2011 IL App (2d) 101042-U
No. 2-10-1042
Order filed October 28, 2011

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

AURORA INTERNAL MEDICINE, LTD., and TED KULCZYCKI, Plaintiffs-Appellees and Cross-Appellants,	Appeal from the Circuit Court of Kane County.
v.	No. 06-CH-0911
PHILIP MOORE, JOAN DODSON, and HIGHLAND PHYSICIANS SERVICES, INC., Defendant-Appellants and Cross-Appellees.	Honorable Robert B. Spence, Judge, Presiding.

JUSTICE BOWMAN delivered the judgment of the court.
Justices Zenoff and Birkett concurred in the judgment.

ORDER

Held: The trial court did not err in its evidentiary rulings, its jury instructions, or in denying defendants' motions for directed verdicts and judgment notwithstanding the verdict. The trial court also did not err in allowing plaintiffs to file a fifth amended complaint or by denying defendants' motion to dismiss the conspiracy count. The jury's verdict on the conspiracy count did not constitute a double recovery. Regarding plaintiffs' cross-appeal, the trial court did not err in entering judgment for defendants on the count of breach of fiduciary duty, nor did it err in awarding plaintiffs $45,000 in attorney fees rather than the full amount they sought. We remanded the cause for the trial court to determine whether to award plaintiffs attorney fees for the appeal.

¶ 1 The claims in this case arose from the departure of defendant, Philip Moore (Dr. Moore) from plaintiff Aurora Internal Medicine, Ltd. (AIM), a medical practice founded by plaintiff Ted Kulczycki (Dr. Kulczycki). After leaving AIM, Dr. Moore joined defendant Highland Physician Services, Inc. (HPS). Several AIM employees followed Dr. Moore to HPS, including defendant Joan Dodson.

¶ 2 Plaintiffs[1] filed a five-count complaint against defendants on June 29, 2006. We summarize the relevant counts. As ultimately amended, count I alleged that Dr. Moore breached his employment agreement. Count II alleged that defendants violated the Illinois Trade Secrets Act (765 ILCS 1065/1 *et seq.* (West 2006)) (Trade Secrets Act or Act) in that they wrongfully misappropriated AIM computer records containing confidential information, including patient contact lists and appointment lists, which they used to solicit AIM patients. Count III requested an injunction against defendants. Count V alleged that Dr. Moore breached his fiduciary duty by participating in and/or owning a competing business (HPS), and by diverting patients from AIM to HPS. It further alleged that Dodson breached her fiduciary duty by assisting Dr. Moore in these actions, and by violating her confidentiality agreement by downloading confidential AIM information and providing it to Dr. Moore and HPS. Count VI sought an accounting. Count IX alleged civil conspiracy in that defendants conspired to, among other things: solicit AIM patients using stolen non-trade-secret AIM records; solicit AIM employees into terminating their employment with AIM; disclose protected health information without patients' permission; cash and retain insurance and patient checks belonging to AIM; open a competing business and divert AIM

[1]The complaint was originally brought by AIM, and Dr. Kulczycki was added as a plaintiff to the proceedings in October 2006.

patients there; and divert AIM mail and telephone calls. Dr. Moore filed a counterclaim against AIM for breach of contract, alleging that AIM did not pay him all of the commission he was owed for 2006.

¶ 3 A jury found in Dr. Moore's favor on plaintiffs' breach of contract claim. It found in plaintiffs' favor on their trade secrets and conspiracy claims and on Dr. Moore's counterclaim. The trial court ruled in defendants' favor on the remaining claims of breach of fiduciary duty, injunction, and accounting. Defendants appeal the judgment against them on the claims of trade secrets and conspiracy, and the judgment in plaintiffs' favor on Dr. Moore's counterclaim of breach of contract. Plaintiffs cross-appeal the judgment in defendants' favor regarding breach of fiduciary duty, as well as the issue of attorney fees for the trade secrets count. We affirm and remand.

¶ 4 I. BACKGROUND

¶ 5 This case has been before us on review on a previous occasion. Along with its initial complaint, AIM filed a combined emergency motion for a temporary restraining order and preliminary injunction. After various intermediate rulings, the trial court denied the motion for a preliminary injunction, and this court affirmed. *Aurora Internal Medicine, Ltd. v. Moore*, No. 2-06-0772 (2006) (unpublished order under Supreme Court Rule 23). Subsequently, plaintiffs added another party, ME Computer Systems (ME Computers), as a defendant. ME Computers settled with plaintiffs prior to trial. Also, at the close of plaintiffs' case, the trial court entered a directed finding in favor of defendant HPS on the conspiracy count.

¶ 6 We now summarize the relevant evidence presented at trial. Dr. Moore became licensed in 1994 and joined Dr. Hatcher at a practice called Hatcher Medical Associates. Dr. Kulczycki also worked there. Hatcher Medical Associates later joined Premier Healthcare Associates. When Premier disbanded in 1998, Dr. Kulczycki started his own practice, AIM. He had 2,000 to 3,000 of his own patients at that time. AIM had two office locations: the Mercy office at 1315 North Highland in Aurora and the Copley office at 2020 Ogden Avenue in Aurora. The Copley office was shared with other medical practices. Dr. Kulczycki testified that he grew the business by word-of-mouth, referrals from other doctors, doing ER backup calls, and advertising.

¶ 7 Dodson was AIM's office manager; Karen Kulczycki was the business manager; and Renee Walter and Jan Usilton were receptionists. These individuals were at-will employees and did not have employment contracts. They had signed patient confidentiality policies and received "HIPPA" training about the confidentiality of patient information, but no form or training discussed trade secrets.

