2015 IL App (1st) 140463-U

FIRST DIVISION
March 30, 2015

No. 1-14-0463

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

EDWARD M. CAULFIELD, Plaintiff-Appellee, v. PACKER ENGINEERING, INC., an Illinois corporation, and THE PACKER GROUP, INC., an Illinois corporation, Defendants-Appellants.	)	Appeal from the Circuit Court of Cook County. No. 11 CH 12474 Honorable Thomas Allen, Judge Presiding.

PRESIDING JUSTICE DELORT delivered the judgment of the court.
Justices Connors and Harris concurred in the judgment.

ORDER

¶1 ***Held:*** The trial court properly denied defendants' motion to dismiss because they waived their right to submit this case to arbitration. The court properly entered summary judgment in favor of plaintiff on his breach of contract claim because no genuine issues of material fact precluding the entry of judgment existed. The court erred by finding that plaintiff was an employee at will because the language of his employment agreement established that he was only terminable for cause. The court properly granted plaintiff severance pay and damages for defendants' unilateral reduction of his salary. Finally, the court's finding that plaintiff's employer had disposable income in 2010 was not against the manifest weight of the evidence.

¶2 Plaintiff Dr. Edward M. Caulfield filed a four count amended complaint against defendants Packer Engineering, Inc. (PEI) and The Packer Group, Inc. (TPG) for (1) declaratory judgment; (2) breach of contract; (3) prejudgment interest; and (4) retaliatory discharge. Dr. Caulfield was awarded summary judgment on his breach of contract claim, and after a bench trial the court entered judgment in favor of him on his claims for declaratory judgment and retaliatory discharge. Defendants appeal, alleging eight points of error by the trial court. We affirm in part, reverse in part, and vacate in part.

¶3 BACKGROUND

¶4 TPG is a PEI's holding company. Dr. Kenneth Packer, who is currently chairman of its board of directors, founded it in 1962. PEI is a "multi disciplinary science and engineering company" and TPG's "primary operating company." In 1979, PEI hired Dr. Caulfield as its Director of Mechanical Engineering. In 2002, Dr. Caulfield was elevated to the position of President and Chief Technical Officer. Dr. Caulfield's promotion was memorialized in a written agreement (the Agreement) dated June 14, 2002. The agreement was signed by Dr. Caulfield and Charlotte Sartain, who served on TPG's board of directors and also served as its corporate secretary, as well as its and PEI's Executive Vice-President of Finance.

¶5 The Agreement's preamble stated that the Agreement began on June 1, 2002, and was to "continu[e] perpetually at the wishes of both parties." Section 1.0 set forth Dr. Caulfield's job duties:

> "[Dr. Caulfield's] responsibilities will be to build and expand [PEI] following the basic tenets of the company. [Dr. Caulfield] will help all employees to grow and achieve their goals and the Company's goals. [Dr. Caulfield], using [PEI's] Mission

> Statement *** will build the company for the future benefit of all its employees."

¶6 Section 2.1 established Dr. Caulfield's base annual salary at $280,170.00. Under section 2.2, Dr. Caulfield was entitled to an incentive bonus if PEI had disposable income, which was defined as "profit before taxes (as reported on the audited P & L Statement) plus the sum of (i) cash and stock bonuses paid to employees (ii) contributions to 401(k) beyond the agreed to amount, [and] (iii) stock contributed to ESOP."

¶7 Section 3.1 set forth when Dr. Caulfield could be terminated by PEI:

> "[Dr. Caulfield] may not be discharged by [PEI] except in the unlikely event of abrogation of duties of an exceptional nature in contravention to the mission and beliefs of [PEI], and deemed harmful to other employees of [PEI] by careful consideration of and resolution by the full Board of Directors of [TPG]."

¶8 Section 3.2 provided that Dr. Caulfield was entitled to "not less than one year severance pay" as well as all accrued bonuses and a repurchase of certain stock if PEI terminated him. Section 3.3 set forth Dr. Caulfield's obligations to PEI if he voluntarily left the company:

> "If [Dr. Caulfield] should choose to leave [PEI] on his own election, then [Dr. Caulfield] agrees: not to compete in the business of [PEI] for a period of not less than one year. During this said year, in the event of conducting work with past and present clients to bill all monies through [PEI] following [PEI] billing conventions then in effect for associate staff at associate staff rate provide to PEI by [Dr. Caulfield], and not to entice or solicit any

> employees of [PEI] to join any other firm for a period of not less than one year."

¶9 Section 6.2 provided that disputes arising from the Agreement would be resolved in binding arbitration. Section 6.9 stated that the Agreement "may be modified by the mutual written agreement of both parties."

¶10 The next events relevant to this thread of the chronology occurred approximately nine years later in April 2011. (We discuss events occurring between 2006 and April 1, 2011 in ¶¶ 20-56.)

¶11 On April 1, 2011, Dr. Caulfield filed a two count complaint against defendants seeking damages for breach of contract and a declaratory judgment that the restrictive covenant contained in section 3.3 of the Agreement was invalid. On April 21, Dr. Caulfield amended his complaint to add claims for prejudgment interest and retaliatory discharge.

¶12 On July 1, 2011, defendants filed their answer, and on July 22, 2011, Sartain was deposed. However, Sartain did not bring certain requested documents and defense counsel, invoking the "three hour rule," terminated the deposition after three hours.

¶13 During her deposition, Sartain testified that around March 15, 2008, she told Dr. Caulfield that PEI did not have sufficient funds to pay him his 2007 incentive bonus. As a result, Dr. Caulfield and Sartain negotiated changes to the Agreement. As relevant here, Dr. Caulfield's salary under the modified Agreement was increased to $500,000.00 and the formula used to compute his incentive bonus was modified to generate a lower bonus. The modifications, however, were never reduced to writing and Sartain was the only member of PEI's management group who knew about them. According to Sartain, Dr. Caulfield was paid a base salary of $500,000.00 in 2009 and 2010.

¶14 On August 3, 2011, Dr. Caulfield filed a motion to continue the Sartain deposition and for sanctions. On August 15, the trial court granted Dr. Caulfield's motion, ordering that he was entitled to depose Sartain for an additional 2.5 hours.

¶15 On August 18, 2011, on the strength of Sartain's July 22 deposition testimony, Dr. Caulfield filed a motion for partial summary judgment with respect to his claims for breach of contract and declaratory judgment. On August 23, Dr. Caulfield filed a motion to compel the continued Sartain deposition. On August 29, the trial court entered an order setting the continued Sartain deposition for September 7.

¶16 On September 7, 2011, the Sartain deposition recommenced. On September 21, defendants filed a motion for extension of time to respond to Dr. Caulfield's motion for summary judgment, explaining that their counsel did not have time to prepare a response due to "other pressing matters."

¶17 On September 28, defendants filed a motion to dismiss plaintiff's amended complaint pursuant to section 2-619(a)(1) and (9) of the Code of Civil Procedure (Code) (735 ILCS 5/2-619(a)(1), (9) (West 2010)). Defendants argued that dismissal was appropriate because the Agreement contained an arbitration clause and that the trial court accordingly lacked subject matter jurisdiction. On December 9, 2011, the trial court denied defendants' motion to dismiss.

¶18 On April 5, 2012, the trial court granted partial summary judgment in favor of Dr. Caulfield on his breach of contract claim with respect to PEI and TPG. On October 19, 2012, the court vacated the judgment with respect to TPG. On September 6, 2013, the court granted summary judgment in favor of defendants on Dr. Caulfield's claim for prejudgment interest, reasoning that prejudgment interest is not an independent cause of action.

¶19 On September 23, 2013, the case proceeded to a bench trial on Dr. Caulfield's claims for retaliatory discharge and declaratory judgment.

¶20 At trial, Dr. Caulfield testified that in 2009, he discussed PEI's financial condition with Sartain, who informed him that the company was "draining money to New Vermillion[,]" a PEI project involving a foundry in Hoopeston, Illinois. Dr. Caulfield subsequently learned from Dr. Michael Koehler, PEI's CEO, that the company had taken on a personal loan which Dr. Packer obtained to purchase the New Vermillion foundry. Afterwards, Dr. Caulfield discussed the matter with an attorney named Michael King. Ultimately, King sent a letter to defendants' corporate attorneys which set forth Dr. Caulfield's belief that Dr. Packer had engaged in financial improprieties relating to New Vermillion and demanded that Dr. Packer repay the companies and that the board of directors form a special committee to investigate Dr. Packer's loan.

