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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

AUTOMATED INDUSTRIAL	)	Appeal from the Circuit Court
MACHINERY, INC.,	)	of Du Page County.
	)	
Plaintiff-Appellant and Counter-	)	
Defendant/Cross-Appellee,	)	
	)	
v.	)	No. 13-CH-1758
	)	
TOM J. CHRISTOFILIS and,	)	
IP AUTOMATION, INC.,	)	
	)	
Defendants-Appellees,	)	
	)	
(Tom J. Christofilis, Counter-Plaintiff/	)	Honorable
Cross-Appellant; Constantine Grapsas,	)	Bonnie M. Wheaton,
Third-Party Defendant/Cross-Appellee).	)	Judge, Presiding.

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

ORDER

- ¶ 1 *Held:* The trial court did not err in: (1) finding in favor of the defendants on the plaintiff's claim for breach of fiduciary duty; (2) dismissing the plaintiff's claim for violation of a restrictive covenant; (3) granting the defendants' claim for indemnification and awarding reasonable attorney fees; and (4) denying counter-plaintiff's claim for shareholder oppression.
- ¶ 2 The plaintiff, Automated Industrial Machinery, Inc. (AIM), filed a second amended complaint against the defendants, Tom Christofilis and IP Automation, Inc. (IPA), alleging

claims based, in relevant part, on breach of fiduciary duty and violation of a restrictive covenant. Christofilis filed a first amended counterclaim against AIM and Constantine Grapsas, alleging shareholder oppression. The trial court dismissed the claims based on the restrictive covenant and, following a bench trial, found in favor of Christofilis and IPA on the breach of fiduciary duty claims. The trial court granted Christofilis' posttrial motion for indemnification and awarded reasonable attorney fees. AIM appeals from these orders. The trial court denied Christofilis' counterclaim for shareholder oppression. Christofilis cross-appeals from that order. We affirm.

¶ 3

I. BACKGROUND

¶ 4 Grapsas is the president and founder of AIM. AIM manufactures a computer-driven machine capable of bending a strand of wire or steel into any geometric form for the automotive, agricultural, appliance, and consumer industries. On February 19, 1998, Grapsas hired Christofilis, a mechanical engineer, to work for AIM. During his tenure, Christofilis rose from mechanical engineer to engineering manager and eventually became the vice president of engineering and director of the engineering department. In 1999, Christofilis was offered the opportunity to purchase 130 shares of AIM stock for \$52,000, and he did so. Thereafter, at some point, Christofilis was elected to AIM's board of directors.

¶ 5 While Christofilis was employed at AIM, AIM adopted a policy that required its employees to sign restrictive covenants. A couple of years after most employees had signed such an agreement, it was discovered that Christofilis never signed a restrictive covenant. Grapsas advised Christofilis that he was expected to sign such an agreement. Christofilis negotiated an agreement tailored to his specific needs. On March 30, 2012, Christofilis signed a non-piracy and confidentiality agreement (the Agreement). The Agreement stated that "[AIM] is willing to continue to employ [Christofilis] provided that [Christofilis] enters into this Agreement with

[AIM] as a condition precedent to his continued employment, and [Christofilis] desires to accept such condition and continue his employment.” The Agreement contained several post-termination restrictive covenants.

¶ 6 On July 27, 2012, Christofilis submitted his resignation. He remained employed until September 7, 2012. Thereafter, Christofilis started his own company, IPA. Christofilis was formally removed from AIM’s board of directors by the shareholders on March 2, 2013.

¶ 7 The record indicates that, on October 1, 2012, Christofilis sent Grapsas documents outlining the IPA business. In an attached letter, Christofilis stated that IPA would not be competing against any machines in AIM’s current product line. Christofilis further stated that IPA’s primary purpose was to automate secondary operations that had no readily available equipment, and to develop high volume machinery for metal fabricators. Christofilis described these “secondary operations” as part finishing operations such as heat treating, stress relieving, and coating, and part joining technologies, such as welding, riveting, and clinching operations.

¶ 8 On May 29, 2013, AIM filed this lawsuit and a petition for temporary restraining order and preliminary injunction against Christofilis and IPA. On September 6, 2013, AIM filed a verified second amended complaint against Christofilis and IPA alleging that Christofilis and IPA were competing against it and sought to enforce Christofilis’ obligations under the Agreement, the Illinois Trade Secrets Act (Trade Secrets Act) (765 ILCS 1065/1 *et seq.* (West 2012)), and as a director of AIM. AIM alleged claims based on breach of the Agreement (counts I, II, VI, VII, and VIII); promissory estoppel (Count III); breach of fiduciary duty (counts IV and V); inevitable disclosure of trade secrets (count IX); misappropriation of trade secrets and violation of the Trade Secrets Act (count X), and tortious interference with customer relations (count XI).

¶ 9 On July 9, 2013, Christofilis filed a section 2-615 (735 ILCS 5/2-615 (West 2012)) motion to dismiss the claims for breach of the Agreement. On October 22, 2013, the trial court granted Christofilis' motion. The trial court found that in the recitals and in the body of the Agreement, the only consideration set forth was the continued employment of Christofilis. The trial court found that Christofilis' five months of continued employment did not constitute valid consideration. As to the claim based on promissory estoppel, the trial court found that promissory estoppel could not be established by a writing outside of the Statute of Frauds if that agreement was unenforceable. As the Agreement was unenforceable due to lack of consideration, the promissory estoppel claim failed. The trial court dismissed counts I, II, III, VI, VII, and VIII with prejudice. AIM subsequently sought leave to file an interlocutory appeal of that order. That request was denied. AIM then withdrew its petition for temporary restraining order and preliminary injunction.

¶ 10 On May 6, 2014, Christofilis filed a three-count first amended counterclaim against AIM and a third-party claim against Grapsas. Count I, against AIM and Grapsas, alleged a claim based on oppressive conduct towards a minority shareholder under section 12.56(a)(3) of the Illinois Business Corporations Act of 1983 (Act) (805 ILCS 5/12.56(a)(3) (West 2012)). Specifically, Christofilis alleged that AIM and Grapsas, as the majority shareholder, had pressured Christofilis, after his resignation, to sell his shares of AIM back to AIM and/or Grapsas. However, they refused to value those shares properly and demanded that Christofilis accept a purchase price that was below market value. Further, Christofilis alleged that Grapsas used his position to engage in conduct that was overbearing and onerous to Christofilis as a minority shareholder of AIM, including by: retaining earnings to avoid paying dividends; barring Christofilis from participating in the selection of board members; falsely accusing Christofilis of improperly providing unauthorized AIM employees with confidential access codes to AIM's

alarm system; and granting a 300% increase and bonus to himself, thereby minimizing monies available to pay dividends to Christofilis. Christofilis requested that AIM and Grapsas be (1) enjoined from such oppressive conduct, (2) ordered to declare and pay dividends due to Christofilis since December 2012, and (3) ordered to pay Christofilis the fair value for his shares of AIM.

¶ 11 Count II asserted a claim against AIM for indemnification under section 8.75(b) of the Act (805 ILCS 5/8.75(b) (West 2012)). Christofilis alleged that under that section of the Act, he should be indemnified for all his expenses, including attorney fees, in defending against AIM's claims based on the Agreement, which were dismissed under section 2-615. Count III stated a claim for indemnification based on AIM's corporate bylaws, which allegedly required AIM to indemnify Christofilis for his expenses, including attorney fees, incurred in litigating the claims based on the Agreement. On July 31, 2014, the trial court granted a motion by Christofilis to voluntarily dismiss the claims for indemnification, and counts II and III were dismissed without prejudice.

¶ 12 On February 19, 2015, Christofilis moved for summary judgment on AIM's remaining claims. On February 27, 2015, AIM moved for summary judgment on Christofilis' claim for shareholder oppression. On July 29, 2015, following oral argument, the trial court denied the cross-motions for summary judgment. Simultaneously, the trial court granted AIM's motion to voluntarily dismiss its claims for trade secret misappropriation (counts IX and X) without prejudice. Given the nature of the remaining claims (counts IV, V and XI), which were based on fiduciary duty and tortious interference, AIM withdrew its jury demand by agreement of the parties.

¶ 13 Counts IV and V were claims for breach of fiduciary duty and duty of loyalty. In count IV, AIM alleged that Christofilis breached these duties by competing with AIM and exploiting

AIM's confidential business information. Count V alleged that Christofilis, through work performed on behalf of IPA, had taken business opportunities that belonged to AIM. In count XI, AIM alleged that Christofilis intentionally and without justification tortiously interfered with AIM's business relationships with its customers. On March 7, 2016, a bench trial commenced on these counts of AIM's verified second amended complaint and count I of Christofilis' first amended counterclaim.