¶ 8 Dr. Moore continued working with Dr. Hatcher for about two years. Dr. Moore then asked Dr. Kulczycki if he could join him at AIM, and Dr. Kulczycki agreed. Dr. Moore brought a patient list with him containing the information of 2,352 patients, and he also brought patient charts. Dr. Kulczycki testified that 833 patients charts were transferred from Hatcher to AIM. Heather Stover, who had worked with Dr. Moore as a nurse since 1997, also decided to join him at AIM. Dr. Moore entered into a two-year employment agreement with AIM on October 1, 2000. Dr. Moore was always an AIM employee, and he never held the position of officer, director, or shareholder of AIM. Dr. Moore entered into a second two-year agreement on October 1, 2002, which expired on September 30, 2004. The two contracts were similar, although the first contract did not have an administrative fee and the second one called for a $1,000 per month administrative fee. The contracts stated that, except for pre-existing patients, the information about new patients Dr. Moore treated at AIM were to remain AIM property. The agreements also contained restrictions that expired two years after the agreements terminated. Thus, certain restrictions in the second agreement were in effect until September 30, 2006, prohibiting the disclosure of patient information, solicitation of AIM's employees and patients, and competing within 20 miles of AIM.

¶ 9 After September 2004, Dr. Moore continued working under the same pay arrangement provided by the expired contract. Dr. Moore was entitled to all of the revenue he brought in, after subtracting half of the common overhead, such as rent and payroll, and subtracting all of his personal overhead, such as malpractice insurance, health insurance, third-party provider charges, and the administrative fee. Dr. Moore believed that the restrictions in the expired contract were no longer valid after 2004. Dr. Moore testified that he did not see a proposed third contract until late May or early June 2006. Dr. Kulczycki testified that he presented it to Dr. Moore in April 2005. It was different in that it contained language requiring practicing for AIM on an exclusive basis and decreased Dr. Moore's revenue share to 90%. Dr. Moore never signed the third contract because he did not think that it was fair.

¶ 10 HPS was owned by Dr. Boer, a chiropractor. HPS was located at 1300 North Highland, across the parking lot from AIM's Mercy office. Dr. Moore met Dr. Boer in 1994 and had referred patients to him for physical therapy. Dr. Boer began taking courses to obtain a physician assistant license, and Dr. Moore allowed him to do his "clinical time" with him at AIM. Dr. Boer "shadow[ed]" Dr. Moore for about ten hours a week for three or four months. In order to later render physician assistant services, Dr. Boer had to practice under a supervising physician. In July 2005, Dr. Moore signed a contract with HPS to work there as the supervising physician.

¶ 11 The AIM employment agreement provided that all fees as a result of professional services would belong to AIM and be subject to shared overhead expenses, with the exception of "other stipends" such as speaker fees, medical directorships, "etc." Dr. Moore had stipends that he received as medical director of various institutions, as did Dr. Kulczycki. Dr. Moore viewed his payment for supervising physician as similar to other stipends that fell outside the AIM contract. Dr. Moore would meet with Dr. Boer at various locations, including the HPS office, to discuss patient cases. Dr. Moore never saw patients at HPS but would rather give Dr. Boer continuing guidance on how to treat and manage patients. If Dr. Boer felt that a patient case was beyond his skill level, he would send the patient to Dr. Moore at AIM for treatment. Dr. Moore would then bill for the care through AIM.

¶ 12 Dr. Moore did not earn any money from HPS in 2005. From January 1, 2006, until June 23, 2006, he earned $29,250 from HPS. Dr. Moore relied on the malpractice insurance through AIM to cover his HPS work. Some of the work conducted at HPS could also have been provided by AIM, such as blood draws, injections, physicals, and MRIs. Dr. Moore did not see HPS as a competitive practice because Dr. Boer's focus was on pain management. Dr. Moore's time commitment as a supervising physician was one to two hours per week, and he never used AIM resources. Dr. Kulczycki testified that Dr. Moore's billings at AIM increased from July 1, 2005, to the end of June 2006.

¶ 13 Dr. Kulczycki testified that he first learned that Dr. Moore might be working at HPS in March 2006. The Kulczyckis were filling out forms to re-credential with insurance companies and were checking the accuracy of the information on the insurance company's websites. A search of Dr. Moore's profile on the websites showed the address of 1300 North Highland, in addition to AIM's two office locations.

¶ 14 Dr. Moore did not recall discussing his role at HPS with Dr. Kulczycki until Dr. Kulczycki asked him about it in March 2006. Dr. Moore testified that Dr. Kulczycki did not thereafter ask him to stop. Dr. Kulczycki asked for a copy of his HPS contract, which Dr. Moore provided. AIM's malpractice insurance renewal was coming due about May 1, 2006, and Dr. Kulczycki was concerned about AIM's exposure for Dr. Moore's work at HPS. Dr. Kulczycki testified that in May 2006, he told Dr. Moore he did not agree to Dr. Moore continuing to work for HPS. He also continually asked Dr. Moore to proceed with the third employment agreement. According to Dr. Kulczycki, Dr. Moore kept saying that his attorney was reviewing it.

¶ 15 Dr. Moore knew of AIM's bookkeeping only through monthly reports he would receive. The last one he got was in March 2006 for the month January 2006. He saw that the monthly administrative fee had unilaterally increased from $1,000 per month to $1,250. Dr. Kulczycki testified that he discussed increasing the fee to $1,250 until the next contract was signed, and Dr. Moore agreed. The proposed third contract called for a $1,500 monthly administrative fee. Dr. Moore believed that revenues were dramatically increasing, but his paycheck was declining. Dr. Moore asked Dr. Kulczycki for the expense sheets but did not receive any financial information, and Karen Kulczycki told him "in no uncertain terms" that he would "never see any of the financial reports." A third physician, Dr. Mustafa, was also set to join the practice (she joined on May 15, 2006). Dr. Moore felt threatened and decided to find work elsewhere.

