned as to the time of service, but that there was no provision for compensation in the former situation. *Id.*<sup>3</sup> The court reasoned:

“In light of this omission practical considerations support a construction of the statute which leaves the question of fees to the discretion of the trial court. When an acting State's Attorney is appointed to fill a vacancy, he takes over the entire resources of the office, including staff, clerical personnel, and offices. On the other hand, a special State's Attorney must use his own staff and office resources in the completion of the assigned task. As a result, the net salary of the State's Attorney apportioned for time of service may be insufficient to pay for both the time and overhead expenses of a private attorney.” *Id.*

The court held that the trial court did not abuse its discretion in its fee award. *Id.* at 669.

¶ 29 Here, the County agrees that *Barrett* correctly interpreted the statute as it existed at the time. However, the County argues that 1988 amendments changed the statute's meaning. We set forth the relevant changes resulting from Public Act 85-188, as indicated in bold/italics and strikeouts:

“~~Any Such~~ attorney ~~so~~ appointed ***for any reason under this Section*** shall possess all the powers and discharge all the duties of a regularly elected state's attorney under the laws of the State ***to the extent necessary to fulfill the purpose of such appointment***, and shall be

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<sup>3</sup>As described, the statute, after mentioning the appointment of a special state's attorney in the event of a vacancy, stated that “[s]uch attorney so appointed” would be compensated “the same compensation as provided by law for the state's attorney of the county, apportioned as to the time of service.” Ill. Rev. Stat. 1970, ch. 14, ¶ 6.

paid by the county he serves *not to exceed in any one period of 12 months, for the reasonable amount of time actually expended in carrying out the purpose of such appointment*, the same compensation as provided by law for the state's attorney of the county, apportioned, *in the case of lesser amounts of compensation*, as to the time of service *reasonably and actually expended.*" Pub. Act 85-188 (eff. Jan. 1, 1988) (amending Ill. Rev. Stat. 1977, ch. 14, ¶ 6).

¶ 30 The County notes that the amendment applied the statute's compensation provision to all special prosecutors, not just those filling a vacancy. The County argues that, thereafter, the statute's structure no longer supported the distinction in *Barrett* that section 3-9008 does not provide for compensation for non-vacancy appointments. The County argues that given that the legislature waited almost 15 years after *Barrett* to enact the amendment, it presumptively represented an intent to change existing law and regulate the compensation of all appointed special prosecutors. The County maintains that although *Barrett* "recognized" that the apportioned amount of a State's Attorney's salary may not be sufficient to pay for both the special prosecutor's time and overhead expenses, the statute was clear and unambiguous and must be enforced as written. The County contends that the apportioned hourly rate should be \$91.50 here.

¶ 31 Special Prosecutors argue that section 3-9008 does not impose any limitation on a trial court's discretion in determining a special prosecutor's hourly rate, but rather limits the trial court discretion in determining the number of hours for which a special prosecutor is entitled to be compensated. They argue that section 3-9008 refers to the amount of time expended twice, first its requirement that compensation be limited to "the reasonable amount of time actually expended" and second in its statement that compensation be apportioned "as to the time of service reasonably and

actually expended.” 55 ILCS 5/3-9008 (West 2010). Special Prosecutors argue that in contrast to the statute’s very specific direction concerning compensable time, there is no mention of a specific hourly rate or any direction to the court on calculating a rate, which the legislature could have included had it intended to. Instead, they argue, the statute caps the total compensation to the state’s attorney’s annual salary, and it limits the compensation to those hours actually spent on matters necessary to fulfill the purpose of the special appointment.

¶ 32 Special Prosecutors maintain that the restriction on the apportionment of time has significant practical consequences, in that it precludes compensation based on a fixed fee arrangement or a contingency fee arrangement. Special Prosecutors argue that it also prohibits a special prosecutor from claiming a pro rata percentage of the State’s Attorney’s full salary for an appointment period, even if the special prosecutor did not devote full time to the matter, which was what the special prosecutor sought in *Aiken v. Will County*, 321 Ill. App. 171 (1943). In that case, the appellate court stated that the question was not how long an individual had been appointed, but rather “how much time he spent in connection with the particular matter for which, and no other, he was employed.” *Id.* at 182. Special Prosecutors argue that section 3-9008’s amendments clearly address the same concerns as in *Aiken*, those being that a special prosecutor’s pay be tied to “the time of service reasonably and actually expended.” 55 ILCS 5/3-9008 (West 2010).