¶21 After King sent the letter, Dr. Caulfield began meeting regularly with Sartain and Walter Denniston, one of TPG's board members, to discuss Dr. Packer's alleged financial improprieties. However, the meetings did not prove fruitful. Thus, on July 1, 2010, Dr. Caulfield filed a shareholder lawsuit against Dr. Packer, Sartain, Denniston, PEI and TPG, claiming breach of fiduciary duty, corporate waste, abuse of control, gross mismanagement and unjust enrichment. See *Caulfield v. Packer*, 10 CH 28475 (Cir. Ct. Cook County July 1, 2010).

¶22 After Dr. Caulfield arrived at work on July 5, 2010, Sartain and Dr. Packer came to his office. Dr. Packer told Dr. Caulfield to leave or he would call the police, so Dr. Caulfield left. Thereafter, Dr. Caulfield was required to schedule times when he would come into the office, which he explained made it "virtually impossible to conduct client business." Dr. Caulfield's understanding from Sartain was that the policy "was [Dr.] Packer's doing."

¶23 On July 21, 2010, Dr. Packer sent Dr. Caulfield a letter stating "[i]t is and will be a terrible shame to end your career in the way it is now headed." Dr. Caulfield interpreted the letter to mean that he "threw the first punch" and that Dr. Packer was retaliating. He explained that he believed that Dr. Packer caused Danya Davis, a former PEI employee, to file a charge of discrimination against PEI alleging that Dr. Caulfield engaged in acts of sexual harassment while working at PEI.[1] Dr. Caulfield testified that Dr. Packer told him during meetings that "if we drop the litigation my pay would be reinstated and the sexual harassment would go away."

¶24 The same day, Dr. Caulfield received a memorandum from the Chief Executive Officer Counsel (CEOC) of TPG informing him that his title was being changed to President and Chief Technical Officer *emeritus* and that his office was being moved closer to Dr. Packer's office. On July 28, 2010, Dr. Packer sent a memorandum to all PEI employees informing them of the change in Dr. Caulfield's job title. Dr. Packer responded to the memorandum via email on July 29, stating that the change in his job title was "another petty act of retaliation" and that it may adversely affect his ability to do his job.

¶25 On January 1, 2011, Dr. Caulfield's salary was reduced from $500,000.00 to approximately $320,000.00 to 330,000.00. On February 22, 2011, Dr. Caulfield attended a meeting with Dr. Packer and Sartain. Dr. Caulfield's notes from this meeting indicate that Dr. Packer threatened to "defame" him and damage his career. He explained that Dr. Packer threatened to discuss the sexual harassment lawsuit with the president of the University of Illinois if Dr. Caulfield did not drop the shareholder lawsuit.

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[1] On January 25, 2010, Davis filed a "Charge of Discrimination" against PEI with the Equal Employment Opportunity Commission (EEOC). On August 10, 2011, the EEOC issued Davis a "Notice of Right to Sue" and on November 7, 2011, Davis filed a federal lawsuit against PEI and TPG alleging violations of Title VII of the Civil Rights Act of 1964 (42 U.S.C § 2000e, *et seq.* (West 2010)). See *Davis v. Packer Engineering, Inc.*, No. 11 CV 07923 (N.D. Ill. Nov. 7, 2011).

¶26 On March 24, 2011 at 3:46 p.m., Dr. Packer sent Dr. Caulfield an email instructing him to stop working on several projects until he met with Sartain and Dr. Packer. On March 28, 2011, Dr. Packer sent Dr. Caulfield an email indicating that he had missed a meeting. Later that day, Dr. Caulfield replied, explaining that he was on vacation and was not aware that a meeting had been scheduled. He also expressed confusion regarding how to proceed with the projects Dr. Packer had suspended.

¶27 On March 31, 2011, Dr. Packer sent an email to Dr. Caulfield scheduling a performance review for April 4, 2011. The email stated that "no outside persons or interferences with the internal business practice of [PEI] will be tolerated." Dr. Caulfield explained that "outside persons" was a reference to previous requests he had made to have a court reporter and attorney present at business meetings. In response, Dr. Caulfield told Dr. Packer that, "on the advice of counsel," he could not attend the performance review "under the conditions you outlined below."

¶28 On April 1, 2011, at 4:09 p.m., Dr. Packer sent an email to Dr. Caulfield stating that the company was treating Dr. Caulfield's refusal to participate in the performance review as a "voluntary resignation from the company effective immediately." At 4:43 p.m., Dr. Caulfield sent an email from his private email account to Dr. Packer stating that he had been locked out of the building and had stopped receiving company email, and that he considered those actions to be a termination of his employment. According to Dr. Caulfield, Dr. Packer's email was the only explanation he ever received for why he had been terminated.

¶29 Michael King testified that on March 16, 2010, he sent a letter to PEI's attorney, Scott Duffield, on behalf of Dr. Caulfield, concerning Dr. Packer's alleged financial improprieties regarding New Vermillion. On March 18, 2010, King received a response from Deborah Hockman, vice-chair of TPG's board of directors, indicating that a special meeting of the board

of directors would be held during which the board would be urged to retain an independent investigator to conduct an inquiry into New Vermillion and Dr. Packer's financial transactions with PEI and TPG.

¶30 A special committee of the board of directors of TPG consisting of three outside directors—Hockman, Dr. William Carroll and Dr. Russell Johnson—was subsequently convened. On April 13, 2010, the special committee sent a letter to Dr. Packer requesting that (1) he reimburse PEI for payments it made to New Vermillion; (2) he and Sartain resign from the board of directors; and (3) outside directors comprise a majority of the board of directors. The letter indicated that the special committee members would resign from the board of directors if those actions were not taken.

¶31 Dr. Michael Koehler testified that he was PEI's CEO from December 2, 2008, until he was terminated on May 17, 2010. He was elected to TPG's board of directors in June 2009. Around January or February 2009, Dr. Packer told Dr. Koehler that he owned the New Vermillion foundry. According to Dr. Koehler, around March or April 2009, he became aware of issues regarding payments that the company was making to cover expenses for New Vermillion, as well as that employees from PEI and other Packer entities were working at New Vermillion. His investigation also revealed that PEI had booked a "loan to officer shareholder" for $761,000.00. Dr. Koehler learned from Sartain that this was a personal loan which Dr. Packer had obtained to fund the purchase of the New Vermillion foundry and that the loan was transferred to the corporation's credit line in late 2008.

¶32 Dr. Russell Johnson testified that he served as an independent director on TPG's board of directors from December 2009 through April 2010 and that he served on the special committee formed in the wake of King's letter. According to Dr. Johnson, Dr. Packer rejected the special

committee's request that he and Sartain resign from the board the directors. As a result, the special committee members resigned from TPG's board of directors.

¶33 Next, Dr. Caulfield's attorneys read portions of Sartain's evidence deposition into the record. Sartain testified that she approached Dr. Caulfield around March or April of 2009 because she was concerned about cash advances which TPG was making to New Vermillion. She explained that earlier, Dr. Packer had approached the board of directors about the project, and that the board told Dr. Packer to proceed with the project and report back, but Dr. Packer never reported back to the board regarding the project. According to Sartain, she discussed her concerns about New Vermillion with Dr. Packer, who told her continue making payments towards New Vermillion because "New Vermillion was part of the company."

¶34 According to Sartain, Dr. Packer met with Denniston and her after Dr. Packer received King's letter. During the meeting, Dr. Packer discussed terminating Dr. Caulfield for cause, but she and Denniston advised against it out of concern that it would appear retaliatory. She also described a business meeting between Dr. Packer and Dr. Caulfield which took place on February 14, 2011, during which Dr. Packer told Dr. Caulfield that he did not want Dr. Caulfield in the company if Dr. Caulfield did not drop the shareholder lawsuit.