¶ 14 Grapsas testified that he was the president and founder of AIM, which he founded in 1992. AIM developed manufacturing processes for bending wire to make finished products such as wire shelves or the metal frames for seats in cars. Grapsas wrote programs for computer numerical controlled (CNC) wire bending equipment. Based on the programming, AIM developed machines that made various parts. These machines performed bending, threading, welding, chamfering (smoothing), squeezing, and pressing. AIM also made welding equipment and presses, and it integrated its machines with robotics. AIM engineered software that allowed its machines to communicate directly with the robot controllers, telling the controllers what to do and when to do it. AIM also provided training for the processes it developed and maintenance on its equipment. Foreign companies sold wire bending machines a lot cheaper so the majority of AIM's business was due to the comprehensive solutions and accessory equipment it provided to its customers.

¶ 15 Grapsas hired Christofilis in 1998 or 1999. Christofilis was promoted to engineering manager, then to director of engineering, and ultimately to vice president of engineering. Christofilis was the principal engineer for AIM. He was responsible for quoting prospective projects and providing technical support. Customers would call Christofilis directly for help with problems. Grapsas testified that he always introduced Christofilis as a partner in the company. Christofilis was the main contact for new customers because there was a lot of

engineering involved to meet customer specifications, OSHA regulations, and other requirements.

¶ 16 Grapsas acknowledged that Christofilis purchased 130 shares of stock for \$52,000 in March 1999. Grapsas identified Plaintiff's Exhibit 14, the balance sheet for AIM as of July 31, 1999. As of that date, the assets of the company totaled \$866,641, the estimated profits on pending sales were \$280,634, and the liabilities were \$180,843. Thus, total assets minus liabilities were about \$966,000. However, Grapsas wanted to give Christofilis a break, so he just used \$866,000 as the total assets minus liabilities in valuing AIM's stock. On cross-examination, Grapsas acknowledged that two exhibits admitted into evidence by Christofilis showed that Grapsas valued the stock for Christofilis' 1999 purchase by considering only the total assets of \$866,641 and not considering profits from pending sales or subtracting any liabilities. The amount of shares was calculated by adding the purchase price of \$52,000 to the total assets of the company (\$866,641), resulting in a percentage of 5.66%. Since there were already 2154 shares outstanding, AIM issued Christofilis 130 shares. This was calculated based on 2154 shares equating to 94.34%. Christofilis had received annual distributions from AIM since his purchase of stock.

¶ 17 Grapsas further testified that when Christofilis purchased his shares of stock, he became a member of AIM's Board of Directors. Christofilis served on the board for 13 years but was voted off the board in March 2013. The shareholders did not remove Christofilis from the board when he resigned because Grapsas did not see any reason to remove him. In March 2013, Grapsas realized Christofilis was competing with AIM and, thereafter, took action to remove Christofilis from the board. Grapsas admitted testifying in a deposition that the first time he learned of Christofilis' alleged competition was in April 2013, when one of AIM's employees went to a customer, Blue Grass Metals, for a service call.

¶ 18 Grapsas testified that between September 7, 2012 and March 2, 2013, Christofilis was providing guidance to AIM employees on his unfinished projects. On cross-examination, Grapsas testified that after September 2012, he did not talk to Christofilis about customers, human resources, or strategic planning. Christofilis did not participate in any management-level meetings and Grapsas did not delegate any management duties to Christofilis. Grapsas testified that after Christofilis' resignation, he told him that he could not compete but he did not mention anything about Christofilis' continuing duties as a director of AIM. He acknowledged that Christofilis did not attend any board meetings after his employment ended.

¶ 19 Grapsas testified that between 2002 and 2011, Christofilis was AIM's third highest paid salaried employee. He was never denied a raise or a bonus. Christofilis had a company car and phone and an IRA plan. When Christofilis resigned, he asked Grapsas to buy his shares of AIM. AIM was not required to purchase the shares of stock, but they started negotiations to do so. One of AIM's directors and a strategic planning consultant, John Kokenge, negotiated on behalf of AIM. AIM never refused to explain the basis for its stock valuation and never provided any false information to Christofilis. AIM offered to purchase the shares at 6.687% of total equity. AIM had recently purchased shares from another shareholder at 5.66%. Grapsas testified that Christofilis has continued to receive all his dividend distributions since his resignation. The distributions were not altered or reduced due to his resignation. Christofilis had received distributions in excess of \$650,000 since he purchased his shares of AIM.

¶ 20 Grapsas testified that Christofilis identified his new company as "automating secondary operations." But AIM already provided automated secondary operations for its machinery. Grapsas further testified that he had been to visit one customer, Blue Grass Metals, and was able to see a project completed by Christofilis and IPA. The completed project was a project that AIM could have performed for Blue Grass Metals. Grapsas stated that AIM would have wanted

to do that project but that Christofilis never disclosed or offered the project to AIM. Grapsas acknowledged that AIM had never designed the exact project at Blue Grass Metals, which included a fluidized bed cell, but it had designed other projects. Grapsas also acknowledged that AIM had never sold a fluidized bed cell.

¶ 21 Grapsas testified that oven stress reliever lines were not something normally offered by AIM but he considered it potentially competitive for IPA to offer such because he could buy oven stress reliever lines from a competitor and integrate them with an AIM machine. He testified similarly as to material joining operations (clipping, clinching, and riveting). Grapsas acknowledged that in its answer to Interrogatory No. 11, AIM identified as “competitive” a list of technologies similar to what Christofilis indicated IPA would perform in IPA’s business brochure, which was included in an October 1, 2012, letter sent from Christofilis to Grapsas. In that interrogatory answer, Grapsas did not indicate that any of the following would be identical or competitive with services offered by AIM: oven stress relieving lines; powder coating through fluidized bed processes in nylon, vinyl, epoxy or polyethylene; material joining operations; or dedicated high-volume production machines.

¶ 22 Grapsas identified Plaintiff’s Exhibit 73 as a proposal made to Supro Spring and Wire from Christofilis and IPA, dated January 2, 2013. It was for the design and installation of a “floating straightener.” Grapsas acknowledged that AIM had never designed or sold a floating straightener but stated it had designed a servo straightener, which was more mechanical and done with a motor. Grapsas identified Plaintiff’s Exhibit 82 as a proposal to Automatic Spring for an automatic resistance stress-relieving application (heating a bent wire to relieve any stresses created by the bending). Grapsas described the stress-relieving equipment as the “same as welding” and acknowledged that AIM never integrated this type of stress-relieving unit with a competitor’s wire bender. Grapsas identified Plaintiff’s Exhibit 90, a proposal to Dudek & Bock

for a vision inspection system. AIM had performed a similar project a couple of times. Plaintiff's Exhibit 100 was a proposal to Hickory Springs for an automated coding cell. Grapsas visited Hickory Springs and saw the final product. These were the types of projects that AIM could have performed, had Christofilis disclosed them to AIM. All of the above companies were long-time customers of AIM. Grapsas testified that he lost profits on these projects and additional revenue AIM would have made in service and maintenance on the projects.

¶ 23 Christofilis testified that after he resigned from AIM, he worked with six or seven of AIM's customers. Half of those customers had called him and he had reached out to the other half. He sold equipment and machinery to five of AIM's customers: Automatic Spring, Blue Grass Metals, Supro Spring, Dudek & Bock, and Hickory Springs.

¶ 24 Christofilis identified Plaintiff's Exhibit 50 as an automatic coating and assembly cell proposal he made for Blue Grass Metals dated September 18, 2012. It was a \$300,000 project that was completed in two phases. The first phase integrated a robotic fluidized bed coating cell, which involved dipping wire parts into a nylon powder. The second phase completed a larger multi-stage assembly of the final product, which was used as a manual lumbar support in the seats of certain automobiles. Christofilis testified that this project was not at all similar to the work he did at AIM. He used technologies that were never used at AIM, such as stress relieving, nylon coating, and clipping things together. He completed the project by trial and error and did not make any money on it.

¶ 25 Christofilis testified that he did a project for Supro Spring in 2015. He drafted a proposal to design and manufacture a "servo control straightener actuator." By using the straightener actuator, a customer could keep a wire straight as it moved back and forth through a machine. Christofilis testified that he never designed a straightener actuator while he was at AIM. Further,

the straightener actuator did not accompany an AIM machine but was suitable for any machine that had a two- or three-plane straightener.