¶ 16 AIM paid Dr. Moore $230,000 from July 1, 2005, until June 23, 2006. Dr. Kulczycki agreed that Dr. Moore's March and April 2006 paychecks were lower than they normally would have been. He informed Dr. Moore that they were holding back some of the income because they were worried about the upcoming malpractice costs. In May 2006 his check was back up to where it normally would have been. AIM's financial records showed that Dr. Moore had undistributed income of $33,000 in March 2006, which was comparable to an over $45,000 rollover in November 2005. Dr. Moore was always paid what he was owed by the end of the year. Dr. Moore had almost $82,000 carried forward in May 2006 and $103,000 in June 2006. In February 2006, AIM made a $9,327 malpractice payment for Dr. Moore, and a $11,110 payment in July 2006.

¶ 17 Around April 15, 2006, Dr. Moore approached Dr. Boer about the possibility of joining him at HPS. Shortly after that, Dr. Moore told Dodson that he was planning to leave AIM and that she was welcome to join him at the new practice. Dodson agreed. She had not been getting along with Karen Kulczycki and already had been looking for another job. According to Dr. Moore and Dodson, in May and June 2006 they and Dr. Boer had two or three meetings at the HPS office on Friday afternoons, after AIM work hours, to plan and organize Dr. Moore's new practice. They discussed keeping their plans secret. Dr. Moore told Dodson to tell other AIM staff members that worked with him that he was leaving the practice and they could join him as well. However, he did not want Dodson to tell them where he was going. Dr. Boer denied being present when Dr. Moore and Dodson discussed hiring staff for Dr. Moore at HPS. Walter approached Dodson and asked if she had found another job, and if Walter could join her. Dodson approached Stover and Usilton, and they agreed to join Dr. Moore. Dr. Moore agreed at trial that his employment agreement stated that for two years after the contract's termination (*i.e.* until September 30, 2006), he could not directly or indirectly solicit any of AIM's employees to work for him or any other person in competition with AIM, yet he did that. Dr. Moore instructed Dodson not to tell anyone, including the employees they solicited, where they would be working.

¶ 18 AIM used Medisoft software to keep track of patient and scheduling information. Every AIM employee had a unique user name and password. The Medisoft system allowed for audit reports to track changes to information. It had five security levels, with level one being the highest. Each level also had 25 to 30 different security options. AIM used only levels one and three. Dodson, Dr. Kulczycki, and Karen Kulczycki had level one access. Dodson testified that Dr. Moore also had level one access. According to Dodson, all employees could print out the patient list, but Dr. Kulczycki testified that level one access was required. In April 2006, Dr. Kulczycki told

Dodson to reduce Dr. Moore's security level to a level three. She refused because she thought Dr. Moore was entitled to level one information as a physician in the practice. Dr. Kulczycki made the change himself. The owner of ME Computers testified that Medisoft security controls could be used to limit an employee's ability to download, view, or print information.

¶ 19 A patient schedule would be printed from the computer system daily so employees would know which patients were coming in. The schedules would be shredded at the end of the day. Sometimes doctors would ask Dodson to print six months of the patient schedules for vacation planning. There were no paper copies of the entire patient list in the AIM offices.

¶ 20 Dr. Moore planned for his last day at AIM to be around July 1, 2006. On April 18, 2006, he asked Dodson to provide him with a list of his patients and a schedule of patients who were coming to see him. He considered patients that he had evaluated to be his patients. Dr. Moore did not ask Dodson for Dr. Kulczycki's patients. He agreed that he knew that the patient list and schedule "were confidential [AIM] information." The patient list included patient information such as names, addresses, phone numbers, and insurance and payment information. The patient schedules included future office visits and sometimes contained the patients' complaint. Dr. Moore asked Dodson to get the information because he did not know how to do it, though he believed that he had access to the patient records. Dodson downloaded the information, and Dr. Moore later learned that she had copied Dr. Kulczycki's patient list as well as his own. Dr. Moore did not recall ever having physical possession of the disk, but Dodson testified that she gave him the disk. Dr. Moore did not tell Dr. Kulczycki or anyone else at AIM, other than Dodson, that he was going to be downloading information from AIM's database. Dodson also did not tell anyone at AIM about the download.

¶ 21 Dr. Moore asked Dodson to hire ME Computers, which had installed the Medisoft Software for AIM, to install HPS's new computer system. ME Computers representatives went to the HPS office prior to June 12 to review the office layout to determine computer needs. Drs. Moore and Boer and Dodson were present, according to a ME Computers representative. Dr. Moore testified that Dr. Boer also knew before June 23 that he would be hiring ME Computers to assist in downloading the AIM information to the HPS computers. Dr. Boer testified that he did not recall a computer representative coming to HPS prior to June 23, and Dr. Moore and Dodson never shared any AIM information with him before that date.

¶ 22 The week of June 12, 2006, Dr. Moore asked Dodson to give the disk with the patient information to ME Computers. Dr. Moore wanted to have Medisoft software installed on the new computer system so that it would be compatible with information on the disk. No one obtained the patients' consent to share their health information with Dr. Boer or HPS before the information was downloaded during the week of June 26, 2006. Dodson specifically told ME computers that she wanted to upload only Dr. Moore's patient list and schedule; she testified that it was the only information she had intended to download from AIM's system in the first place. ME Computers later informed her that the entire database was on the disk, including the entire patient list. The company used Dr. Moore's provider number to subtract his patients out of the database. That information was put on HPS computers on June 30. ME Computers deleted all other information and destroyed the disk Dodson had given it.

¶ 23 Following Dr. Moore's unannounced decision to leave AIM, his hours and patient load at AIM did not change. Dodson tendered her resignation to AIM on June 15, saying that her last day was going to be June 30. Dr. Kulczycki asked if there was anything he could do to convince her to stay, and he asked where she was going. Dodson did not tell him where she was going to be working. On June 19, Usilton gave her resignation. Dr. Kulczycki testified that it was unusually quiet in the office that week and "something [was] not right." Based on the multiple employee resignations, Dr. Kulczycki decide on June 22 to have the office locks changed on Friday, June 23, to protect his business and equipment. That day, AIM was operating on a summer schedule, and the employees were gone by 2 or 2:30 p.m. The locksmith came at 3 or 4 p.m. Dr. Moore discovered that AIM's locks had been changed when he stopped by the office on Saturday, June 24. After the lock-out, AIM stopped making any payments to Dr. Moore, including his undistributed income, because Dr. Kulczycki felt that he was disloyal to the company and "whatever he left behind he left behind." Dr. Moore's last check from AIM was dated June 30, 2006, and was in the amount of 57 cents.