¶35 Chetan Joshi testified that he was Dr. Caulfield's retained damages expert. Joshi testified that Dr. Caulfield was owed incentive bonus payments in the amount of $447,425.00 for 2010 and $188,249.00 for 2011. According to Joshi, Dr. Caulfield's lost compensation for 2011 was $352,982.00 and he was owed $500,000.00 for his salary "upon his separation from [PEI]." Joshi stated that he his incentive calculations did not take into account whether PEI had disposable income because he was not provided with P&L statements for 2010 and 2011.

¶36 During cross-examination, Joshi testified that he computed Dr. Caulfield's incentive compensation based upon the assumption that PEI had disposable income. However, he conceded that he did not see any evidence that PEI had disposable income in any of the documents he examined and that TPG's 2011 tax return showed a loss of $3,283,288.00.

¶37 On redirect-examination, Joshi explained that "[w]hile a tax return may show a taxable income or a loss, *** disposable income means something very different" and is based on audited financial statements rather than tax returns. Dr. Caulfield then rested his case-in-chief.

¶38 Dr. Packer testified for defendants. According to him, PEI had been searching for a foundry to manufacture steel and iron castings. In June 2007, a man named Robert Breast heard that Vermillion Ironworks in Hoopeston, Illinois, was being sold. According to Dr. Packer, Vermillion Ironworks possessed the material, equipment and staff required by PEI to manufacture the castings. Breast purchased the foundry and, according to Dr. Packer, he and Breast had a "gentleman's agreement" whereby Breast and PEI would co-own the New Vermillion foundry. However, because PEI's cash reserves were low, Dr. Packer "fronted some of the money for the operation of the organization." Dr. Packer testified that his actions were approved by the board of directors. The Breast-Packer agreement ultimately fell through after Breast received a job offer.

¶39 In October 2007, TPG incorporated the foundry under the name New Vermillion Ironworks. Once incorporated, the New Vermillion project had several revenue streams, including the manufacture of various castings and a potential contract with the military to manufacture a special armor for the United States Army. However, according to Dr. Packer, the military canceled the contract before production began, and so PEI only realized approximately $159,900 of the $13 million contract value.

¶40 Dr. Packer testified that work at the foundry stopped around summer 2009 because "Dr. Koehler stopped the allocation of funds to cover the cash flow." He explained that the company had a "backlog" of business in the foundry's other profit centers and that the "loss of cash flow caused the inability to pay salaries and buy materials and caused the closing of the New Vermillion Ironworks."

¶41 Dr. Packer testified that after he received King's letter, he became concerned about Dr. Caulfield's health and the circumstances surrounding the letter's creation. He explained that Dr. Caulfield had a history of heart attacks and that he had experienced times where people who had heart attacks "became *** very different *** mentally." Dr. Packer noted that prior to receiving the letter, Dr. Caulfield had never expressed concerns about New Vermillion.

¶42 As a result of the letter, Dr. Packer believed that he needed to "build communication" with Dr. Caulfield. Towards that end, Dr. Packer moved Dr. Caulfield's office closer to his and made several attempts meet with Dr. Caulfield. He testified, however, that Dr. Caulfield subsequently moved his office and "did not make himself available for *** meetings." Dr. Packer explained that Dr. Caulfield's job title was changed because he wanted Dr. Caulfield to "slow down and take stock of himself, his health and his condition, and to back away from the high-pressure things that seemed to be impacting him."

¶43 On January 14, 2011, the management committee, along with Sartain, and Dr. Packer, sent Dr. Caulfield a memorandum about an annual self-appraisal Dr. Caulfield had been asked to complete. According to Dr. Packer, Dr. Caulfield never completed the self-appraisal. On January 21, 2011, Dr. Packer sent Dr. Caulfield a memorandum to schedule a meeting with the management committee. According to Dr. Packer, Dr. Caulfield did not respond.

¶44 In an undated communication, Dr. Packer denied unilaterally suspending Dr. Caulfield's projects, stating that Dr. Caulfield's " 'leadership' and focus on building [PEI] *** has been non-existent at best and highly damaging to morale and the constructive accomplishments of our entire staff." He explained that Dr. Caulfield's lack of communication with management needed immediate correction and asked whether "we are to read into your behavior that you have quit your job with the company?"

¶45 On March 16, 2011, Dr. Caulfield, through counsel, sent Dr. Packer a letter indicating that Dr. Packer had breached the Agreement by telling Dr. Caulfield that he would not be paid his 2010 incentive bonus. On March 31, Dr. Caulfield's attorney notified Dr. Packer that he considered Dr. Packer's actions preventing Dr. Caulfield from working on his projects to be a breach of contract with PEI's clients and subjected Dr. Caulfield to liability and explained that absent a "legitimate corporate reason" for withholding work, he would advise Dr. Caulfield to continue working.

¶46 On March 31, 2011, Dr. Packer sent Dr. Caulfield an email scheduling his performance review which stated that "outside persons or interferences with the internal business practice of [PEI] will not be tolerated." The same day, Dr. Caulfield's counsel sent Dr. Packer a letter stating that he had advised Dr. Caulfield to have an attorney and court reporter present at the performance review. Later that day, Dr. Caulfield replied, stating "[o]n the advice of counsel, I cannot attend this performance review under the conditions you outlined below."

¶47 On April 1, 2011, Dr. Packer sent Dr. Caulfield an email stating that Dr. Caulfield's refusal to participate in his performance review had been accepted by the company as a voluntary resignation. On June 20, 2011, Dr. Packer sent Dr. Caulfield a letter stating that he

believed Dr. Caulfield had violated section 3.3 of the Agreement by "working on matters that [he] worked on while at [PEI]" and not "billing [the matters] through [PEI]."

¶48 On cross-examination, Dr. Packer gave conflicting testimony about whether Dr, Caulfield was working on the projects which he was instructed to stop working on. Dr. Packer then accused Dr. Caulfield of billing time for projects he did not work on. However, upon further questioning, Dr. Packer was unable to give a specific example of a project which Dr. Caulfield had improperly billed, and he was also unable to say with certainty whether or not Dr. Caulfield was the testifying expert on projects which he had been told to stop working on.

¶49 In addition, he conceded that Dr. Caulfield brought clients to the company and contributed to the company's growth "somewhat on occasion." He also admitted that he told Dr. Caulfield to leave or he would call the police when Dr. Caulfield came to work on July 5, 2010. He also conceded that Dr. Caulfield's heart attack occurred in 1996 and that he was not sure if Dr. Caulfield had suffered a more recent heart attack. He testified that in the 24 years since the heart attack, Dr. Caulfield had traveled extensively, testified in court, and worked "quite a few hours."

¶50 Dr. Packer was also cross-examined regarding his ownership interest in New Vermillion. His testimony, although at times unclear and internally inconsistent, seemed to be that he "technically" owned New Vermillion, but that he did not own it "in reality" because he had a handshake agreement with "all in the folks in [PEI]" that PEI would ultimately own New Vermillion. However, according to Dr. Packer, all of the necessary agreements were never "consummate[d]" and PEI never obtained legal title to New Vermillion. Dr. Packer admitted that he borrowed money on his personal credit line to pay for New Vermillion, and although he denied transferring the credit line to TPG, he admitted that it the transfer occurred.

¶51 Sartain then testified in open court that she first became aware of New Vermillion when Dr. Packer presented the project during a board meeting in October 2007. During the meeting, it was discussed that New Vermillion "would become part of [PEI]." She confirmed that Dr. Packer was the shareholder associated with the "loan to shareholder" and explained that she booked the expense that way because "New Vermillion was Dr. Packer's; he was the owner." She testified that she calculated Dr. Caulfield's 2010 incentive bonus to be $263,000.00. However, although she was not certain, she believed that PEI did not have disposable income in 2010 because PEI did not pay bonuses, make contributions to employees' 401(k) plans or engage in profit sharing in 2010.

¶52 On cross-examination, Sartain was questioned about a supplemental affidavit which she executed on May 24, 2012. In the supplemental affidavit, she stated that Dr. Caulfield's 2010 incentive bonus was $263,308.77. With respect to 2011, her affidavit testimony indicated that Dr. Caulfield was not entitled to a bonus because, based on TPG's 2011 income statement which purported showed a loss of $2,738,178.78, PEI did not have disposable income in 2011. During trial, however, she conceded, however, that TPG's income statement included financial information for other Packer entities in addition to PEI. In addition, she admitted that when she first discussed Dr. Caulfield's 2010 bonus with him, she agreed with an estimate he provided showing that his bonus should be between $446,000 and $485,000.00. She further conceded that she testified during her deposition in July 2011 that she told Dr. Packer that Dr. Caulfield's 2010 bonus was around $400,000.