¶ 26 Christofilis identified Plaintiff's Exhibit 82 as a proposal he submitted to Automatic Spring on February 27, 2013. It was a proposal to design and manufacture an automated resistance stress-relieving unit—where a piece of equipment took a wire form from a wire bender machine and moved it to a “resistance head,” where the wire was heated by passing electricity through it. The heating removed stress that was created when the wire was bent. The wire bender machine was manufactured by Mang, an AIM competitor. Christofilis testified that AIM never sold the integration of a stress-relieving unit to one of its wire benders.

¶ 27 Christofilis identified Plaintiff's Exhibit 88, dated January 3, 2012, as a proposal accepted by Dudek & Bock for an automated vision inspection station. Essentially, the system grabbed a spring, rotated it and took two pictures, via computer software determined if the spring met specifications, and then dropped the part into a “good” or “bad” chute. There were no AIM machines used in this project and Christofilis had never worked on a spring machine at AIM.

¶ 28 Christofilis identified Plaintiff's Exhibit 100 as a proposal, dated February 14, 2013, for the design and installation of an automated coating cell at Hickory Springs. The design involved a conveyor to transport bent wire to an oven for stress relief and then to a fluidized bed for coating. Overall the project involved a conveyor, cooling station, vision inspection system, and a robot. This project was unlike anything he did at AIM and did not involve any AIM machines.

¶ 29 Christofilis also testified that he only attended one board of directors' meeting while he worked at AIM. That meeting was on October 13, 2011, and was preceded by a shareholders' meeting. At the shareholders' meeting, the shareholders voted on directors. Grapsas moved to amend the bylaws to allow for four directors. Grapsas proposed the slate of directors to be Grapsas and three others, but not Christofilis. One of the people Grapsas proposed did not want

to be on the board. As a result, Christofilis was elected to the board. Christofilis testified that he never had any other discussions with Grapsas about being on the board. The October 2011 meeting was the first time he had known of being placed on the board. After he left AIM, and was reviewing some corporate documents, he realized for the first time that he had been on the board of directors since March 2000. Christofilis testified that after he left AIM, he turned down certain opportunities with companies like Automatic Spring and K&S Wire because he thought he had a non-compete agreement with AIM, not because he thought he had continuing duties as a director of AIM.

¶ 30 Christofilis testified that, before his last day of employment, he told Grapsas that he planned to open an automation company that would do custom automation. Christofilis told Grapsas that he was particularly interested in stress relieving and nylon coating. Christofilis was going to go after high-volume stuff. Christofilis testified that AIM was not into high-volume machinery. Grapsas told Christofilis that he would help him out and they could work together.

¶ 31 In a March 1, 2016, deposition, Tony Schmidt testified that he was the president of Blue Grass Metals. As to the Blue Grass Metals project completed by IPA, it occurred in two phases. The first phase automated the coating of the parts. Prior to the project, Blue Grass Metals was paying an outside service to do the coating by hand. The second phase was assembling the whole part, joining the coated part with a piece of plastic, another wire form, and four clips. Schmidt testified that he did not ask AIM to bid on the project because it was not in their scope of engineering or service. AIM typically provided them with single head benders. Schmidt described the project as “turnkey custom machinery” and testified that AIM had never performed work for him that fell within this realm.

¶ 32 Karolis Dubauskas testified that he had been an AIM employee for five years. After engineers designed a project for a customer, his role was to go and install the machine and

equipment. Christofilis was the person who hired him at AIM. Dubauskas testified that Christofilis was one of the most talented engineers he had ever met. Dubauskas testified that he made a service call at Blue Grass Metals in Kentucky in April 2013. He noticed a robot integrated into an AIM machine, which he had never seen before. He was aware that the project was performed by Christofilis. Dubauskas opined that AIM could have performed this work.

¶ 33 Constant Goudis testified that he had been employed by AIM as a sales executive and sales manager for 16 years. In sales, he would interact with the customer to determine what they needed and then go back to AIM's engineering department to see if it could be done. Based on his experience, he believed that AIM could have performed the projects that were completed by Christofilis for IPA. On cross-examination, Goudis acknowledged that Hickory Springs had asked AIM to quote the integration of a robot to a fluidized bed. AIM quoted the robots and the integration but not the fluidized bed because Hickory Spring said it would provide its own fluidized bed. AIM would not have designed the fluidized bed, it would have purchased it from a third party and integrated it with AIM's system. AIM had never designed a fluidized bed cell without a corresponding sale of an AIM wire bender. Goudis acknowledged that Hickory Springs had purchased three wire benders from AIM since Christofilis resigned. Goudis also acknowledged that AIM had never sold a vision inspection unit or an automated stress-relieving unit that was integrated to a competitor's machine. While AIM had quoted a floating straightener, it had never sold one. Goudis testified that since Christofilis resigned, AIM had sold three wire benders to Hickory Springs, five wire benders to Supro Springs, and a 3D wire bender to Blue Grass Metals

¶ 34 Kokenge testified that he advised AIM on strategic planning and was a member of AIM's board of directors. After Christofilis resigned in September 2012, he had no expectation that Christofilis would play any ongoing role in AIM management. He never responded to

Christofilis' October 2012 letter. He believed that IPA would be competing with AIM. He acknowledged that after receiving the October 2012 letter, neither he nor Grapsas sought to immediately remove Christofilis as a director. Kokenge identified Defendant's Exhibit 27 as a letter from Bradley Haas, AIM's outside counsel, to Christofilis dated October 3, 2012. In that letter Haas outlined obligations AIM believed Christofilis had under the Agreement, but did not mention anything about ongoing duties that Christofilis had as a director of AIM.

¶ 35 In its April 20, 2016, judgment, the trial court found that Christofilis "was open, forthright and credible in his testimony, and readily admitted certain facts that were contrary to his best interest." The trial court found that Grapsas was "engaging on direct examination but was impeached and discredited in many key areas of his testimony on cross-examination. Many of his answers were evasive, exaggerated, and contrary to the testimony of other witnesses." Specifically, the trial court noted that Grapsas testified that Christofilis was removed as a director because of the discovery of IPA's Blue Grass Metals project but that later testimony showed that the discovery took place after Christofilis was removed from the board. The trial court noted that Grapsas "clung" to his testimony that he deducted corporate liabilities to arrive at the "book value" price for Christofilis' 1999 purchase of AIM shares, despite documentary evidence to the contrary. The trial court also found that Grapsas "confounded the roles of shareholder and director for many years."

¶ 36 With respect to his corporate duties as a director after his termination, the trial court found that "[t]here was no testimony that Christofilis learned anything about AIM's business or had any power in the corporation between his [September 7] departure and his removal as director 6 months later." The trial court further found that, even assuming Christofilis owed a corporate duty following his resignation, the evidence did not establish that Christofilis seized any corporate opportunities from AIM. The trial court noted that, with respect to the Blue Grass

Metals project, Schmidt, its president, testified that the project completed by Christofilis had never been done before, even by AIM. The trial court further noted that the only AIM employees who testified that AIM could have performed the project were not engineers. The trial court found that there was no evidence that Christofilis “put any corporate assets into the acquisition of the Blue Grass Metals jobs, or any of the other jobs, but rather used his own considerable skill and knowledge.” The trial court concluded that Christofilis and IPA did not usurp any corporate opportunity that reasonably belonged to AIM, and thus breached no duty to AIM.

¶ 37 The trial court went on further to state that even if there was a fiduciary duty and Christofilis had usurped a corporate opportunity, AIM failed to sustain its burden of proof on the issue of damages. The trial court found that there was no credible testimony that AIM would have won the contracts at issue but for the actions of Christofilis. With respect to AIM’s claim for tortious interference with prospective business advantage, the trial court found that AIM failed to establish a reasonable expectancy of entering a specific relationship with any of the five customers at issue. The trial court noted that, in his deposition, Schmidt testified that Christofilis urged him to buy a more expensive machine from AIM. The trial court also noted that Grapsas testified that Hickory Spring requested a quote from AIM and that AIM provided a quote but did not receive a response.

¶ 38 The trial court further found that neither Grapsas nor AIM had been guilty of oppression of a minority shareholder within the meaning of the Act. The trial court noted that AIM’s shareholders had no buy-sell agreement, or any other document that required Christofilis to sell his shares or Grapsas/AIM to buy Christofilis’ shares. The trial court noted that Grapsas’ demand that Christofilis sell his shares at Grapsas’ price may have been overbearing and heavy-

handed, but it did not amount to minority shareholder oppression. The trial court found that there was no just reason to delay enforcement or appeal of its order.

¶ 39 On April 22, 2016, AIM filed a notice of appeal. On May 4, 2016, Christofilis filed a motion for indemnification. On May 5, 2016, AIM filed an amended notice of appeal. On May 17, 2016, Christofilis filed his notice of cross-appeal. On June 27, 2016, following oral argument, the trial court granted Christofilis' motion for indemnification. On December 19, 2016, following proceedings on the fee petition, the trial court awarded Christofilis his requested attorney fees in the amount of \$1,499,702. On January 13, 2017, AIM filed its fourth amended notice of appeal.