¶ 24 On Sunday, June 25, Dr. Moore instructed Dodson to call the patients scheduled to see him on June 26 using the data taken from AIM's computer system. He told Dodson to tell them that he would be seeing patients at HPS. Therefore, Dr. Moore had a full schedule of patients his first full day of business at HPS, as well as all of that first week. Most if not all of those patients had been rescheduled from AIM to HPS. HPS also opened another location in the same suite at Copley that was shared by AIM and other practices.

¶ 25 The Kulczyckis arrived early to open the doors at AIM on Monday, June 26. Dodson had called the prior day and had said that she would not be returning. Prior to June 23, AIM had 10 to 12 employees, including the three doctors. Dr. Mustafa and the staff members who worked with her came in that day. Dr. Moore, Dodson, Stover, Usilton, and Walter did not come. From June 26 to September 30, a total of 269 patients did not show up for their scheduled appointments at the two AIM offices. Another 73 did not show up for lab work. Dr. Kulczycki testified that it was an unusual amount of no-shows. Also, AIM subsequently received patient requests for the release of 600 to 700 records from HPS.

¶ 26 On June 27, 2006, AIM's patient list contained 10,817 names. Dr. Moore's patient list at HPS contained 5,238 names on July 3, 2006, compared to the 2,352 patients he had brought with him from Dr. Hatcher's. The additional patients were those who had first seen him at AIM. The employment agreement stated that all the lists, records, and charts of patients who were not Dr. Moore's preexisting patients were AIM's property. However, Dr. Moore testified that his main priority was to take care of his patients and let them know where they could find him. Dr. Moore's patient list at HPS contained patients that he had treated for any reason, even if they were originally treated by Dr. Kulczycki and Dr. Moore was just filling in for him. Dodson could not return the AIM information that she had taken because it was combined with Dr. Boer's patients and new clients on the HPS system, and there was no way to isolate the AIM information.

¶ 27 Around June 29, 2006, Dr. Moore had Dodson instruct ME Computers to send out about 5,557 postcards using the AIM data of patients he had seen in the past five years. Some patients received more than one postcard. The postcards stated, "We have moved," and included the HPS location on North Highland, as well as the new location in the same suite as AIM's Copley office. Dr. Moore agreed that the action could be seen contrary to his employment agreement's provision not to solicit AIM's patients. At the time, Dr. Moore had also forgotten about the geographical limitation in his AIM employment contract. Further, Dr. Moore received a letter from AIM's attorney stating that AIM recognized that there was no restrictive covenant and he was "free to practice medicine wherever [he saw] fit." Dr. Kulczycki testified that some of his patients received postcards from Dr. Moore.

¶ 28 Dr. Moore had a staff member call the answering service AIM used and instruct it to forward to HPS any calls asking for Dr. Moore. He also had an employee fill out information with the postal service forwarding to HPS mail addressed to him at AIM. Insurance companies often sent groups of checks in one envelope, so some mail they were forwarded contained checks for both Drs. Moore and Kulczycki. Dr. Kulczycki testified that someone forwarded the calls from AIM's Copley office to HPS.

¶ 29 Dr. Moore agreed that he saw patient Scott L. on June 23 at AIM, before he was locked out, and ordered that he go to Fox Valley Imaging for a CAT scan. The scan was done on June 26, and Dr. Moore billed for it through HPS. Dodson testified that Fox Valley imaging billed HPS for those tests.

¶ 30 Robert Kleeman was retained by plaintiffs around March 2009 to determine the nature and amount of damages due to defendants' actions. At the beginning, he considered three methods for assessing damages. The first potential method was actual loss, which measured lost revenues. He did not use that method because it would have been too difficult to track thousands of patient records and stay within medical disclosure guidelines. Further, the costs of doing so would have exceeded the damages AIM suffered. For the same reasons, Kleeman did not try to assess damages by the unjust enrichment method, which would look at how much defendants benefitted by taking the trade secrets. Kleeman instead used a reasonable royalty method, which considers a hypothetical negotiation for the asset, in this case the patient list and schedules. The list was very specific to people who had contacted AIM or had been a patient at one time, so it was not comparable to a commercially available mailing list. A patient list is the second most valuable asset in a medical practice other than the doctor, because patients generate all of the revenue.

¶ 31 To determine net revenues, Kleeman used a trailing 12-month calculation, which showed revenues of $1,435,000. Dr. Moore had 56% of the revenue according to patient data. Average medical practice profit is 30 to 50% after contractual insurance adjustments and all expenses except the doctor's compensation are considered. Kleeman used 40% for his calculations and multiplied it by Dr. Moore's percent of the patient revenues. Kleeman then multiplied that figure by a reasonable royalty rate. He determined that rate to be 30% by considering factors set forth in the federal case *Georgia-Pacific Corp. v. U.S. Plywood-Champion Papers, Inc.*, 446 F.2d 295 (2nd Cir. 1971). Kleeman came up with annual damages of $96,500. On average, a patient stays with an internal medicine practice for three to five years, and Kleeman used a conservative three-year average. Using these numbers, he concluded that the total reasonable royalty value for the alleged violation of the Trade Secrets Act was $289,500. He was not offering any opinions on whether a trade secret was involved; his analysis assumed that one was involved. Kleeman was also not provided any information about pre-existing patients that Dr. Moore had before coming to AIM.