¶ 33 Special Prosecutors argue that in addition to a lack of statutory basis to read an hourly rate limitation in section 3-9008, there are strong public policy reasons not to do so. They argue that special prosecutors serve a valuable function by performing a public role when the State’s Attorney’s office is precluded from performing its usual duties. Special Prosecutors argue that such an appointment typically requires an attorney to divert time that would otherwise be devoted to private

practice to investigate matters that may be unpopular, such as the investigation and prosecution of the elected official here. Special Prosecutors argue that a circuit court's discretion to set a reasonable hourly rate, subject to the statutory cap, enhance a county's ability to persuade experienced and talented attorneys to take on controversial matters. Special Prosecutors argue that imposing an hourly rate of \$91.50 would present serious impediments to hire such attorneys, because as *Barrett* pointed out, it would not cover the overhead of many attorneys in private practice.

¶ 34 Special Prosecutors further argue that although section 3-9008 was amended to address the compensation of special prosecutors following *Barrett*, *Barrett's* analysis remains consistent with the statute, which does not limit the trial court's discretion to set a reasonable hourly rate for special prosecutors. Special Prosecutors agree that the prior version addressed the compensation of only state's attorneys appointed to fill a vacancy, whereas the 1988 amendment extended the compensation language to "[a]ny attorney appointed" under the statute. However, Special Prosecutors argue that the amendment does not include a mathematical formula for determining a special prosecutor's hourly rate. Special Prosecutors argue that although the County relies on the term "apportioned," there is no language in that statute applying this term to an hourly rate, but rather the statute expressly ties the term "apportioned" to "the time of service," meaning the number of hours devoted. Special Prosecutors argue that the trial court did not err in exercising its discretion to grant their fee petitions based on a \$250 per hour rate, subject to the annual statutory salary cap and a review of their services to make sure their time was reasonable.

¶ 35 We agree with Special Prosecutors that the statute did not dictate their hourly rate of compensation. Rather, it limited the amount they "shall be paid by the county [they serve] not to exceed in any one period of 12 months \*\*\* the same compensation as provided by law for the State's

attorney of the county \*\*\*.” *Id.* Here, it is undisputed that neither special prosecutor received more than the McHenry County’s State’s Attorney’s annual salary in any 12-month period. Section 3-9008 also limited their payment to the “reasonable amount of time actually expended in carrying out the purpose of such appointment.” *Id.* As Special Prosecutors point out, although the County relies on the term “apportioned,” this term is used to reiterate that the payments are limited “as to the time of service reasonably and actually expended.” *Id.* Here, the County does not contest the number of hours Special Prosecutors ultimately billed for the case.

¶ 36 It is true that an amendment to a statute creates the presumption that the legislature intended to change the statute. *People v. Jackson*, 2011 IL 110615, ¶ 18. Still, we agree with Special Prosecutors that although the legislature amended section 3-9008 following *Barrett*, *Barrett*’s analysis that the trial court has the discretion to set a reasonable hourly rate remained consistent with the amendment, which did not limit the trial court’s discretion in determining a reasonable hourly rate for special prosecutors. Instead, the amendment changed the statute to specifically provide compensation for special prosecutors appointed for situations such as a conflict of interest, which was lacking in the prior version. It also added the annual compensation limit and the requirement that the payment be for hours reasonably and actually spent on the assignment, the latter which prevents a special prosecutor from raising an *Aiken*-type argument that he or she receive a pro rata portion of the State’s Attorney’s salary for the length of assignment, regardless of the number of hours worked during that time.

¶ 37 Moreover, we may look to a subsequent amendment to a statute to assist in determining legislative intent. *Jackson*, 2011 IL 110615, ¶ 18. In August 2012, section 3-9008 was significantly amended, as indicated in bold/italics and strikeouts:

“ (a) Whenever the State’s attorney is sick or absent, or unable to attend, or is interested in any cause or proceeding, civil or criminal, which it is or may be his duty to prosecute or defend, the court in which said cause or proceeding is pending may appoint some competent attorney to prosecute or defend such cause or proceeding, and the attorney so appointed shall have the same power and authority in relation to such cause or proceeding as the State’s attorney would have had if present and attending to the same. ***Prior to appointing a private attorney under this subsection (a), the court shall contact public agencies, including but not limited to the Office of Attorney General, Office of the State’s Attorneys Appellate Prosecutor, and local State’s Attorney’s Offices throughout the State, to determine a public prosecutor’s availability to serve as a special prosecutor at no cost to the county.*** ~~and~~