¶ 40

II. ANALYSIS

¶ 41

A. AIM's Direct Appeal

¶ 42 At the outset, we note that Christofilis filed a motion to strike portions of AIM's reply brief and AIM filed an objection. Christofilis argues that, in its reply brief, AIM improperly refers to a voice mail message and raises new arguments concerning pretrial discovery. Supreme Court Rule 341(j) provides, "The reply brief, if any, shall be confined strictly to replying to arguments presented in the brief of the appellee and need contain only Argument." Ill. S. Ct. R. 341(j) (eff. Feb. 6, 2013).

¶ 43 The voice mail message at issue was left by Christofilis' attorney for AIM's attorney just prior to the commencement of litigation. In that message, Christofilis' attorney stated that another person, not Christofilis, was responsible for the integration of a robot to an AIM machine at Blue Grass Metals. At trial, when AIM attempted to question Christofilis about the alleged voice mail message, the trial court sustained an objection based on attorney-client privilege and relevance (as Christofilis had already admitted that he did the integration). Based on the

sustained objection, Christofilis argues that it was improper for AIM to refer to the voice mail message in its reply brief.

¶ 44 However, while it may have been improper to question Christofilis about the contents of the voicemail message, the voice mail message itself was admissible. Christofilis does not cite to any part of the record indicating that the trial court excluded the voice mail itself. In fact, AIM referred to the voice mail message and included it as an exhibit in its sur-reply memorandum in opposition to Christofilis' petition for attorney fees. Thus, it is part of the record on appeal. To the extent Christofilis argues that it was improper to refer to the voicemail message in the reply brief, we find the argument to be without merit and we deny the motion to strike the references. We note that Christofilis also argues that AIM misstated the testimony with respect to the voice mail message. To the extent AIM misrepresents the testimony with respect to the voice mail message, we will disregard any improper interpretations of the record.

¶ 45 Christofilis also argues that AIM raised new arguments in its reply brief. Specifically, in its appellant brief, AIM argued that the trial court erred in denying AIM equal access to pretrial discovery and trial exhibits. In support, AIM argued that while Christofilis was allowed access to AIM's trade secrets prior to trial, AIM was not allowed to review IPA's customer proposals prior to trial. In its reply brief, AIM raises five other issues in support of this argument that were not raised in its original brief. As noted, an appellant cannot raise new issues in its reply brief. Ill. S. Ct. R 341(j); *CCP Ltd. Partnership v. First Source Financial, Inc.*, 368 Ill. App. 3d 476, 485 (2006). We grant Christofilis' motion to strike this portion of AIM's reply brief.

¶ 46 1. Was Christofilis a Director of AIM?

¶ 47 AIM's first argument on appeal is that the trial court erred in finding that Christofilis was not a director of AIM following his resignation and thus did not have any fiduciary duty as a director after that time. Specifically, the trial court found that there was no evidence that

Christofilis learned anything about AIM's business or had any power in the corporation between the time he resigned and his formal removal as a director six months later. The trial court thus found that Christofilis had no fiduciary duty as a director following his resignation.

¶ 48 “Ordinarily, the existence of a duty is a question of law to be determined by the court. [Citation.] However, where the duty depends on the existence of facts that are in dispute, the existence of the relevant facts presents a question for the [trier of fact] to resolve.” *Jones v. O'Brien Tire & Battery Service Center, Inc.*, 374 Ill. App. 3d 918, 933 (2007). When reviewing a bench trial, we defer to the trial court's factual findings to the extent they are not against the manifest weight of the evidence. *Southwest Bank of St. Louis v. Poulokefalos*, 401 Ill. App. 3d 884, 890 (2010). Factual findings or credibility determinations are “against the manifest weight of the evidence only if the opposite conclusion is clearly evident.” *People v. Tate*, 367 Ill. App. 3d 109, 113 (2006).

¶ 49 In finding that Christofilis owed no fiduciary duty as a director following his resignation, the trial court relied on *Voss Engineering, Inc. v. Voss Industries, Inc.*, 134 Ill. App. 3d 632 (1985). In *Voss*, Robert Voss was the majority shareholder and essentially ran the company. His son, James Voss, served as the president and was also a director of the corporation. In September 1980, Robert essentially terminated James' employment. *Id.* at 634. Thereafter, James started a competing corporation. In April 1981, Voss Engineering commenced a lawsuit against James for breach of fiduciary duty as a director. *Id.* at 635. Thereafter, James sent a letter formally resigning as director of the corporation. *Id.*

¶ 50 Following a hearing, the trial court found in favor of James and the reviewing court affirmed that determination on appeal. *Id.* at 635, 638. In holding that James owed no fiduciary duty following his termination in 1980, the reviewing court noted that, following his termination, James never performed any directorial duties, attended any corporate meetings, or acted for Voss

Engineering in any capacity following his termination. *Id.* at 637. Further, the reviewing court noted that James had a subjective belief that his directorship was terminated along with his position as president and that Robert had the authority to remove James as a director when he was terminated. *Id.* The reviewing court stated that James' "formal resignation [as a director] some seven months later does not, by its mere form, negate the substance of his [earlier] removal." *Id.* at 638. The reviewing court concluded that "[b]ecause James Voss was effectively removed in September 1980, prior to the time he began operating a competing corporation, he owed no fiduciary duty to [Voss Engineering]." *Id.*

¶ 51 In the present case, the trial court correctly relied on *Voss*. As in *Voss*, the evidence indicates that Christofilis performed no directorial duties after he resigned. Christofilis testified that, after he resigned, he did not believe he had any continuing duties as a director. Grapsas admitted on cross-examination that following Christofilis resignation, Christofilis did not attend any board meetings, did not participate in any management meetings, and that he did not talk to Christofilis about any continuing duties as a director. Kokenge testified that he did not believe Christofilis had any ongoing role following his resignation. Kokenge also acknowledged that AIM's October 3, 2012 letter to Christofilis outlined his obligations under the Agreement but did not say anything about continuing duties or fiduciary obligations as a director. Accordingly, the trial court's determination that Christofilis did not owe any fiduciary duty as a director following his resignation was not against the manifest weight of the evidence.

¶ 52 The plaintiff argues that the trial court's determination was error because in his verified pleadings Christofilis stated, "On March 24, 2000, Christofilis became a member of the board of directors of AIM and held that position until March 2, 2013." Additionally, in an October 26, 2012, email to a customer, Christofilis wrote that he was still "part of the board of directors" of AIM. However, in *Voss* the reviewing court held that James was effectively removed as a

¶ 54 AIM's next contention on appeal is that the trial court erred in dismissing counts I, II, III, VI, VII and VIII of the second amended complaint pursuant to section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2012)), on the basis that the plaintiff failed to allege sufficient consideration to support the Agreement.¹ A motion to dismiss brought under section

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2-615 of the Code attacks the legal sufficiency of the complaint by alleging defects on the face of the complaint. 735 ILCS 5/2-615 (West 2012); *Vitro v. Mihelcic*, 209 Ill. 2d 76, 81 (2004). To determine the legal sufficiency of a complaint, all well-pleaded facts are taken as true and all reasonable inferences from those facts are drawn in favor of the plaintiff. *Springfield Heating & Air Conditioning, Inc. v. 3947-55 King Drive at Oakwood, LLC*, 387 Ill. App. 3d 906, 908-09 (2009). When reviewing a decision to grant a motion pursuant to section 2-615, our inquiry is whether the allegations of the complaint, construed in the light most favorable to the nonmoving party, are sufficient to establish a cause of action upon which relief may be granted. *Weidner v. Karlin*, 402 Ill. App. 3d 1084, 1086 (2010). We review a trial court's granting of a section 2-615 motion to dismiss *de novo*. *Wallace v. Smyth*, 203 Ill. 2d 441, 447 (2002).

¶ 55 Restrictive covenants are scrutinized by the courts, because they operate as partial restrictions on trade. *Fifield v. Premiere Dealer Services, Inc.*, 2013 IL App (1st) 120327, ¶ 13. In addition to being reasonable, a restrictive covenant must be ancillary to a valid contract, and it must be supported by adequate consideration. *Id.* ¶ 13. The only issue raised on appeal is whether there was adequate consideration to support the Agreement in this case.