¶ 32 The jury found in plaintiffs' favor on the trade secrets claim and awarded it $213,000 against defendants, along with punitive damages of $50,000 against Dr. Moore, $4,000 against Dodson, and $20,000 against HPS. It also found for plaintiffs on their conspiracy claim and awarded it $3,000 against Dr. Moore and Dodson, as well as punitive damages of $1 against each of these defendants. Finally, the jury found in Dr. Moore's favor on AIM's breach of contract claim and in plaintiffs' favor on Dr. Moore's breach of contract counterclaim.

¶ 33 The remaining claims of breach of fiduciary duty, injunction, and accounting were decided by the trial court, and ruled in defendants' favor. It subsequently awarded plaintiffs $45,000 for attorney fees, compared to the $126,100 they had sought. Following the denial of their posttrial motion, defendants timely appealed. Plaintiffs timely cross-appealed.

¶ 34 II. ANALYSIS

¶ 35 A. Evidence of Manner in which AIM Maintained Patient Charts

¶ 36 On appeal, defendants first argue that the trial court erred in granting plaintiffs' motion to exclude evidence regarding the manner in which AIM maintained patients' medical charts. The trial court excluded the information on the basis that it was not relevant because the charts were not trade secrets, and the issue was "whether the patient list and the patient schedules [were] properly protected, not the patient charts."

¶ 37 Defendants maintain that the patient names and addresses were kept in two forms, electronically on computers and on paper in patient charts. Defendants made an offer of proof showing that the charts were in unlocked cabinets at both AIM offices; a fax machine and copier were near the charts in the Mercy office; the charts were accessible to non-AIM doctors and staff and the Copley office; maintenance and cleaning staff had access to the area where the charts were kept; and employees transported charts between offices by taking them home in their cars and bringing them in the next day. Defendants argue they should have been allowed to present to the jury evidence that the allegedly secret information was also kept in paper form that plaintiffs took no efforts to protect.

¶ 38 Defendants cite *Gillis Associated Industries, Inc. v. Cari-All, Inc.*, 206 Ill. App. 3d 184 (1990). There, the appellate court held that the plaintiff's customer list was not a trade secret because the plaintiff did not take affirmative measures to keep its lists secret. *Id.* at 192. While employees had limited access to the customer list on the computer, there were no restrictions on hard copies of the list printed from the computer; there was no evidence that the plaintiff communicated to employees that the lists were to be kept confidential; and sales reports, which were also not shown to be confidential, had even more detailed regional customer information than the customer list. *Id.* at 191-92. Defendants argue that as in *Gillis*, the trial court should have allowed evidence of how the alleged trade secret information was treated in all forms in which it was kept.

¶ 39 Plaintiffs argue that the trial court's ruling excluding evidence about their maintenance of patient charts was proper because they never claimed that the charts were trade secrets. Plaintiffs also argue that patient charts are not trade secrets, noting that the Trade Secrets Act includes a "list of actual or potential customers" in its definition, but does not mention patient charts.

¶ 40 Evidentiary rulings are within the trial court's discretion. *Gunn v. Sobucki*, 216 Ill. 2d 602, 609 (2005). A trial court does not abuse its discretion regarding evidentiary rulings unless no reasonable man would take the trial court's view. *In re Leona W.*, 228 Ill. 2d 439, 460 (2008). Further, even where the trial court has abused its discretion, we will not reverse the trial court's judgment unless the error resulted in substantial prejudice affecting the trial's outcome. *Id.*

¶ 41 A "trade secret" is defined as:

> "information, including but not limited to *** [a] list of actual or potential customers or suppliers, that:
>
> (1) is sufficiently secret to derive economic value, actual or potential, from not being generally known to other persons who can obtain economic value from its disclosure or use; and
>
> (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy or confidentiality." 765 ILCS 1065/2(d) (West 2006).

A court can consider the following factors in determining whether information is a trade secret: (1) to what extent the information is known outside of the plaintiff's business; (2) to what extent employees and others involved in the plaintiff's business know the information; (3) the extent of the measures the plaintiff has taken to guard the information's secrecy; (4) the information's value to the plaintiff and competitors; (5) the amount of effort or money the plaintiff expended in developing the information; and (6) the ease or difficulty with which others could properly acquire or duplicate the information. *ILG Industries, Inc. v. Scott*, 49 Ill. 2d 88, 93 (1971). The most important factor of these is whether and how an employer acts to keep the information secret. *Alpha School Bus Co. v. Wagner*, 391 Ill. App. 3d 722, 740 (2009).

¶ 42 We conclude that the trial court acted within its discretion by granting plaintiffs' motion to exclude evidence of the manner in which AIM maintained patients' medical charts. As plaintiffs point out, they did not claim that the patient charts were trade secrets, but rather only the patient list and schedules. We understand defendants' point that a person could recreate the patient list using names and addresses from the patient charts. However, the charts were kept at two different office locations. Further, recreating the patient list would have involved a great deal of time and effort, in that someone would have to physically pull each chart and copy the information. Such activity would have also been clearly visible to anyone in the vicinity. In contrast, Dodson was able to quickly and discreetly download the patient information from AIM's computers and have ME Computers upload that information to medical software on HPS's computer system, ready to use for business. Unlike *Gillis*, where there were unsecured paper copies of the customer list available, here there were no paper copies of the entire patient list in the offices. In sum, the individual patient charts were sufficiently different from the complete patient list such that the trial court did not abuse its discretion in excluding evidence of how the charts were maintained.

¶ 43 Defendants further argue that the trial court erred in granting plaintiffs' motion *in limine* to exclude evidence regarding subsequent changes AIM made in protecting the charts after it locked out Dr. Moore. Defendants made an offer of proof that after Dr. Moore's departure, AIM installed locked filing cabinets for its patient charts at Copley. Plaintiffs argue that defendants have forfeited this issue by failing to raise it in their posttrial motion. However, we agree with defendants that they did raise the issue in their posttrial motion. Still, based on our conclusion that the trial court did not err in excluding evidence of how AIM originally stored patient charts, it follows that it did not err in excluding evidence of AIM's subsequent changes in maintaining the charts.