(b) ~~In~~ ***In*** in case of a vacancy of more than one year occurring in any county in the office of State’s attorney, by death, resignation or otherwise, and it becomes necessary for the transaction of the public business, that some competent attorney act as State’s attorney in and for such county during the period between the time of the occurrence of such vacancy and the election and qualification of a State’s attorney, as provided by law, the vacancy shall be filled upon the written request of a majority of the circuit judges of the circuit in which is located the county where such vacancy exists, by appointment as provided in The Election Code of some competent attorney to perform and discharge all the duties of a State’s attorney in the said county, such appointment and all authority thereunder to cease upon the election and qualification of a State’s attorney, as provided by law. Any attorney appointed for any reason under this Section shall possess all the powers and discharge all the duties of a

regularly elected State's attorney under the laws of the State to the extent necessary to fulfill the purpose of such appointment, and shall be paid by the county he serves not to exceed in any one period of 12 months, for the reasonable amount of time actually expended in carrying out the purpose of such appointment, the same compensation as provided by law for the State's attorney of the county, apportioned, in the case of lesser amounts of compensation, as to the time of service reasonably and actually expended. ***The county shall participate in all agreements on the rate of compensation of a special prosecutor.***

***(c) An order granting authority to a special prosecutor must be construed strictly and narrowly by the court. The power and authority of a special prosecutor shall not be expanded without prior notice to the county. In the case of the proposed expansion of a special prosecutor's power and authority, a county may provide the court with information on the financial impact of an expansion on the county. Prior to the signing of an order requiring a county to pay for attorney's fees or litigation expenses, the county shall be provided with a detailed copy of the invoice describing the fees, and the invoice shall include all activities performed in relation to the case and the amount of time spent on each activity.***" Pub. Act 97-982 (eff. Aug. 17, 2012) (amending 55 ILCS 5/3-9008 (West 2010)).

¶ 38 The legislature retained the language at issue here, that the special prosecutor "shall be paid by the county he serves not to exceed in any one period of 12 months, for the reasonable amount of time actually expended in carrying out the purpose of such appointment, the same compensation as provided by law for the State's attorney of the county, apportioned, in the case of lesser amounts of compensation, as to the time of service reasonably and actually expended." *Id.* Significantly,

however, the legislature also added the language that the “county shall participate in all agreements *on the rate of compensation* of a special prosecutor.” (Emphasis added.) *Id.* Wherever possible, a statute should be construed so that no word is rendered meaningless or superfluous. *Sheffler v. Commonwealth Edison Co.*, 2011 IL 110166, ¶ 77. If the prior language had already set the hourly rate of compensation, there would be no need for new language giving counties a role in determining such fees. Instead, the language indicates that the compensation rate is flexible rather than rigid. Thus, the August 2012 amendment supports our interpretation that the version of section 3-9008 at issue here does not dictate the hourly fees for special prosecutors.

¶ 39

B. Quest’s Fees

¶ 40 The County next argues that the trial court erred in ordering it to pay unreasonable compensation for Quest employee Jerger’s time in preparing discovery for Special Prosecutors and in responding to a subpoena *duces tecum* that was directed to Quest. An award of attorney fees and costs is reviewed under the abuse-of-discretion standard. *Kunkel v. P.K. Dependable Construction, LLC*, 387 Ill. App. 3d 1153, 1159 (2009). The party seeking fees must provide sufficient information, including detail time records, to assist the trial court in assessing the reasonableness of fees. *McHenry Savings Bank v. Autoworks of Wauconda, Inc.*, 399 Ill. App. 3d 104, 113 (2010).

¶ 41 The County argues that Jerger was court-appointed to act only as an agent and investigator of the special grand jury, and preparing material for Special Prosecutors’ discovery compliance was not a grand jury responsibility. The County maintains that Special Prosecutors failed to explain why it should be ordered to pay Quest for Special Prosecutor’s unilateral decision to contract out a key portion of their own duties, namely discovery compliance, without seeking prior judicial authorization.

¶ 42 We note that Quest has not filed a brief on appeal. However, we will address the issues presented based upon the principles set forth in *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976).