¶53 Warren Denniston testified that he served on TPG's board of directors from 2002 until 2010. According to Denniston, when Breast purchased the New Vermillion foundry, he met with Dr. Packer and Breast to review UCC filings to ensure that there were no impediments to

clearing title to the foundry. In 2010, Denniston, at the request of the board of directors, began investigating alleged financial irregularities with New Vermillion. His investigation revealed that Dr. Packer contributed $500,000.00 to New Vermillion and that Dr. Packer, at least for some time, owned New Vermillion.

¶54 On cross-examination, Denniston conceded that he was concerned by the fact that Packer companies had loaned New Vermillion money that had not been documented by TPG. In addition, he testified that Dr. Packer never repaid to PEI the full proceeds of the New Vermillion loan. Denniston also believed that firing Dr. Caulfield would have harmed the company.

¶55 Defendants next called Dr. Caulfield to testify. Dr. Caulfield was examined extensively regarding the timing of his lawsuit and whether he intended to resign from PEI at the time of filing. He denied that he intended to form his own company when he filed the present case against defendants. However, he conceded that he was still employed at PEI when he filed the lawsuit and that he sought a declaration that the restrictive covenant was invalid. He also he admitted that he formed his own company within 15 to 20 days of filing his complaint.

¶56 On cross-examination, Dr. Caulfield testified that he sought to invalidate the restrictive covenant because defendants had breached the contract.

¶57 After closing arguments, the court took the case under advisement. On February 6, 2014, the court issued a 24-page written ruling. In its ruling, the court found (1) that Dr. Caulfield was an employee at will; (2) that he was subjected to a "pattern of harassment and retaliation" after he reported Dr. Packer's alleged financial misdeeds, culminating in his discharge; and (3) that his discharge violated Illinois public policy because he had a good faith basis to believe that Dr. Packer stole corporate assets. The court further found that the restrictive covenant contained in

section 3.3 of the Agreement was inapplicable and unenforceable because Dr. Caulfield was terminated by PEI.

¶58 The court then turned to the issue of damages. With respect to incentive compensation, the court noted that P&L statements did not exist for 2010 and 2011. The court stated, however, that "the failure of PEI and TPG to take steps, in the ordinary course of business, to create such statements should not bar Dr. Caulfield from producing evidence on his own to establish profitability of the company." With respect to 2010, the court held that email correspondence between Dr. Caulfield and Sartain regarding the 2010 bonus, as well as the language of the Agreement and Dr. Caulfield and Sartain's testimony, established that PEI had disposable income in 2010.

¶59 With respect to 2011, however, the court held that a 2011 income statement prepared for TPG, as well as testimony from Sartain that the company gave no bonuses and made no 401(k) contributions in 2011, showed that PEI did not have disposable income in 2011.

¶60 The court further held that Joshi's determination that Dr. Caulfield was entitled to $252,982.00 in lost income for 2011 was "based upon a flawed methodology" because Joshi improperly calculated Dr. Caulfield's annual compensation by including his incentive bonus along with his salary. With respect to Dr. Caulfield's damages for the 2011 reduction in salary, the court noted that Dr. Caulfield received $83,648.00 in salary for the first quarter of 2011 and that he should have received one of quarter of $500,000.00, or $125,000. Accordingly, the court set his damages at $41,352.00.

¶61 Defendants filed a timely notice of appeal and this appeal followed.

¶62 ANALYSIS

¶63 Defendants present eight issues for our review: (1) whether the trial court properly denied their motion to dismiss; (2) whether Dr. Caulfield was an employee at will; (3) whether "the evidence contained a sufficiently clear mandate of public policy" to support Dr. Caulfield's retaliatory discharge claim; (4) whether the trial court properly granted summary judgment in favor of Dr. Caulfield on his breach of contract claim; (5) whether the trial court properly entered final judgment on Dr. Caulfield's breach of contract claim where Dr. Caulfield abandoned the claim before the trial court entered judgment; (6) whether the trial court properly awarded Dr. Caulfield identical damages for his breach of contract and retaliatory discharge claims; (7) whether the trial court properly awarded Dr. Caulfield damages for his 2010 incentive bonus where he failed to prove that PEI had disposable income in 2010; and (8) whether the trial court properly awarded Dr. Caulfield damages for his 2011 reduction in salary and his severance pay in light of the trial court's finding that Dr. Caulfield was an employee at will.

¶64 *A. The Trial Court Properly Denied Defendants' Motion to Dismiss*

¶65 Defendants' motion to dismiss was filed pursuant to section 2-619 of the Code. A section 2–619 motion admits as true all well-pleaded facts, along with all reasonable inferences that can be gleaned from those facts." *Porter v. Decatur Memorial Hospital*, 227 Ill. 2d 343, 352 (2008). "[W]hen ruling on a section 2–619 motion to dismiss, a court must interpret all pleadings and supporting documents in the light most favorable to the nonmoving party." *Id.* We review orders from a section 2-619 motions *de novo*. *Id.*

¶66 "Illinois courts favor using arbitration as a method of settling disputes." *Schroeder Murchie Laya Associates, Ltd. v. 1000 West Lofts, LLC,* 319 Ill. App. 3rd 1089, 1095 (2001). Although disfavored, a court may nonetheless find that a party has waived its right to arbitrate.

Id. at 1095-96. "[W]aiver of the right to arbitration occurs when a party's conduct is so inconsistent with the arbitration clause as to demonstrate abandonment of that right [citation] or when the party submits arbitrable issues to the court for a decision. *Lundy v. Farmers Group, Inc.*, 322 Ill. App. 3d 214, 219 (2001).

¶67 Initially, we consider defendants' argument, premised upon *Epstein v. Yoder*, 72 Ill. App. 3d 966 (1979),[2] that because they denied the existence and validity of the Agreement, waiver could not occur until the trial court found that the Agreement existed and was valid. Upon review of the record, it appears that defendants have raised this argument for the first time on appeal. Indeed, in their reply in support of their motion to dismiss, defendants refer to the Agreement as a "binding contract" and stated that they "never denied the existence or validity of the contract. Instead, Defendants denied Plaintiff's characterization of the contract as an 'employment agreement.' " Because defendants did not raise this issue in the trial court, it is forfeited on appeal. *Johnson Press of America, Inc. v. Northern Insurance Co. of New York*, 339 Ill. App. 3d 864, 874 (2003).

¶68 Forfeiture aside, defendants' argument makes no sense because their motion to dismiss was premised on the arbitration clause contained in the Agreement, the validity of which defendants now call into question. Defendants cannot simultaneously invoke *and* disclaim the Agreement.

¶69 Defendants fare no better on the merits. Defendants argue that they did not waive their right to arbitration because they did not act inconsistently with their right to arbitrate and because they did not submit arbitrable issues to the trial court prior to filing their motion to dismiss.

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[2] Defendants also cite *Healy & Schulte, Inc. v. Lakeshore Holdings, LLC*, 2013 IL App (1st) 123060-U. *Healy* is an unpublished order which, pursuant to Illinois Supreme Court Rule 23(e)(1) (Ill. Sup. Ct. R. 23(e)(1) (eff. July 1, 2011)) "is not precedential and may not be cited by any party except to support contentions of double jeopardy, *res judicata*, collateral estoppel or law of the case." We have not considered *Healy* in deciding this case.

Defendants also claim that they denied venue in their answer and explain in their reply brief that this denial was "based on the arbitration clause in the Agreement." It is apparent from reading defendants' answer, however, that they did not even mention the arbitration clause in their answer. The relevant allegation and answer state:

> "6. Venue properly lies in Cook County based upon, among other bases, the Illinois Code of Civil Procedure Section 5/2-101.
>
> **ANSWER:** Defendants deny the allegations contained in Paragraph 6 of Plaintiff's Complaint."