¶ 44 Defendants argue that even if the trial court's ruling on the motion *in limine* was proper, plaintiffs opened the door to evidence regarding subsequent changes by questioning witnesses on whether the computer hard drive was currently kept in a locked cabinet. Defendants cite other testimony that the hard drive was not stored in a locked cabinet prior to June 26, 2006. A party who procures, invites, or acquiesces in the admission of improper evidence cannot subsequently complain about the admission of that evidence (*Hamrock v. Henry*, 222 Ill. App. 3d 487, 495 (1991)), and a party can open the door to the admission of evidence that would have been excluded under a motion *in limine* (*Rush v. Hamdy*, 255 Ill. App. 3d 352, 366 (1993)). In this situation, however, evidence of changes in computer security did not open the door to evidence about the patient charts, which was a different subject. See *People v. Griffiths*, 112 Ill. App. 3d 322, 328 (1983), citing E. Cleary and M. Graham, Handbook of Illinois Evidence §103.4, at 9 (3d ed. 1979) (although a party who opens the door to testimony on a particular subject may not object to evidence on the same subject, the party may still object to evidence on grounds not violated by the party's admission of evidence).

¶ 45 B. Kleeman's Expert Testimony

¶ 46 Defendants next argue that the trial court erred in denying their motion *in limine* to bar Kleeman's testimony. In the motion, defendants argued that the Trade Secrets Act measures damages by the actual loss or unjust enrichment caused by the misappropriation or, if those cannot be proven, based on a reasonable royalty. Defendants argued that Kleeman's opinions should be barred because he chose to use a reasonable royalty rate despite the ability to determine plaintiffs' damages by using a lost profit or unjust enrichment analysis. Defendants reassert these arguments on appeal.

¶ 47 The issue raised by defendants is one of statutory construction. The primary rule of statutory construction is to ascertain and give effect to the legislature's intent, which is best determined by the statutory language's plain and ordinary meaning. *Board of Education of Auburn Community Unit School District No. 10 v. Department of Revenue*, 242 Ill. 2d 272, 279 (2011). We review *de novo* questions of statutory interpretation. *Id.* at 278.

¶ 48 The damages provision of the Trade Secrets Act states:

> "Damages can include both the actual loss caused by misappropriation and the unjust enrichment caused by misappropriation that is not taken into account in computing actual loss. *If neither damages nor unjust enrichment caused by the misappropriation are proved by a preponderance of the evidence, the court may award damages caused by misappropriation measured in terms of a reasonable royalty* for a misappropriator's unauthorized disclosure or use of a trade secret." (Emphasis added) 765 ILCS 1065/4(a) (West 2006).

¶ 49 We conclude that the plain language of section 4(a) does not require that a plaintiff be unable to measure damages by actual loss or unjust enrichment in order to receive damages based on a reasonable royalty. The statute allows a plaintiff to seek to recover damages based on "both the actual loss caused by misappropriation and the unjust enrichment caused by misappropriation that is not taken into account in computing actual loss." *Id.* The statute goes on to state that the court may award damages based on reasonable royalty if neither actual loss nor unjust enrichment "are proved" (*id.*); it does not state that reasonable royalty damages are available only if neither actual loss nor unjust enrichment cannot be proven. Thus, the trial court did not err in denying defendants' motion *in limine* to bar Kleeman's testimony.

¶ 50 Defendants' reliance on *Parus Holdings, Inc. v. Banner & Witcoff, Ltd.*, 585 F. Supp. 2d 995 (N.D. Ill. 2008), does not change our result. There, the federal district court stated that section 4(a) allows for actual loss or unjust enrichment "or, if those cannot be proven," reasonable royalty damages. *Id.* at 1004. However, the *Parus* court was briefly paraphrasing section 4(a) and not attempting to interpret the statute, so reliance on that case is not persuasive. *Cf. Catapult Communications Corp. v. Foster*, No. 06 CV 6112, slip op. at 2 (N.D. Ill. 2010) (the Trade Secrets Act "states that Plaintiff can either show actual damages or provide an expert report regarding reasonable royalties").

¶ 51 Defendants argue that an interpretation contrary to theirs renders superfluous the statutory language regarding proof by a preponderance of the evidence, thereby violating the rules of statutory construction. We note that our supreme court has stated that "*[i]f the statutory language is ambiguous*, we construe the statute to avoid rendering any part meaningless or superfluous." (Emphasis added.) *Blum v. Koster*, 235 Ill. 2d 21, 29 (2009). As section 4(a) does not present an ambiguity, this aid of statutory construction does not come into play. Even otherwise, we do not find the language in question to be superfluous. Rather, the statute allows a plaintiff to seek damages for both actual loss and unjust enrichment that is not taken into account in computing actual loss, and it allows reasonable royalty damages only if neither actual loss nor unjust enrichment are proven by a preponderance of the evidence. In other words, if a plaintiff presents evidence on all three types of damages, it will be given reasonable royalty damages only if it did not prove the other two types of damages by a preponderance of the evidence.[2] We further note that

[2]We note that some courts in other jurisdictions have interpreted similar statutory language as requiring the trial court, rather than the jury, to determine reasonable royalties. See, *e.g.*, *De*

defendants' interpretation, requiring that a plaintiff not be able to prove actual loss or unjust enrichment before seeking reasonable royalty damages, adds a limitation to the statute not present in the plain language, contrary to principles of statutory construction. See *Maksym v. Board of Election Commissioners*, 242 Ill. 2d 303, 318 (2011) (where statutory language is unambiguous, we will enforce it as written and will not read into it exceptions, limitations, or conditions).