¶ 43 In discussing its ruling on fees and costs, the trial court noted that section 3-9008 provides that a special prosecutor “shall have the same power and authority in relation to such cause or proceeding as the State’s attorney would have if present and attending to the same \*\*\*.” 55 ILCS 5/3-9008 (West 2010). The powers of a State’s Attorney include appointing special investigators to serve subpoenas and conduct investigations (55 ILCS 5/3-9005 (West 2010)) and procuring the necessary services to perform the duties of his office (55 ILCS 5/3-9006 (West 2010)). Special Prosecutors stated during the January 2012 hearing that they hired Quest because both the State Police and Lake County Sheriff would not help them in their investigation. Given the statutory powers given to Special Prosecutors and the practical necessity of using investigators to build a criminal case, we conclude that they were not required to obtain court permission to hire Quest for investigation purposes. That being said, their ultimate billings were still subject to court review.

¶ 44 Although the County seems to argue that Special Prosecutors should have conducted their own discovery compliance rather than assigning such tasks to Jerger, we note that this would not have resulted in any reduction of fees to the County, as Special Prosecutors were likewise paid \$250 per hour. Moreover, the County fails to cite in its brief the specific discovery charges it contests (see *People v. Chatman*, 357 Ill. App. 3d 695, 703 (2005) (an appellant’s failure to properly present his own arguments can result in forfeiture of those claims on appeal)), other than those related to compliance with a subpoena *duces tecum*. Accordingly, we turn to that issue.

¶ 45 Special Prosecutors argue that the County forfeited its argument regarding costs associated with a subpoena *duces tecum* by failing to raise the issue in the trial court. However, Special Prosecutors' counsel recognize that they do not represent Quest, which, as stated, did not file a brief in this appeal. A party forfeits a forfeiture argument by failing to argue it in its brief. *Jackson v. Board of Election Commissioners*, 2012 IL 111928, ¶ 63. As Quest has not raised the issue of forfeiture, it may not be applied against the County. Moreover, in its response pleading to the fee petition, the County specifically identified discovery charges made shortly before the March 2011 trial, and at the hearing Special Prosecutors identified the work as a result of a subpoena directed at Quest.

¶ 46 The recipient of a subpoena *duces tecum* is not automatically entitled to compensation for reproducing requested documents. See *People v. Ekong*, 221 Ill. App. 3d 559, 563-64 (1991). Section 2-1101 of the Code of Civil Procedure states:

“For good cause shown, the court on motion may quash or modify any subpoena or, in the case of a subpoena *duces tecum*, condition the denial of the motion upon payment in advance by the person in whose behalf the subpoena is issued of the reasonable expense of producing any item therein specified.” 735 ILCS 5/2-1101 (West 2010).

Here, Quest did not request advance payment for the reasonable expenses of complying with the subpoena *duces tecum*. Also, the appellate court has rejected the argument that the statute allows for the payment of expenses *after* the production is complete. *Costa v. Keystone Steel & Wire Co.*, 267 Ill. App. 3d 683, 691-92 (1994). Accordingly, we agree with the County that the trial court abused its discretion in ordering the County to pay the costs associated with Quest's compliance with

the subpoena *duces tecum* issued against it. Therefore, we remand the cause for the trial court to reduce Quest's fees by the amount charged to comply with the subpoena *duces tecum*.

¶ 47 Finally, the County argues that there is no evidence in the record that every hour of Jerger's work was necessary, that it all required someone of his skill level, and that \$250 per hour was a reasonable and customary rate charged by experts of Jerger's caliber.

¶ 48 We note that the County agreed in the trial court that Jerger was entitled to payment for about 80 hours of work at \$250 per hour, so it may not now universally challenge his hourly rate. See *In re Marriage of Petrik*, 2012 IL App (2d) 110495, ¶ 40 (issues not raised in the trial court are forfeited on appeal). Moreover, the trial court here reviewed the detailed billing records submitted by Quest and reduced its fees by amounts it found to be insufficiently explained. Other than the charges related to the subpoena *duces tecum*, we cannot say that the trial court abused its discretion in awarding Quest the remainder of its fees.

¶ 49

### III. CONCLUSION

¶ 50 For the reasons stated, the judgment of the McHenry County circuit court is affirmed in part and reversed in part, and the cause is remanded for further proceedings consistent with this order.

¶ 51 Affirmed in part and reversed in part; cause remanded.