¶ 56 In Illinois, continued employment for a substantial period of time may provide sufficient consideration to support a restrictive covenant in an employment agreement. *Id.* ¶ 14. Illinois courts have repeatedly held that two or more years of continued employment constitutes adequate consideration. *Id.* ¶ 19 (citing *Diederich Insurance Agency, LLC v. Smith*, 2011 IL App (5th) 100048, ¶ 15; *Lawrence & Allen, Inc. v. Cambridge Human Resource Group, Inc.*, 292 Ill. App. 3d 131, 138 (1997); *Brown & Brown Inc. v. Mudron*, 379 Ill. App. 3d 724, 728-29 (2008); see also *Prairie Rheumatology Associates, S.C. v. Francis*, 2014 IL App (3d) 140338, ¶ 16. This rule applies even if the employee resigns on his own instead of being terminated. *Fifield*, 2013 IL App (1st) 120327, ¶ 19.

¶ 57 AIM argues that whether or not a restrictive covenant is supported by adequate consideration should be determined based on the totality of the circumstances and not on a two-year bright-line rule. AIM notes that many courts have criticized the two-year rule. See *McInnis v. OAG Motorcycle Ventures, Inc.*, 2015 IL App (1st) 142644, ¶ 58 (Ellis J., dissenting); *Allied Waste Services of North America LLC v. Tibble*, 177 F. Supp. 3d 1103 (N.D. Ill. 2016) (predicting that the Illinois Supreme Court will reject the Illinois Appellate Court's two-year bright-line rule in favor of a more fact-specific approach); *Cumulus Radio Corp. v. Olson*, 80 F. Supp. 3d 900, 907 (C.D. Ill. 2015) (noting that a two-year rule suffers from a number of analytical problems that make it unsatisfying). AIM states that the purpose of the adequacy-of-consideration inquiry is to combat the limited bargaining power of most employees. AIM notes that, here, it had no increased bargaining power to take advantage of Christofilis and that Christofilis actually negotiated the Agreement to be less restrictive than the restrictive covenants signed by other AIM employees. AIM urges this court to reject the two-year rule and adopt a standard focusing on the totality of the circumstances.²

¶ 58 In the present case, the trial court did not err in granting Christofilis' section 2-615 motion to dismiss, finding that AIM failed to allege sufficient consideration to support the Agreement. A decision of the appellate court, though not binding on other appellate districts, is binding on the circuit courts throughout the State. *People v. Harris*, 123 Ill. 2d 113, 128 (1988). The trial court in the present case was thus bound by appellate court precedent and properly

² An *amici curiae* brief has been filed in support of AIM's position on this issue by the National Association of Manufacturers, National Alliance for Jobs and Innovation, The Alliance for Industry and Manufacturing, The Illinois Manufacturer's Association, National Small Business United, and the Technology & Manufacturing Association.

applied existing law to the undisputed facts. AIM concedes that existing appellate court caselaw holds that continued employment for two years or more constitutes adequate consideration to support a restrictive covenant. None of the federal cases cited by AIM call into question the proposition that, to serve as adequate consideration, continued employment must last for “a substantial period of time.”

¶ 59 This court is bound only by the supreme court, not by other appellate districts. As noted by AIM in its appellate brief, our supreme court has yet to address the two-year rule for determining adequacy of consideration for a postemployment restrictive covenant. We acknowledge that there is a possibility that our supreme court will reject a two-year bright-line rule in favor of a more fact specific approach. Even if we were to depart from the two-year rule, however, we would not find the five months’ employment in this case to be a “substantial period of time.” *Cf. Prairie Rheumatology*, 2014 IL App (3d) 140338, ¶ 16 (15 months’ continued employment was insufficient consideration for enforcement of restrictive covenants); *Fifield*, 2013 IL App (1st) 120327, ¶ 19 (3 months’ continued employment insufficient); *Diederich Insurance Agency, LLC v. Smith*, 2011 IL App (5th) 100048, ¶ 15 (3 months’ continued employment insufficient); *Brown & Brown*, 379 Ill. App. 3d at 728 (seven months’ continued employment insufficient).

¶ 60 Furthermore, AIM’s request that we reconsider established caselaw is premised on its assertion that there was other consideration for the Agreement, including continued eligibility for bonuses, continued membership on the board of directors, and the opportunity to invest in AIM International. This assertion is belied by the Agreement. The Agreement specifically stated that “[AIM] is willing to continue to employ [Christofilis] provided that [he] enters into this Agreement with AIM as a condition precedent to his continued employment, and [he] desires to accept such condition and continue his employment.” The Agreement also contained an

integration clause stating that “[t]his Agreement constitutes the entire agreement between the parties and supersedes any prior or contemporaneous agreements or understandings, whether written or oral.” As such, the Agreement clearly established that the only consideration was continued employment. Because five months’ continued employment was not adequate consideration and the Agreement was thus unenforceable, the trial court properly dismissed counts I, II, IV, V, and VI of AIM’s second amended complaint.

¶ 61

3. Indemnification

¶ 62 AIM’s next contention on appeal is that the trial court erred in granting Christofilis’ motion for indemnification because it was based on his status as one of AIM’s directors and the trial court had held that he was not a director. At the outset, AIM argues that the trial court lacked jurisdiction to hear the motion for indemnification because AIM had already filed a notice of appeal. AIM contends that whether indemnification was warranted was based on the trial court’s finding that Christofilis was not a director, an issue that would be addressed on appeal, and that the trial court should have therefore abstained from ruling on the motion for indemnification. This argument is without merit. It is well settled that a trial court retains jurisdiction after a notice of appeal is filed to determine matters collateral or incidental to the judgment. *General Motors Corp. v. Pappas*, 242 Ill. 2d 163, 174 (2011). More specifically, “[a] circuit court has jurisdiction to entertain a motion for attorney fees filed within 30 days of the entry of a final judgment without regard to a previously filed notice of appeal.” *Herlehy v. Marie V. Bistersky Trust, Dated May 5, 1989*, 407 Ill. App. 3d 878, 898 (2010). The trial court found, and we agree, that Christofilis’ motion for indemnification was essentially a motion for attorney fees. Accordingly, the trial court had jurisdiction to address Christofilis’ motion. *Id.*

¶ 63 Turning to the merits, AIM argues that the trial court’s order granting Christofilis’ motion for indemnification was based on a “dramatic inconsistency.” Specifically, in denying AIM’s

claims for breach of fiduciary duty, the trial court held that Christofilis did not have a fiduciary duty as a director following his resignation. But then the court held that Christofilis was a director for purposes of indemnification. AIM argues that under both section 8.75 of the Act (805 ILCS 5/8.75 (West 2012)) and AIM's bylaws, Christofilis was only eligible for indemnification if he was a director of AIM. AIM argues that Christofilis was not entitled to indemnification under the Act or AIM's bylaws because (1) the claims in the lawsuit were not based on actions "by reason of the fact" that Christofilis was a former director, officer, or employee of AIM; (2) Christofilis was not successful on the merits; and (3) Christofilis did not act in good faith.

¶ 64 Section 2 of Article XII of AIM's bylaws provided that:

"The corporation shall have power to indemnify any person who was or is a party *** to any *** pending or completed action or suit by or in the right of the corporation to procure a judgment in its favor by reason of the fact that he is or was a director, officer, employee or agent of the corporation *** against expenses (including attorneys' fees) actually and reasonably incurred by him in connection with the defense or settlement of such action or suit if he acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interest of the corporation ***."

Further, section 3 provided that to the extent that a director, officer, or employee "has been successful on the merits or otherwise" in defense of any action, he would be indemnified against expenses (including attorneys' fees) actually and reasonably incurred. These same provisions are found in the Act. See 805 ILCS 5/8.75(b), (c) (West 2012). In addition, the Act includes an additional requirement for indemnification, namely, that the "person acted in good faith and in a manner he or she reasonably believed to be in ***the best interests of the corporation." 805 ILCS 5/8.75(c) (West 2012). The interpretation of bylaws and statutes are questions of law

subject to *de novo* review. *Lo v. Provena Covenant Medical Center*, 342 Ill. App. 3d 975, 982 (2003).

¶ 65 a. “By Reason of the Fact”

¶ 66 AIM’s first contention is that its claims did not arise “by reason of the fact” that Christofilis was a previous employee or director. Cases “broadly interpret ‘by reason of the fact’ to require no more than a nexus between the corporate officers’ or directors’ official activity and the matter for which indemnification is sought.” *Pontone v. Milso Industries Corp.*, 100 A.3d 1023, 1050 (Del. Ch. 2014); *In re Miller*, 290 F.3d 263, 267 (5th Cir. 2002); see also *Heffernan v. Pacific Dunlop GNB Corp.*, 965 F.2d 369, 374 (7th Cir. 1992). “Whether a nexus exists is a question of fact to be determined by the trial court considering all the circumstances surrounding the proposed indemnification.” *Miller*, 290 F.3d at 267. We defer to the trial court’s factual findings to the extent they are not against the manifest weight of the evidence. *Poulokefalos*, 401 Ill. App. 3d at 890.