¶ 52 C. Jury Instructions on Trade Secrets

¶ 53 Defendants additionally argue that the trial court improperly refused their instruction no. 26 regarding factors to consider in ascertaining what is a trade secret. Jury instructions should inform the jurors of the issues presented, the principles of law to be applied, and the facts needed to be proved in support of a verdict. *Howat v. Donelson*, 305 Ill. App. 3d 183, 186 (1999). The trial court must instruct the jury using an Illinois Pattern Jury Instruction (IPI) unless it determines that the instruction does not accurately state the law. *Studt v. Sherman Health Systems*, 2011 IL 108182, ¶13, citing Ill. S. Ct. R. 239(a) (eff. Jan. 1, 1999). "Whenever IPI does not contain an instruction on a subject on which the court determines that the jury should be instructed, the instruction given in that subject should be simple, brief, impartial, and free from argument." Ill. S. Ct. R. 239(a) (eff. Jan. 1, 1999). It is within the trial court's discretion to grant or deny a particular jury instruction. *Id.* " 'The standard for determining an abuse of discretion is whether, taken as a whole, the instructions are sufficiently clear so as not to mislead and whether they fairly and correctly state the law.' " *Id.*, quoting *Dillon v. Evanston Hospital*, 199 Ill. 2d 483, 505 (2002). Moreover, a reviewing

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Lange Landen Operational Services, LLC v. Third Pillar Systems, LLC, No. 09-2439, slip op. at 2 (E.D. Pa. April 28, 2011). However, that issue was not raised here, so we do not address it.

court will not grant a new trial based on a trial court's refusal to provide a suggested jury instruction unless the refusal seriously prejudiced the complaining party's right to a fair trial. *Surestaff, Inc. v. Azteca Foods, Inc.*, 374 Ill. App. 3d 625, 627 (2007).

¶ 54 There is no pattern jury instruction for trade secret claims, so the trial court had to provide non-pattern instructions on this issue. The trial court gave defendants' instructions nos. 25 and 27, which parallel the statutory definitions of a "trade secret" and "misappropriation." See 765 ILCS 1065/2 (West 2006). Defendants further sought to have the jury receive their proposed instruction no. 26, which set forth the six factors *ILG Industries* listed in determining whether information is a trade secret. Defendants point out that *Alpha School Bus Co.*, 391 Ill. App. 3d at 740, states that a court should consider the *ILG Industries* factors in determining whether a trade secret exists. Defendants argue that jurors should also have had the benefit and guidance of those factors. The trial court denied defendants' proposed instruction no. 26 on the basis that it did not think that the jury needed to be instructed on the factors, and the parties could argue inferences drawn from the evidence.

¶ 55 *Alpha School Bus Co.* cites *ILG Industries* directly in stating that the court should consider the six factors in determining whether a trade secret exists. *Id.* We therefore look to *ILG Industries*, which states:

> "As stated in the Restatement of Torts, an exact definition of a trade secret, applicable to all situations, is not possible. 'Some factors to be considered in determining whether given information is one's trade secret are: (1) the extent to which the information is known outside of his business; (2) the extent to which it is known by employees and others involved in his business; (3) the extent of measures taken by him to guard the secrecy of the information; (4) the value of the information to him and to his competitors; (5) the amount

> of effort or money expended by him in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.' " *ILG Industries, Inc.*, 49 Ill. 2d at 93, quoting Restatement of Torts, §757, comment b, p. 6.

¶ 56 We conclude that the trial court properly acted within its discretion in declining to give defendants' proposed instruction no. 26. *ILG Industries* predates the Trade Secrets Act. Further, as *ILG Industries* clearly states, an exact definition of a trade secret is not possible, and the factors it named were described as some factors to consider, rather than as an exhaustive list. See *id.* Thus, as plaintiffs argue, providing the factors to the jury could create the danger of overemphasizing them. The trial court instead gave the jury defendants' instructions nos. 25 and 26, which simply and accurately set forth the definitions of trade secrets and misappropriation under the Act, and from which the jury could reach an informed decision.

¶ 57 Defendants further argue that the trial court improperly gave plaintiffs' instruction no. 11A over their objection. That instruction, relating to punitive damages, was modeled after Illinois Pattern Jury Instructions, Civil, No. 35.01 (Supp. 2009) (hereinafter, IPI Civil (Supp. 2009) No. 35.01). Defendants point out that the Notes on Use to IPI Civil (Supp. 2009) No. 35.02 state that the instruction should be given with IPI Civil (Supp. 2009) No. 35.01 if punitive damages are sought against a corporate defendant. Defendants maintain that plaintiffs did not offer IPI Civil (Supp. 2009) No. 35.02, so HPS should not have been included on IPI Civil (Supp. 2009) No. 35.01. Therefore, according to defendants, the trial court erred in giving plaintiffs' instruction no. 11A over their objection, and the error resulted in an improper punitive damage award against HPS.

¶ 58 Plaintiffs argue that by failing to offer IPI Civil (Supp. 2009) No. 35.02 at trial, defendants forfeited any objection to the lack of such an instruction. We agree. Defendants objected to instruction no. 11A on the basis that punitive damages was not supported by the evidence, and they did not mention IPI Civil (Supp. 2009) No. 35.02. A party forfeits the right to challenge a jury instruction unless it objects to the instruction and offers an alternative, remedial instruction. *Mikolajczyk v. Ford Motor Co.*, 231 Ill. 2d 516, 557 (2008). This rule prevents the challenging party from gaining an unfair advantage by failing to raise the issue when the trial court could have corrected the defective instruction, and then obtaining a reversal on appeal. *Id.* at 557-58. As defendants failed to offer a remedial instruction including IPI Civil (Supp. 2009) No. 35.02, we find that they forfeited this issue on appeal.

¶ 59 Defendants argue that regardless of forfeiture, we still have jurisdiction to review whether the punitive damage instructions were proper. They cite *Dillon*, 199 Ill. 2d 483. However, that case is distinguishable because there was no pattern instruction on the issue of increased risk of future injury as an element of damages, and the supreme court therefore addressed the issue in furtherance of providing a just result and to maintain a sound and uniform body of precedent. *Id.* at 505. These considerations are not present here, where the issue involves pattern instructions. See *Gehrett v. Chrysler Corp.*, 379 Ill. App. 3d 162, 178 (2008) (similarly distinguishing *Dillon*).