¶70 Even assuming that defendants' denial of venue invoked the arbitration clause, we are not persuaded that it was sufficient to show defendants acted consistently with their right to arbitrate. Defendants filed their answer purportedly invoking the arbitration clause on July 1, 2011. The record reveals that defendants participated in the litigation several times thereafter, including (1) contesting a motion to set the deposition of Sartain filed on July 7, 2011; (2) defending the evidence deposition of Sartain on July 22, 2011, and unilaterally terminating the deposition pursuant to the "three hour rule" on the basis that Sartain "will be available to testify at trial"; (3) contesting plaintiff's motion to continue the Sartain deposition filed on August 3, 2011; (4) defending the recommenced Sartain deposition on September 7, 2011; and (5) filing a motion for extension of time to respond to plaintiff's motion for partial summary judgment. Assuming that defendants invoked the arbitration clause in their answer, their subsequent participation in no less than five substantive events in the case history without ever raising the arbitration issue or questioning why the case was still proceeding in the Circuit Court of Cook County is entirely inconsistent with their right to arbitrate.

¶71 In addition, during the hearing on defendants' motion to dismiss, the trial court asked defense counsel why they litigated issues regarding the Sartain deposition if they "were just going to ask to go to arbitration[.]" Defense counsel responded:

> "At that point, I don't believe that we knew we were going to be seeking to enforce the arbitration provision. My understanding is that when they filed a motion for summary judgment, which would then be an arbitrable issue before the Court, is when we moved to dismiss based on the arbitration provision."

¶72 Defense counsel's response confirms that defendants acted inconsistently with their right to arbitrate, for two reasons. First, it confirms that defendants were aware of the arbitration clause and had made a conscious decision to not invoke it until the time they did. Second, it shows that defendants acceded to litigating plaintiff's claims in court until the likelihood of an adverse ruling—fueled largely by Sartain's deposition testimony—was apparent.

¶73 We further note that defendants' position that they waited to invoke the arbitration clause until plaintiff submitted an arbitrable issue to the trial court is disingenuous because the scope of the complaint made it obvious that Dr. Caulfield would eventually submit some arbitrable issue to the trial court for decision. Armed with that knowledge, defendants' decision to wait seven months to enforce the arbitration clause cannot be considered consistent with their right to arbitrate. Accordingly, we find that defendants waived their right to arbitration.

¶74 *B. The Trial Court Properly Granted Summary Judgment in Favor of Dr. Caulfield*

¶75 Defendants contend that the trial court improperly granted summary judgment in favor of Dr. Caulfield because there are genuine issues of material fact as to whether (1) Dr. Caulfield breached the Agreement and (2) the Agreement was validly modified.

¶76 Summary judgment is appropriate "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2010). "In considering a motion for summary judgment, all reasonable inferences must be drawn strictly against the moving party and liberally in favor of the opponent." *Weedon v. Pfizer, Inc.*, 332 Ill. App. 3d 17, 20 (2002). We review an order granting or denying summary judgment *de novo*. *Bruns v. City of Centralia*, 2014 IL 116998, ¶ 13.

¶77 The sufficiency of affidavits submitted in support of or opposition to motions for summary judgment is governed by Illinois Supreme Court Rule 191(a). Rule 191(a) provides:

> "[a]ffidavits in support of and in opposition to a motion for summary judgment *** shall be made on the personal knowledge of the affiants; shall set forth with particularity the facts upon which the claim, counterclaim, or defense is based; shall have attached thereto sworn or certified copies of all documents upon which the affiant relies; shall not consist of conclusions but of facts admissible in evidence; and shall affirmatively show that the affiant, if sworn as a witness, can testify competently thereto."

As Rule 191(a) makes clear, "summary judgment affidavits must contain not conclusions but only evidentiary facts to which the affiant is capable of testifying." *Gassner v. Raynor Manufacturing Co.*, 409 Ill. App. 3d 995, 1005 (2011). Moreover, "[u]nsupported assertions, opinions, and self-serving or conclusory statements do not comply" with Rule 191(a). *Id.* "Rule 191(a) is satisfied if 'from the document as a whole, it appears the affidavit is based on the personal knowledge of the affiant and there is a reasonable inference that the affiant could

competently testify to its contents at trial.' " *Jackson v. Graham*, 323 Ill. App. 3d 766, 777 (2001) (quoting *Kugler v. Southmark Realty Partners III*, 309 Ill. App. 3d 790, 795 (1999)).

¶78 Defendants' argument that there is a genuine issue of material fact as to whether Dr. Caulfield breached the Agreement is premised entirely on Dr. Packer's affidavit. The trial court declined to consider Dr. Packer's affidavit, stating that it did not "rise to the level of admissible evidence." Accordingly, we must determine whether the trial court properly declined to consider Dr. Packer's affidavit.

¶79 Ordinarily, we consider a trial court's evidentiary decisions under the deferential abuse of discretion standard. *Jackson*, 323 Ill. App. 3d at 773. However, because the trial court's decision to disregard Dr. Packer's affidavit was made in conjunction with its decision on Dr. Caulfield's motion for summary judgment, our standard of review is *de novo*. *Id.*; see also *US Bank, National Association v. Avdic*, 2014 IL App (1st) 121759, ¶ 18; *Travel 100 Group, Inc. v. Mediterranean Shipping Co.*, 383 Ill. App. 3d 149, 152 (2008).

¶80 We have reviewed the Packer affidavit in its entirety. Summarized briefly, Dr. Packer claimed that Dr. Caulfield breached the Agreement in numerous ways, including by: (1) "fail[ing] to grow PEI's business;" (2) causing by his "action and inaction" PEI to lay off all of its work force and close its business in January 2012; (3) attempting to extort money and "destroy the Packer Companies" by filing this lawsuit; (4) threatening outside board members, leading to their resignation; (4) filing "unfounded lawsuits"; (5) holding "unauthorized meetings" with his attorney and other employees during which he made knowingly false statements about the company, causing many employees to leave the company and/or become less productive; (6) "creat[ing] dissention and discord amongst loyal employees, loss of personnel, loss of clients, and infliction of emotional distress to the employees and management,

as well as damage to the reputation of the Packer Companies"; (7) attempting to take over the Packer Companies through "misguided self-interest" and "sabotage"; overseeing PEI's forensic consulting group during a period in which it realized "disastrous losses," including a loss of $3 million in 2009; (8) willfully and wantonly misrepresenting the facts about New Vermillion, leading to the loss of staff members, degrading employee morale, and decline in stock value; and (9) engaging in "bullying, disrespectful treatment, belittling, harassment of *** female employees, improper and disrespectful language and name calling."

¶81 We find, as did the trial court, that the Packer affidavit does not rise to the level of admissible evidence. Contrary to the strictures of Rule 191(a), the Packer affidavit consists almost entirely of legal conclusions and factual assertions offered without foundation. For example, Dr. Packer asserted that Dr. Caulfield failed to grow PEI's business and sustained severe losses in 2009. The affidavit is devoid, however, of any evidence tying Dr. Caulfield to those losses or establishing how he specifically caused them. In any event, we seriously doubt that Dr. Caulfield breached the Agreement simply because PEI lost revenue. As the trial court observed, if loss of profit were evidence that Dr. Caulfield breached the Agreement, then "[h]alf of corporate America would be out of a job." Likewise, Dr. Packer's claim that Dr. Caulfield filed unfounded lawsuits is nothing more than a legal conclusion, based upon Dr. Packer's opinion, that Dr. Caulfield's lawsuits against PEI and TPG lacked merit. We could dissect the Packer affidavit further, but that would only underscore the obvious; the Packer affidavit clearly fails to comply with Rule 191(a).

¶82 Because the Packer affidavit does not comply with Rule 191(a), we decline to consider it. This is fatal to defendants' argument that Dr. Caulfield breached the Agreement because the affidavit was the only "evidence" submitted by defendants in support of that argument.

Accordingly, we find that there is no genuine issue of material fact as to whether Dr. Caulfield breached the Agreement.