¶ 67 In the present case, the breach of fiduciary duty claims clearly arose from Christofilis’ position as one of AIM’s directors. The claims were based on Christofilis’ alleged fiduciary duty as a director between the time he resigned and the time the shareholders formally removed him as a director. AIM alleged that his position as director required Christofilis to disclose and tender IPA projects to AIM. As the claims asserted clearly related to Christofilis’ service as a director of AIM, he is entitled to indemnification on those claims.

¶ 68 AIM argues that the trial court’s finding that Christofilis had no duties as a director following his resignation precludes a finding of indemnification on the breach of fiduciary duty claims. We disagree. Regardless of when his directorship terminated, the claims clearly arose by the reason of the fact that Christofilis was a former director of AIM. See *Pontone*, 100 A.3d at 1053 (even though the defendant was not serving as an officer or director at the time of the

alleged misconduct, the reviewing court held that the claims still arose by reason of the defendant's former role as officer and director because the proprietary information that allegedly enabled the wrongdoing was acquired while the defendant was an officer or director).

¶ 69 We also affirm the trial court's determination awarding indemnification as to the trade secret claims. In the trade secret claims, AIM alleged that Christofilis, through IPA, would use and disclose AIM's trade secrets, proprietary and confidential information, and customer and business information. Christofilis acquired knowledge of this information through his former position as a director, shareholder, and employee of the company. As such, those claims also arose by reason of Christofilis' position as an employee and director of AIM. See *Brown v. LiveOps, Inc.*, 903 A.2d 324, 328-30 (Del.Ch. 2006) (the trade secret claims were directly related to former employee's status as cofounder, officer, and director because the claims alleged that the employee gained access to the proprietary information while he was a corporate official at the company).

¶ 70 Finally, the claims based on the Agreement also arose by reason of Christofilis' former role as a director and employee of AIM. Counts I and II alleged that Christofilis was "selling identical products and competitive services and know how to customers of AIM, using proprietary information of AIM." Count VI alleged that Christofilis breached the Agreement by hiring a former employee of AIM to assist and facilitate in the foregoing breach. Counts VII and VIII alleged that Christofilis breached the Agreement "by disclosing or utilizing AIM's Confidential Information." Underlying all of these claims is the assertion that Christofilis was misappropriating information acquired during his position as an employee and director of AIM. Accordingly, these claims arose by reason of his former roles at AIM. See *Pontone*, 100 A.3d at 1053 (finding claims based, in part, on breach of a restrictive covenant arose by reason of former employment because the underlying allegations were all founded on the misappropriation of

confidential and proprietary information acquired during the employee's time as an officer and director of the company).

¶ 71 In so ruling, we note that AIM cites several cases in support of its position that claims based on breach of a restrictive covenant are not subject to indemnification: *Stifel Financial Corp. v. Cochran*, 809 A.2d 555 (Del. 2002); *Weaver v. ZeniMax Media, Inc.*, No. Civ.A. 20439-NC, 2004 WL 243163 (Del. Ch. Jan. 30, 2004); *Minami International Corp. v. Clark*, No. 88 Civ. 2135 (JSM), 1992 WL 58838 (S.D.N.Y. Mar. 16, 1992); and *Brush Creek Mining & Development v. Lawson*, 205 F.3d 1350, 1999 WL 1253370 (Table), (9th Cir. 1999).

¶ 72 In *Stifel*, a corporation succeeded on its claims against a former employee for failing to return excess pay and failing to pay the balance due on a promissory note, as required by the terms of an employment agreement. *Stifel*, 809 A.2d at 557. The employee sought indemnification for these claims. *Id.* The court refused to grant indemnification because these claims were based on personal obligations that arose from an employment contract and were not based on any actions the former employee took as an officer or director of the company. *Id.* at 562. *Stifel* is distinguishable because in that case the corporation prevailed on its claims and the court held that granting indemnification would be problematic because attorney fees would be shifted back onto the company to which the obligations were owed, thus “render[ing] the officer's duty to perform his side of the contract in many respects illusory.” *Id.* As Christofilis was the prevailing party here, ordering indemnification does not present the same problem.

¶ 73 We note that *Weaver*, *Minami*, and *Brush Creek Mining* are unpublished opinions having no precedential value in Illinois. See *Sexton v. Brach*, 124 Ill. App. 3d 202, 206 (1984) (unpublished decisions are not precedential); see also Ill. S.Ct. R. 23(e)(1) (eff. Jan. 1, 2011) (prohibiting the citation of unpublished opinions, except to support a claim of “double jeopardy,

res judicata, collateral estoppel or law of the case”). Thus, we need not consider these cases in our analysis.

¶ 74 In summary, the trial court’s determination that a nexus existed between Christofilis’ corporate activity and the claims for which indemnification was sought was not against the manifest weight of the evidence. Accordingly, we hold that the claims arose “by reason of the fact” that Christofilis’ was an employee and director of AIM.

¶ 75 b. “Successful on the Merits or Otherwise”

¶ 76 AIM next argues that Christofilis was not entitled to indemnification because he was not successful on the merits or otherwise as required by AIM’s bylaws. Article XII, Section 3, of AIM’s bylaws state that “[t]o the extent that a director, officer, employee or agent of a corporation has been successful on the merits or otherwise in defense of any action *** he shall be indemnified against expenses (including attorneys’ fees) actually and reasonably incurred by him in connection therewith.” This language mirrors the language of section 8.75(c) of the Act (805 ILCS 5/8.75(c) (West 2012) (also stating that indemnification allowed to the extent that the former employee was “successful on the merits or otherwise”)).

¶ 77 AIM first argues that “success” for indemnification purposes requires that all appeals must have been exhausted. We disagree. Illinois has a long-standing public policy of disfavoring piecemeal appeals. *State Farm v. John J. Rickoff Sheet Metal Co.*, 394 Ill. App. 3d 548, 557 (2009) (citing *John G. Phillips & Associates. v. Brown*, 197 Ill. 2d 337, 344 (2001)). It is well settled that a trial court has authority to entertain a petition for fees filed within 30 days of the entry of a final judgment. *Phillips*, 197 Ill. 2d at 337; *Marsh v. Evangelical Covenant Church of Hinsdale*, 138 Ill. 2d 458, 468 (1990). Here, Christofilis’ motion for indemnification was essentially a petition for fees. Allowing Christofilis to pursue indemnification following

final judgment in the trial court supports our public policy of avoiding piecemeal appeals and comports with our general practice.

¶ 78 In so ruling, we note that AIM cites one case, from the Intermediate Court of Appeals of Hawaii, which held that indemnification was only appropriate after a final appellate ruling. *Lussier v. Mau-Van Development*, 667 P.2d 830, 834 (Haw. Ct. App. 1983) (if a judgment is appealed, a corporate agent is not “successful on the merits or otherwise” until the entry of a favorable and final appellate ruling). This is the only case interpreting this phrase in this manner as we have found no other cases directly addressing this issue. Nonetheless, this court is not bound to follow decisions from other states although we may look to such caselaw as persuasive authority. *Fosse v. Pensabene*, 362 Ill. App. 3d 172, 186 (2005). We find nothing in the reasoning in *Lussier* to persuade us to depart from our long-standing public policy disfavoring piecemeal appeals and allowing timely filed postjudgment petitions for attorney fees.

¶ 79 Next, AIM argues that Christofilis was not successful on the merits “or otherwise” in the defense of the trade secret claims because AIM had voluntarily withdrawn those claims prior to trial. AIM argues that the term “or otherwise” authorizes indemnification when a defendant succeeds on a procedural defense, such as statute of limitations, without having to undergo a prolonged trial. The Act’s indemnification provision (850 ILCS 5/8.75(c) (West 2012)) was copied directly from the Delaware statute (Delaware Code Annotated, Title 8, sec. 145 (1982 cumulative supp.)). *Johnson v. Gene’s Supermarket, Inc.*, 117 Ill. App. 3d 295, 301-02 (1983). Under Delaware caselaw, the “successful on the merits or otherwise” standard calls for a case-by-case factual examination. *National Union Fire Insurance Co. of Pittsburgh, Pa. v. Continental Illinois Corporation*, 652 F. Supp. 858, 864 (N.D. Ill. 1986). When determining success on the merits, courts should not look behind the result. *Hermelin v. K-V Pharmaceutical Co.*, 54 A.3d 1093, 1107 (Del. Ch. 2012). “Rather, where the outcome of a proceeding signals

that the indemnitee has avoided an adverse result, the indemnitee has succeeded ‘on the merits or otherwise’.” *Id.* We review a trial court’s factual determinations to determine whether they are against the manifest weight of the evidence. *Poulokefalos*, 401 Ill. App. 3d at 890.