¶83 We next consider defendants' argument that the modification was invalid because it was not in writing. In order to make this argument, defendants rely on *Khan v. BDO Seidman, LLP*, 404 Ill. App. 3d 892 (2010). There, the court, applying *New York* law, recited the rule that a written agreement "which contains a provision to the effect that it cannot be changed orally, cannot be changed by an executory agreement unless such executory agreement is in writing and signed by the party against whom enforcement of the change is sought or by his agent." *Id.* at 917 (quoting N.Y. Gen. Oblig. Law § 15–301(1) (McKinney 2001)). We reject defendants' argument because it is premised on authority which applied New York rather than Illinois law. See *Israel v. Chabra*, 12 N.Y. 3d 158, 164-67 (2009) (noting that New York General Obligations Law section 15-301(1) is an exception to the general common law rule that "a contractual 'no oral modification' clause was not enforceable because contracting parties were viewed as being able to waive such a clause, thereby orally amending their written agreement[]").[3]

¶84 In *Illinois*, it is well settled that "the terms of a written contract can be modified by a subsequent oral agreement even though *** the contract precludes oral modifications." *Tadros v. Kuzmak*, 277 Ill. App. 3d 301, 312 (1995); *A.W. Wendell and Sons, Inc. v. Qazi*, 254 Ill. App. 3d 97, 105 (1993); *Falcon, Ltd v. Corr's Natural Beverages, Inc.*, 165 Ill. App. 3d 815, 821 (1987); *Estate of Kern v. Handelsman*, 115 Ill. App. 3d 789, 794 (1983); see also *Hannafan and Hannafan, Ltd. V. Bloom*, 2011 IL App (1st) 110722, ¶ 20 ("Parties to a written contract may

[3] In the proceedings below, defendants cited *Khan* in their response to Dr. Caulfield's motion for summary judgment. In his reply brief, Dr. Caulfield explained that *Khan* applied New York law. In their briefing before this court, defendants again cite *Khan* without acknowledging that it applied New York law and that New York law, as relevant here, is directly contrary to controlling Illinois law.

modify its terms by a subsequent oral agreement."). The record contains ample evidence showing that a modification took place. Sartain testified during her deposition that she and Dr. Caulfield negotiated changes to the Agreement around March 2008 whereby Dr. Caulfield's base salary was increased to $500,000.00 annually. According to Sartain, Dr. Caulfield was in fact paid a base salary of $500,000.00 in 2009 and 2010. Based on these facts, we find that there is no genuine issue of material fact as to whether the Agreement was modified.

¶85 We next consider defendants' contention that the modification was invalid because Sartain lacked authority to unilaterally modify the Agreement. During the hearing on Dr. Caulfield's motion for summary judgment, the trial court found that Sartain had, "at a minimum," apparent authority to make financial decisions for PEI. Thus, we review this issue *de novo*. *Chatham Foot Specialists, P.C. v. Health Care Service Corp.*, 216 Ill. 2d 366, 376 (2005). "The test of agency is whether the alleged principal has the right to control the manner and method in which work is carried out by the alleged agent and whether the alleged agent can affect the legal relationships of the principal." *Oliveira-Brooks v. Re/Max International, Inc.*, 372 Ill. App. 3d 127, 134 (2007). "While the existence of any agency relationship is usually a question of fact, it becomes a question of law when the facts regarding the relationship are undisputed or no liability exists as a matter of law." *Id.* "The burden of proving the existence of an agency relationship and the scope of authority is on the party seeking to charge the alleged principal." *Id.*

¶86 Agency may be actual or apparent. *Id.* at 135, 137. "[A]ctual agency may be either express or implied." *Cove Management v. AFLAC, Inc.*, 2013 IL App (1st) 120884, ¶ 23. "Express authority is actual authority granted explicitly by the principal to the agent, while implied authority is actual authority proven circumstantially by evidence of the agent's position."

Id. Apparent agency, by contrast, "is rooted in the doctrine of equitable estoppel and is based upon the idea that 'if a principal creates the appearance that someone is his agent, he should not then be permitted to deny the agency if an innocent third party responsibly relies on the apparent agency and is harmed as a result.' " *Oliveira-Brooks*, 372 Ill. App. 3d at 137 (quoting *O'Banner v. McDonald's Corp.*, 173 Ill. 2d 208, 213 (1996)). "Apparent authority in an agent is the authority which the principal knowingly permits the agent to assume, or the authority which the principal holds the agent out as possessing." *Gilbert v. Sycamore Municipal Hospital*, 156 Ill. 2d 511, 523 (1993). The elements of apparent agency are: "(1) that the principal held the agent out as having authority or knowingly acquiesced in the agent's exercise of authority; (2) based on the actions of the principal and agent, the third person reasonably concluded that an agency relationship existed; and (3) the third person relied on the agent's apparent authority to his detriment." *Oliveira-Brooks*, 372 Ill. App. 3d at 137.

¶87 We note at the outset that Dr. Caulfield has not directed our attention to any express grant of authority to Sartain to modify the Agreement in the record, and our independent review of the record has revealed none. Accordingly, we find that Sartain did not possess express authority to unilaterally modify the Agreement.

¶88 However, we believe that based upon the record before us, the elements of apparent agency are present. As to the first element, we note that Sartain signed the Agreement on behalf of PEI as executive vice president of finance. We believe this is evidence that PEI held Sartain out as someone with authority to memorialize employment agreements on behalf of PEI.

¶89 As to the second element, we note that Sartain testified during her deposition that she negotiated changes to the Agreement "on behalf of Packer" after she informed Dr. Caulfield that PEI did not have sufficient funds in March 2008 to pay his 2007 incentive bonus. Based on the

fact that Sartain signed the Agreement and subsequently negotiated changes to the Agreement, we believe that Dr. Caulfield could have reasonably believed that Sartain was authorized to modify the Agreement.

¶90 Finally, as to the third element, Sartain testified during her deposition that as a result of her negotiations with Dr. Caulfield, the parties agreed to a new compensation structure whereby Dr. Caulfield's base salary was increased and the formula to calculate his incentive bonus was altered in a manner resulting in lower incentive bonuses. Therefore, we believe that the record supports a finding that Dr. Caulfield detrimentally relied on Sartain's apparent authority to modify the Agreement.

¶91 Because we find that Illinois law permitted the parties to orally modify the Agreement and that Sartain possessed apparent authority to do so, we affirm the trial court's entry of summary judgment in favor of Dr. Caulfield on his breach of contract claim.

¶92 *C. The Trial Court Erred by Finding that Dr. Caulfield was an employee at will*

¶93 Defendants contend that Dr. Caulfield's retaliatory discharge claim fails because he was not an employee at will and that even if he was, his discharge did not implicate an issue of public policy. Because it is dispositive, we consider only whether Dr. Caulfield was an employee at will.

¶94 "Generally, an employer may fire an employee-at-will for any reason or no reason at all." *Jacobson v. Knepper & Moga, P.C.*, 185 Ill. 2d 372, 375-76 (1998). Since 1978, however, Illinois courts have recognized "the limited and narrow tort of retaliatory discharge as an exception to the general rule of at-will employment." *Id.*; see *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172 (1978). To establish a claim for retaliatory discharge, a plaintiff must prove she was an employee at will (see *Petrik v. Monarch Printing Corp.*, 111 Ill. App. 3d 502, 504 (1982)) and

that "she was '(1) discharged; (2) in retaliation for her activities; and (3) that the discharge violates a clear mandate of public policy.' " (*Blount v. Stroud*, 232 Ill. 2d 302, 314 (2009) (quoting *Hinthorn v. Roland's of Bloomington, Inc.*, 119 Ill.2d 526, 529 (1988))).

¶95 As a general rule, employment relationships without a fixed duration presumptively are at will (*Ahlgren v. Blue Goose Supermarket, Inc.*, 266 Ill. App. 3d 154, 160 (1994)) and thus may be terminated by either party "for any reason or for no reason." (*Fellhauer v. City of Geneva*, 142 Ill. 2d 495, 505 (1991)). The parties may deviate from at will employment by entering into an employment agreement which contains a "specific temporal duration" or which "articulate[es] cognizable events upon which termination may occur." *Cress v. Recreation Services, Inc.*, 341 Ill. App. 3d 149, 171 (2003).