¶ 80 In the present case, the trial court properly granted indemnification on the trade secret claims. Those claims were dismissed after two years of litigation. The trial court noted that, during that time, AIM was unable to identify a specific trade secret that Christofilis allegedly violated. Thus, Christofilis could have sought summary judgment on those claims. Through AIM’s voluntary dismissal of the trade secret claims, Christofilis clearly avoided an adverse result on those claims. Accordingly, under the circumstances in this case, we cannot say the trial court’s determination was against the manifest weight of the evidence. *Hermelin*, 54 A.3d at 1107.

¶ 81 In so ruling, we note that AIM cites *Galdi v. Berg*, 359 F. Supp. 698 (D. Del. 1973), for the proposition that indemnification is not proper when a claim is dismissed without prejudice. In *Galdi*, the court construed the “or otherwise” language in the Delaware statute as not giving an officer or director the right to indemnification following a without-prejudice dismissal. *Id.* at 701-02. However, in *Galdi*, the same claims were simultaneously pending in a different forum. The court concluded that “when a case is dismissed without prejudice so that the same issue may be litigated in another pending case, an indemnification award would be premature and contrary to the spirit of the statute.” *Id.* at 702. A critical factor in the *Galdi* court’s determination was the fact that the director was able to resolve the issue of indemnification in the already-pending litigation. The *Galdi* court also recognized that the specific facts of the case must be examined to determine whether indemnification is appropriate. *Id.*

¶ 82 *Galdi* is distinguishable from the present case. Here, the voluntarily withdrawn trade secret claims were not pending in any other litigation. Further, AIM represented to the court that

it had no intention of refiling its trade secret claims. AIM's counsel said the purpose in voluntarily dismissing the trade secret claims was to "trim the issues in the case" and that AIM wanted to proceed only on the breach of fiduciary duty counts. The record indicates that AIM essentially abandoned its claims based on trade secret. Christofilis thus obtained, for all practical purposes, the equivalent of a dismissal with prejudice. The trial court's determination that the "or otherwise" language was broad enough to cover the abandonment of the trade secret claims was not improper. Under the circumstances in this case, Christofilis' was successful on the merits or otherwise within the meaning of AIM's bylaws and section 8.75(c) of the Act.

¶ 83 c. Good Faith

¶ 84 Finally, AIM argues that Christofilis was obligated to show "good faith" in addition to being successful on the merits. AIM acknowledges that its bylaws have no explicit good faith requirement but notes that section 8.75(c) includes a requirement that indemnification is only warranted if the "person acted in good faith and in a manner he or she reasonably believed to be in, or not opposed to, the best interests of the corporation." 805 ILCS 5/8.75(c) (West 2012). AIM argues that the Act sets a minimum standard for mandatory indemnification.

¶ 85 We need not decide whether the Act creates a minimum standard for mandatory indemnification because, even if it did, Christofilis met the "good faith" requirement. A trial court's findings of fact will not be disregarded unless they are against the manifest weight of the evidence. *Poulokefalos*, 401 Ill. App. 3d at 890. The factfinder, who observes witnesses testify, has a superior ability to assess their credibility than a reviewing court which is limited to reading a transcript. *Chicago Title & Trust Co. v. First Arlington National Bank*, 118 Ill. App. 3d 401, 410 (1983). Here, the trial court found that Christofilis "acted in good faith and in the best interests of AIM at all times when he owed any duty to AIM." Based on the record before us and the fact that the trial court had numerous occasions to weigh the parties' credibility during

the proceedings, we find no reason to disturb the trial court's finding that Christofilis acted in good faith. Moreover, AIM makes no argument that the trial court's good faith finding was against the manifest weight of the evidence and any such argument is thus forfeited. See Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016) (points not argued are waived).

¶ 86 4. Amount of the Attorney Fee Award

¶ 87 AIM argues that the trial court erred in awarding Christofilis the full amount of the requested attorney fees and costs. When ruling on a petition for attorney fees, the trial court has broad discretionary powers and its decision will not be reversed unless the court has abused its discretion. *Kaiser v. MEPC American Properties, Inc.*, 164 Ill. App. 3d 978, 984 (1987). Based on its familiarity with the underlying litigation, a trial court is not limited to the evidence presented by the parties but may independently assess the necessity and reasonableness of the legal services rendered. *In re Estate of Healy*, 137 Ill. App. 3d 406, 411 (1985). A trial court has the discretion to independently review and consider the contents of the entire court file in determining whether a party is entitled to fees and whether the fees requested are reasonable. *Kaiser*, 164 Ill. App. 3d at 986. A fee petition must specify the services performed, by whom they were performed, the time expended thereon and the hourly rate charged. *Id.* at 984. Additionally, the trial court should consider the skill and standing of the attorneys, the nature of the case, the novelty and difficulty of the issues and work involved, the usual and customary charges for comparable services and whether there is a reasonable connection between the fees and the amount involved in the litigation. *Id.*

¶ 88 AIM first argues that the trial court abused its discretion because the hourly rate charged was not the usual and customary fee for Du Page County. Rather, Christofilis was represented by a firm from Chicago for part of the proceedings and the Chicago firm charged rates normal and customary in Chicago. Nonetheless, we cannot say the trial court abused its discretion in

finding that the rates charged by the Chicago firm were reasonable. The trial court found that it was reasonable for Christofilis to hire the Chicago firm as it had represented Christofilis for six months prior to the litigation, was familiar with the facts and prior negotiations between the parties, and was in the best position to respond to AIM's original complaint and petition for temporary restraining order. Further, the trial court specifically found that this case presented complex factual and legal matters, that it was common for Chicago attorneys to represent clients in Du Page on complex cases, and that the higher fees were usual and customary for these types of cases in Du Page County. It is not improper for a trial court to use its own knowledge and experience in determining what is reasonable and necessary under the specific facts of a case. *Richardson v. Haddon*, 375 Ill. App. 3d 312, 315 (2007) (stating that the trial court may "use its own knowledge and experience when making the reasonableness determination"); *Healy*, 137 Ill. App. 3d at 411 (same).

¶ 89 AIM next argues that the attorney fee award was not reasonable because the fee petition contained fees for work that did not materially advance the litigation. AIM takes exception to the fees for the preparation of the motion for summary judgment, the noticing and preparation for expert witness depositions, and the initial pretrial filing of the motion for indemnification. We note that Illinois Supreme Court Rule 341(h)(7) (eff. Feb. 6, 2013) requires an appellant's brief to contain argument supported by citation to authority and to the record. *In re Marriage of Petrik*, 2012 IL App (2d) 110495, ¶ 38. An appellant's failure to support his or her argument with citation to authority can forfeit consideration of the issue. *Id.* The appellate court is not a depository in which the appellant may dump the burden of argument and research. *Lewis v. Heartland Food Corp.*, 2014 IL App (1st) 123303, ¶ 5. AIM fails to cite a single authority supporting the contention that the trial court abused its discretion in awarding the fees at issue. Accordingly, AIM has forfeited this argument.

¶ 90 AIM next argues that the attorney fee award was improper because it included extensive block billing and thus did not show the time spent on individual tasks. However, AIM acknowledges that block billing is not prohibited. Further, the trial court found that the characterization of the billing records as “block billing” was unwarranted. The trial court stated that “[g]iven the complexity of the factual and legal issues, the items set forth in the voluminous invoices of both the [firms] are sufficient to allow the Court to determine the reasonableness of the entries.” AIM argues generally that block billing in this case was improper, but does not cite to any specific block billing in the record where the trial court could not have determined the reasonableness of the time and services provided. Accordingly, AIM has failed to establish that the trial court abused its discretion in allowing the block billing.

¶ 91 Finally, AIM argues that there were improper costs awarded for reproduction of documents, delivery charges, and postage. AIM cites authority for the proposition that such charges are more appropriately considered overhead expenses, already reflected in an attorney’s hourly rate, and should not be separately charged as costs. AIM also argues that deposition subpoena fees for people that were never deposed were also improperly included in the attorney fee award. AIM has failed to cite to any part of the record to support their points and we thus reject these arguments as forfeited. See Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016) (failure to provide supporting record citations results in forfeiture of a point). Even if AIM’s arguments had merit, it has not provided the necessary information to determine an appropriate modification to the attorney fee award. AIM does not cite to the record showing that such improper fees were charged and the amounts of those alleged charges. As noted, the appellate court is not a depository in which the appellant may dump the burden of argument and research. *Lewis*, 2014 IL App (1st) 123303, ¶ 5.

¶ 93 AIM's final contention on appeal is that the trial court erred in denying it equal access to pretrial discovery and trial exhibits. AIM notes that on July 18, 2013, the trial court entered an agreed protective order. AIM contends that, despite the protective order, the trial court denied it equal access to discovery materials, namely, Christofilis' customer proposals, and further denied any witness access to those proposals during trial. AIM argues that these rulings hampered it in the preparation and presentation of its case. This argument is forfeited for failure to cite relevant portions of the record and to even a single authority in support of the contention. See Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016) (failure to provide citation to authority and the pages of the record relied on results in waiver of the contention). We will not sift through the record or complete legal research to find support for an issue. *Walters v. Rodriguez*, 2011 IL App (1st) 103488, ¶ 5. The only portion of the record cited concerned an evidentiary ruling during the testimony of one witness, who was only allowed to view a redacted version of one of Christofilis' customer proposals. However, that same witness' testimony on the redacted proposal was not allowed (the trial court sustained an objection to the testimony) because AIM failed to establish an adequate foundation. Accordingly, any argument that the witness' inability to view the unredacted document hampered the presentation of its case is without merit as that witness' testimony as to the customer proposal at issue was excluded anyway.

¶ 94 B. Christofilis' Cross-Appeal

¶ 95 On cross-appeal, Christofilis argues that the trial court erred in finding in favor of AIM and Grapsas on count I of his counterclaim for minority shareholder oppression. In his counterclaim, Christofilis alleged that AIM and Grapsas were pressuring him to sell his shares of AIM at a price below market value; retaining earnings to avoid paying dividends; barring Christofilis from participating in the selection of Board members; falsely accusing Christofilis of improperly providing unauthorized AIM employees with confidential access codes to AIM's

alarm system; and increasing salaries and bonuses thereby minimizing monies available to pay out dividends to Christofilis. However, although not alleged in his counterclaim, at trial Christofilis argued that when he purchased his shares of stock in 1999, Grapsas and AIM miscalculated the value of the stock such that he was granted too few shares. When the issue was raised at trial, AIM and Grapsas argued the five-year statute of limitations (735 ILCS 5/13-205 (West 2014)) as a defense to this contention.

¶ 96 The trial court found that when Grapsas calculated how many shares Christofilis could purchase for \$52,000, he only considered the total assets of AIM (\$866,000) and did not deduct the liabilities of the corporation. At trial, Grapsas testified that he had deducted liabilities but that he added expected profits from book sales and deducted \$100,000 to give Christofilis a discount. This calculation also resulted in total assets of \$866,000. The trial court found Grapsas' explanation "patently incredible." The trial court agreed with Christofilis that the value of the corporation was lower than Grapsas considered and that his \$52,000 investment should have resulted in a higher number of shares. Nonetheless, the trial court found that the statute of limitations barred any dispute over the number of shares owned by Christofilis because Christofilis had been receiving distributions based on 130 shares since his purchase, never complained about the distributions he was receiving, and admitted that Grapsas' miscalculation of the number of shares was a mistake and not intentional.

¶ 97 Christofilis first contends that the trial court erred in finding the statute of limitations applicable because AIM and Grapsas never raised the statute of limitations as a defense prior to trial and, thus, the defense was waived. The expiration of a statute of limitations is an affirmative defense, which is forfeited if not timely raised in the trial court. *Fox v. Heimann*, 375 Ill. App. 3d 35, 45 (2007). It is the duty of the party wishing to assert a limitations defense to raise it at the earliest possible time. *McKinnon v. City of Chicago*, 243 Ill. App. 3d 87, 92

(1993). In the present case, the trial court did not err in finding the claims related to Christofilis' purchase of shares of stock in 1999 barred by the statute of limitations. Christofilis did not raise this issue in his counterclaim but raised it for the first time at trial. Thereafter, AIM and Grapsas immediately raised the statute of limitations as a defense. Because AIM and Grapsas raised this defense at the earliest possible time, Christofilis' argument that the defense was forfeited is without merit. *Id.*

¶ 98 Christofilis next argues that even if the statute of limitations defense was timely raised, the limitations period was tolled under the discovery rule. Christofilis contends that he did not discover the share-purchase error until just before trial. The discovery rule is a judicially created rule that tolls the beginning of a statute of limitations until the injured plaintiff knows or reasonably should know that she has been injured and that her injury was wrongfully caused. *Wisniewski v. Diocese of Belleville*, 406 Ill. App. 3d 1119, 1150 (2011). The discovery rule is designed to prevent the unduly harsh result of a statute of limitations barring a plaintiff's lawsuit before he was even aware that he was injured. *Id.* Nonetheless, "[i]t is well settled that issues not raised in the trial court are deemed waived and may not be raised for the first time on appeal." *Haudrich v. Howmedica, Inc.*, 169 Ill. 2d 525, 536 (1996). An issue not presented to or considered by the trial court cannot be raised for the first time on review. *Id.* In the present case, Christofilis never argued at trial that the statute of limitations was tolled under the discovery rule. Any claim on appeal that the statute of limitations was tolled has been forfeited. *Id.*

¶ 99 Finally, Christofilis argues that regardless of the statute of limitations, AIM's and Grapsas' refusal to acknowledge the stock purchase error was sufficient to warrant recovery for shareholder oppression under section 12.56(a)(3) of the Act (805 ILCS 5/12.56(a)(3) (West 2012)). Section 12.56(a)(3) of the Act provides remedies to shareholders of closely-held corporations where "directors or those in control of the corporation act in a manner that is illegal,

oppressive, or fraudulent with respect to” the other shareholders. See 805 ILCS 5/12.56(a)(3) (West 2012). Although the Act does not define what types of conduct are “oppressive,” the few cases that address the issue under Illinois law have found that conduct is oppressive if it is “arbitrary, overbearing and heavy-handed.” See, e.g., *Hager-Freeman v. Spircoff*, 229 Ill. App. 3d 262, 276 (1992); *Compton v. Paul K. Harding Realty Co.*, 6 Ill. App. 3d 488, 499 (1972). We review the trial court’s rulings after a bench trial using the manifest weight of the evidence standard of review. *Poulokefalos*, 401 Ill. App. 3d at 890. “A finding is against the manifest weight of the evidence only if, upon hearing such evidence, no reasonable person would reach the conclusion arrived at by the trial court.” *Coduti v. Hellwig*, 127 Ill. App. 3d 279, 288 (1984).

¶ 100 In arguing that AIM’s and Grapsas’ refusal to correct the stock-purchase error warranted some type of relief under section 12.56(a)(3) of the Act, Christofilis relies on *Compton* and *Gidwitz v. Lanzit Corrugated Box Co.*, 20 Ill. 2d 208 (1960). In *Compton*, the reviewing court held the following to be an arbitrary, overbearing and heavy-handed course of conduct: the failure of the corporate president to call meetings of the board of directors or to consult with shareholders regarding management of corporate affairs, and the president’s “imperious attitude” when questioned about his excessive salary. *Compton*, 6 Ill. App. 3d at 499. In *Gidwitz*, the president of the corporation at issue violated the corporate bylaws; negotiated interest-bearing loans on behalf of the corporation, without consulting the board of directors, while having a personal financial interest in the lending agencies; organized one of the corporation’s departments into a separate corporation, without the board’s approval, and sustained significant losses; and failed to pay dividends to the shareholders of the corporation for a number of years. *Gidwitz*, 20 Ill. 2d at 219-220. The reviewing court held that the foregoing established oppressive conduct under the Act. *Id.*

¶ 101 In the present case, we cannot say that the trial court's determination, finding no shareholder oppression, was against the manifest weight of the evidence. On appeal, in support of his shareholder oppression claim, Christofilis cites only to the alleged error in the number of shares he was issued in 1999. As noted by the trial court, Christofilis conceded that this error was a mistake and not intentional. Unlike in *Compton* and *Gidwitz*, Christofilis is not now arguing that Grapsas failed to call board meetings, raised his own salary, violated corporate bylaws, or was mismanaging the corporation or failing to pay dividends. The share-purchase error alone does not establish an arbitrary, overbearing and heavy-handed course of conduct. We hold that Christofilis' argument on appeal has failed to establish any error in the trial court's denial of his claim for shareholder oppression.

¶ 102

III. CONCLUSION

¶ 103 For the foregoing reasons, the judgment of the circuit court of Du Page County is affirmed. Christofilis' motion to strike portions of AIM's reply brief is granted in part.

¶ 104 Motion to strike granted in part; judgment affirmed.