¶96 The trial court construed various sections of the Agreement and ruled on their legal effect. "As a general rule, the construction, interpretation, or legal effect of a contract is a matter to be determined by the court as a question of law." *Avery v. State Farm Mutual Insurance Co.*, 216 Ill. 2d 100, 129 (2005). Accordingly, we review this issue *de novo*. *Id.* Our primary goal in interpreting contractual language is to give effect to the intent of the parties. *Gallagher v. Lenart*, 226 Ill. 2d 208, 232 (2007). "[B]ecause words derive their meaning from the context in which they are used, a contract must be construed as a whole, viewing each part in light of the others." *Id.* at 233.

¶97 The Agreement's preamble states "[t]his agreement beginning June 1, 2002 and continuing perpetually at the wishes of both parties is between [PEI] *** and [Dr. Caulfield]." This language clearly evinces an intent on behalf of the parties to establish a perpetual employment relationship. Such agreements are presumptively at will. *Ahlgren*, 266 Ill. App. 3d at 160.

¶98 However, we believe that sections 3.0 and 3.1 are sufficient to remove the Agreement from the scope of at will employment. Section 3.0 provides "[t]his contract can only be terminated if one of the following conditions exist or if both parties mutually consent to its termination." Although section 3.0 uses the permissive "can," it also employs the word "only," indicating that the conditions which follow provide the sole basis upon which Dr. Caulfield could be terminated.

¶99 Section 3.1 provides that Dr. Caulfield "may not be discharged by [PEI] except in the unlikely event of abrogation of duties of an exceptional nature in contravention to the mission and beliefs of [PEI], and deemed harmful to other employees of [PEI] by careful consideration of and resolution by the full Board of Directors of [TPG]." Like section 3.0's use of the word "only," we believe that section 3.1's use of the word "except" establishes that the terms which follow are the sole exception to a general understanding between the parties that Dr. Caulfield "may not be discharged." Thus, like section 3.0, section 3.1 suggests that, while Dr. Caulfield's termination upon satisfaction of the condition is not mandatory, the condition itself is the sole and exclusive basis for which his employment could be terminated.

¶100 We further note that section 3.1 permitted Dr. Caulfield to submit disputes regarding his termination to arbitration. This provision cannot be squared with a reading of the Agreement as establishing an at will relationship. If defendants intended for Dr. Caulfield to be an at will employee, then it makes no sense why they would include language in the Agreement circumscribing the defining characteristic of at will employment, namely that it may be terminable by either party at any time, for any or no reason. Accordingly, we find that Dr. Caulfield was not an employee at will.

¶101 Because status as an employee at will is an element of a retaliatory discharge claim, we reverse the trial court's judgment and vacate the award of damages in favor of Dr. Caulfield on his retaliatory discharge claim. Based on our finding with respect to this issue, we need not consider whether Dr. Caulfield's discharge implicated Illinois public policy.

¶102 *D. Dr. Caulfield Did Not Abandon His Breach of Contract Claim*

¶103 Defendants contend that Dr. Caulfield waived his breach of contract claim because his attorneys did not reference it during closing arguments of the bench trial. Defendants further assert that Dr. Caulfield's attorneys confirmed that he was no longer pursuing the claim in a post-trial email to defense counsel.

¶104 We need not consider this argument because defendants have failed to support it with citation to any relevant authority. To be sure, defendants cite two cases—*Dukes v. J.I. Case Co.*, 186 Ill. App. 3d 349 (1989) and *Barnes v. Huffman*, 113 Ill. App. 226 (1903)—but *Dukes* is not *relevant* because it does not discuss waiver or abandonment of claims, and *Barnes* is not *authority* because it is from 1903 and is therefore not binding authority. See *Cinkus v. Village of Stickney Municipal Officers Electoral Board*, 228 Ill. 2d 200, 221 (2008) (appellate court decisions issued prior to 1935 are not binding authority). Issues raised on appeal which are not supported by citation relevant authority are forfeited. *Alvarez v. Pappas*, 374 Ill. App. 3d 39, 44 (2007); see Ill. Sup. Ct. R. 341(h)(7) (eff. Feb. 1, 2013)). Accordingly, defendants have forfeited their argument that Dr. Caulfield abandoned his breach of contract claim.

¶105 Forfeiture aside, defendants' argument is meritless. Waiver "consists of the intentional relinquishment of a known right." *Crum and Forster Managers Corp. v. Resolution Trust Corp.*, 156 Ill. 2d 384, 396 (1993). A party may waive or abandon a claim, but only by an affirmative act. *Id.*

¶106 After granting summary judgment in favor of Dr. Caulfield on his breach of contract claim, the trial court reserved the issue of damages. In Dr. Caulfield's post-trial brief, he sought damages attributable to defendants' breach of contract. Moreover, in a post-trial email to defense counsel, Dr. Caulfield's attorney clarified that Dr. Caulfield was still "pursuing a claim for damages resulting from Defendant's wrongful *** conduct, including *** the material breaches of the oral modification of the employment agreement." There is thus no evidence that Dr. Caulfield undertook any affirmative act whereby he affirmatively relinquished his right to pursue the breach of contract claim.

¶107 *E. The Trial Court's Award of Damages is Affirmed in Part and Vacated in Part*

¶108 Dr. Caulfield was awarded damages for breach of contract and retaliatory discharge. Because we have found that Dr. Caulfield was not an employee at will, we vacate the trial court's award of damages based on his retaliatory discharge claim. Our review is thus limited to the trial court's award of damages to Dr. Caulfield based on his breach of contract claim.

¶109 In a breach of contract action, damages are imposed in order to "place the plaintiff in the same position as if the contract had been performed." *Westlake Financial Group, Inc. v. CDH-Delnor Health System*, 2015 IL App (2d) 140589, ¶ 30. "Where an award of damages is made after a bench trial, the standard of review is whether the trial court's judgment is against the manifest weight of the evidence." *1472 North Milwaukee, Ltd. v. Feinerman*, 2013 IL App (1st) 121191, ¶ 13. A trial court's award of damages is against the manifest weight of the evidence where the opposite conclusion is clear, or where the court's decision is "unreasonable, arbitrary, or not based on evidence." *Id.* "An award of damages is not against the manifest weight or manifestly erroneous if there is an adequate basis in the record to support the trial court's determination of damages." *Id.*

¶110 *i. 2011 Reduction in Salary*

¶111 The trial court awarded Dr. Caulfield $41,352.00 for the 2011 reduction in salary. Defendants argue that, assuming Dr. Caulfield was an employee at will, they were free to modify the terms of his compensation and that Dr. Caulfield's continuing work after the modification was both acceptance and consideration for the modification. However, because we have found that Dr. Caulfield was not an employee at will, this argument is not persuasive. The court arrived at its damages calculation by first determining Dr. Caulfield's quarterly salary by dividing his annual salary of $500,000 by 4 to arrive at $125,000. The court then subtracted that amount from the amount Dr. Caulfield was actually paid in 2011, $83,648.00, to determine the extent to which he was underpaid. That amount was $41,352.00. We do not believe that the trial court's imposition of these damages was against the manifest weight of the evidence.

¶112 *ii. Severance Pay*

¶113 The trial court awarded Dr. Caulfield $500,000.00 in severance pay. Under section 3.2 of the Agreement, Dr. Caulfield was entitled to "not less than one year severance pay" in the event he was discharged by PEI. As the court found that Dr. Caulfield was discharged and defendants do not dispute that finding on appeal, it is clear that Dr. Caulfield is entitled to severance pay. Defendants contend that the trial court should have only awarded Dr. Caulfield severance pay in the amount of his salary reduction, $337,821.00. However, this argument, too, is premised on Dr. Caulfield being an at will employee. He was not. Accordingly, based on our review of the record and the trial court's order, we do not believe that the court's award of $500,000.00 in severance pay was against the manifest weight of the evidence.

¶114 *iii. 2010 Incentive Compensation*

¶115 The trial court awarded Dr. Caulfield $447,425.00 for his 2010 incentive bonus. Defendants contend that these damages were improperly awarded because Dr. Caulfield failed to prove that PEI had disposable income in 2010. Under section 2.2 of the Agreement, Dr. Caulfield's entitlement to incentive compensation is conditioned on PEI having disposable income in an amount greater than zero. The Agreement defines disposable income as "profit before taxes (as reported on the audited P & L Statement) plus the sum of (i) cash and stock bonuses paid to employees (ii) contributions to 401(k) beyond the agreed to amount, [and] (iii) stock contributed to ESOP."

¶116 It is undisputed that defendants did not produce a P&L Statement for 2010. The trial court, nonetheless, explained that "the failure of PEI and TPG to take steps, in the ordinary course of business, to create such statements should not bar Dr. Caulfield from producing evidence on his own to establish profitability of the company." The trial court proceeded to "consider the intent of the parties as it relates to the necessity of the P&L statements in calculating Dr. Caulfield's possible bonus." The court ultimately held, based on "email correspondence between Dr. Caulfield and Sartain regarding his 2010 bonus ***, the testimony of the Dr. Caulfield and Sartain, and the language of the *** Agreement, that Dr. Caulfield had satisfied his burden of proof that PEI had disposable income in 2010." The court went on to hold, however, that PEI did not have disposable income for 2011 based on TPG's 2011 income statement as well as testimony from Sartain indicating that PEI did not give out bonuses or make 401(k) contributions.

¶117 We agree with the trial court that the absence of a P&L statement is not fatal to Dr. Caulfield's effort to collect damages for his 2010 incentive bonus. Initially, we note that the trial

court did not provide any analysis as to whether, under the Agreement, a P&L statement was to be the exclusive means of proving that PEI had disposable income. Instead, the court proceeded immediately to its analysis of whether Dr. Caulfield presented sufficient evidence that PEI had disposable income in 2010. However, the lack of explanation from the trial court is not an obstacle to our review because this issue is one of contractual construction and is thus subject to *de novo* review. *Avery*, 216 Ill. 2d at 129.

¶118 We find that the existence of a P&L statement is not a prerequisite to finding disposable income. Section 2.2 states that PEI "*shall*" pay Dr. Caulfield an incentive bonus. (Emphasis added). If PEI's production of a P&L statement was a prerequisite to paying Dr. Caulfield a bonus, then PEI could avoid paying Dr. Caulfield a bonus by simply deciding not to produce a P&L statement. The use of the mandatory "shall," however, strongly suggests that Dr. Caulfield's entitlement to a bonus was not subject to the whims of PEI. Furthermore, section 2.2 places a single explicit limitation on Dr. Caulfield's ability to collect a bonus, namely that PEI have disposable income. To read the Agreement as requiring a P&L statement in order to establish whether PEI has disposable income would in effect place an additional, judicially crafted, limitation upon Dr. Caulfield's contractual right to a bonus which the parties did not clearly contemplate.

¶119 We note that in her supplemental affidavit, upon which the trial court relied, Sartain herself cited evidence in the form of TPG's 2011 income statement to prove that PEI did not have disposable income in 2011. The fact that defendants looked to sources of evidence beyond P&L statements to prove PEI did not have disposable evidence suggests that the parties did not intend for P&L statements to be the *sine qua non* of disposable income. Moreover, defendants offer no argument explaining why they should be permitted to utilize all forms of evidence to

prove that PEI did not have disposable income while limiting Dr. Caulfield to only using a P&L statement to prove that PEI did have disposable income. Accordingly, we find that under the plain language of the Agreement, Dr. Caulfield may rely on evidence beyond a P&L statement to prove that PEI had disposable income in 2010.

¶120 We must now consider the trial court's conclusion that PEI had disposable income in 2010. The trial court reached this factual determination after careful consideration of the testimony of Sartain and Dr. Caulfield, as well as several exhibits and the Agreement. "The trial judge, when sitting as the trier of fact in a bench trial, makes findings of fact and weighs all of the evidence in reaching a conclusion." *Staes and Scallan, P.C. v. Orlich*, 2012 IL App (1st) 112974, ¶ 35. "When a party challenges a trial court's bench-trial ruling, we defer to the trial court's factual findings unless they are contrary to the manifest weight of the evidence." *Id.* The trial court's credibility determinations are entitled to substantial deference "because the fact finder is in the best position to evaluate the conduct and demeanor of the witnesses." *Samour, Inc. v. Board of Election Commissioners*, 224 Ill.2d 530, 548 (2007). "A factual finding is against the manifest weight of the evidence when the opposite conclusion is clearly evident or the finding is arbitrary, unreasonable, or not based in evidence." *Id.* at 544.

¶121 Preliminarily, we note that defendants contend that the trial court misunderstood certain aspects of Sartain's testimony regarding whether PEI had disposable income. Defendants specifically contend that the trial court inappropriately considered Sartain's testimony that PEI did not give out bonuses nor make contributions to its employee 401(k) plans in 2010 when it analyzed whether PEI had disposable income in 2011. Even assuming defendants are correct on this point, this purported error is not sufficient to show that the trial court's finding that PEI had disposable income in 2010 was against the manifest weight of the evidence.

¶122 First, Sartain's trial testimony was far from unequivocal. Sartain was asked during cross-examination "you are not arguing that there is no disposable income for [PEI], are you?" She replied "No. No, sir." Later, she testified merely that she did not "believe" that PEI had disposable income in 2010. Second, the trial court was presented with Sartain's deposition testimony as well as two affidavits she submitted. During her deposition on July 22, 2011, Sartain testified that Dr. Caulfield was entitled to an incentive bonus between $446,000 and $485,000. In an affidavit executed on March 23, 2012, attached to defendants' opposition to Dr. Caulfield's motion for summary judgment, she testified that Dr. Caulfield's 2010 bonus was estimated to be $350,000 and that PEI did not have disposable income in 2011. She did not state whether or not PEI had disposable income in 2010. In a supplemental affidavit executed on May 24, 2012, Sartain testified that the bonus calculations contained in her March 23 affidavit were incorrect and that Dr. Caulfield's 2010 incentive bonus should have been $263,308.77. She did not state whether PEI had disposable income in 2010. She did, however, state that PEI did not have disposable income in 2011. She also mentioned that PEI did not pay bonuses, make 401(k) contributions "beyond the agreed" amount or make "stock contributions to ESOP" in 2011. She also attached a copy of PEI's 2011 income statement, which according to her reflected a "loss of $2,738,178.78."

¶123 Sartain's affidavit showed that PEI had disposable income in 2010. Unlike her affidavit testimony with respect to 2011, in her affidavit testimony with respect to 2010, Sartain did not deny that PEI had disposable income. Instead, she testified that Dr. Caulfield was entitled to specific bonus payments in 2010, which, as discussed above, he would not be entitled to under the Agreement had PEI lacked disposable income in 2010. It is unclear why Sartain would affirmatively testify under penalty of perjury that Dr. Caulfield was entitled to a specific bonus in

2010 if she knew that PEI did not have disposable income in 2010. Moreover, Sartain's shifting testimony regarding Dr. Caulfield's 2010 bonus—first she testified in her deposition that he was entitled to an amount between $446,000 and $485,000; then in her first affidavit she stated the amount was $350,000; then in the supplemental affidavit $263,308.77; and finally at trial she stated that she "believe[d]" that PEI did not have disposable income in 2010—raised a legitimate issue regarding her credibility. The trial court clearly did not believe Sartain's trial testimony regarding PEI's 2010 disposable income, a finding with which we cannot disagree in light of all of her previous testimony on the issue.

¶124 Based on the foregoing, we find that the trial court's factual determination that PEI had disposable income in 2010 was not against the manifest weight of the evidence. Because defendants have not challenged the specific amount of damages the trial court awarded for Dr. Caulfield's 2010 incentive bonus—$447,425.00—we affirm the trial court's judgment with respect to Dr. Caulfield's 2010 incentive bonus.

¶125 CONCLUSION

¶126 We affirm the decision of the trial court denying defendants' motion to dismiss. We affirm the trial court's entry of summary judgment in favor of Dr. Caulfield on his breach of contract claim, and we further find that Dr. Caulfield did not abandon that claim. We reverse the trial court's finding that Dr. Caulfield was an employee at will and accordingly vacate the trial court's award of damages to Dr. Caulfield for his retaliatory discharge claim. We affirm the trial court's award of $500,000.00 severance pay and $41,352.00 for the 2011 salary reduction. We affirm the trial court's award of $447,425.00 for Dr. Caulfield's 2010 incentive bonus.

¶127 Affirmed in part; reversed in part; vacated in part.