¶ 60 D. Sufficiency of the Evidence on Trade Secrets Count

¶ 61 1. Motion for a Directed Verdict as to HPS

¶ 62 Defendants next argue that plaintiffs failed to present any evidence that HPS misappropriated the patient list or schedule, and therefore the trial court erred in denying their motion for a directed verdict on this issue. A trial court should grant a directed verdict or judgment notwithstanding the verdict (*n.o.v*) only where all the evidence, when viewed in the light most favorable to the nonmoving party, so overwhelmingly favors the moving party that no contrary verdict based on the evidence could ever stand. *Lazenby v. Mark's Construction, Inc.*, 236 Ill. 2d 83, 100 (2010). We review *de novo* the denial of a motion for a directed verdict or the denial of a motion for judgment *n.o.v*. *Lawlor v. North American Corp. of Illinois*, 409 Ill. App. 3d 149, 161 (2011).

¶ 63 To state a cause of action for misappropriation of a trade secret, a plaintiff must show: (1) he had a trade secret (2) that was misappropriated and (3) used in the defendant's business. *Alpha School Bus Co.*, 391 Ill. App. 3d at 740. The Act defines "misappropriation" as:

> "(1) acquisition of a trade secret of a person by another person who knows or has reason to know that the trade secret was acquired by improper means; or
>
> (2) disclosure or use of a trade secret of a person without express or implied consent by another person who:
>
> (A) used improper means to acquire knowledge of the trade secret; or
>
> (B) at the time of disclosure or use, knew or had reason to know that knowledge of the trade secret was:
>
> (I) derived from or through a person who utilized improper means to acquire it;
>
> (II) acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or
>
> (III) derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or
>
> (C) before a material change of position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake." 765 ILCS 1065/2(b) (West 2006).

¶ 64 Defendants point out that Dr. Boer was the president and sole shareholder of HPS. Defendants cite Dr. Boer's testimony that Dr. Moore and Dodson did not share any AIM information with him prior to the lock-out; they did not tell him prior to the lock-out that they had a disk containing AIM patient information; and he did not recall ever seeing or using Dr. Moore's patient list in either printed form or on disk. Defendants argue that plaintiffs failed to prove that Dr. Boer or HPS knew or had reason to know that the AIM patient list or schedule was a trade secret or that it was acquired by improper means, so the trial court should have entered judgment in HPS's favor on the trade secrets count.

¶ 65 We conclude that the trial court did not err in denying defendants' motion for a directed verdict. The business knowledge an agent acquires in the natural scope of his employment is imputed to the principal. *St. Paul Mercury Insurance Co. v. Statistical Tabulating Corp.*, 155 Ill. App. 3d 545, 550 (1987). The knowledge an employee gains before his employment may sometimes be imputed to the employer if it is clear the information was so precise and definite that it must be present in the employee's mind at a later time (*Carrizales v. Rheem Manufacturing Co.*, 226 Ill. App. 3d 20, 45-46 (1991)), as opposed to being forgotten (*Greer v. Carter Oil Co.*, 373 Ill. 168, 172 (1940)). Dr. Moore and Dodson, who both were involved in taking the AIM information, were subsequently hired by HPS. It is clear that HPS acquired the trade secret when the information was uploaded onto its computer system. Further, through Dr. Moore and Dodson, HPS used the information to, among other things, solicit over 5,000 patients from AIM's patient list through postcards. Thus, there was evidence that HPS used the trade secret at a time when, through Dr. Moore and Dodson, it knew or had reason to know that it was acquired through improper means and/or under circumstances which gave rise to a duty, or through a person who had a duty, to maintain secrecy or limit its use, thereby satisfying the elements of misappropriation of a trade secret.

¶ 66 Even looking, *arguendo*, at just Dr. Boer, Dr. Moore testified that Dr. Boer knew that he was going to hire ME Computers to upload AIM information onto the new HPS computers. Although

Dr. Boer testified to the contrary, it was up to the trier of fact to weigh the witnesses' credibility and resolve conflicts in the evidence. *Maple v. Gustafson*, 151 Ill. 2d 445, 452 (1992). A reasonable jury could also have determined that, based on all of the evidence, including the secret meetings to organize the new practice, Dr. Boer had reason to know that the patient list and charts were acquired through improper means or under circumstances which gave rise to a duty, or through a person who had a duty, to maintain secrecy or limit its use.

¶ 67 2. Proof that Plaintiffs' Patient List and Schedule were Trade Secrets

¶ 68 Defendants further argue that the trial court erred in denying their motion for a directed verdict on the trade secrets count, because plaintiffs' patient list and schedule were not trade secrets. As stated, to establish that information is a trade secret, a plaintiff must show that (1) the information is sufficiently secret to derive economic value, and (2) it took measures that were reasonable, under the circumstances, to maintain the information's secrecy or confidentiality. 765 ILCS 1065/2(d) (West 2006). Defendants do not dispute the first element, that the list and schedule were sufficiently secret to derive economic value, but rather argue that plaintiffs did not make reasonable efforts to maintain the information's secrecy or confidentiality.

¶ 69 Citing the six *ILG Industries* factors, defendants argue as follows. Regarding the first factor (to what extent the information is known outside of the plaintiff's business), receptionists employed by the Rush Copley Physician's Group, who were not AIM employees, were given a daily schedule. Stover shared a desk at the Copley office with other medical practices, and other individuals could have viewed the information on her computer or used it. If an AIM employee did not log off a computer, as Stover testified she rarely did, anyone who sat at the desk could have access to the information at that employee's clearance level. Regarding the second factor (to what extent employees know the information), AIM schedules and patient information were accessible to AIM employees; daily patient schedules were printed as a convenience; and printed copies of portions of the patient list were around the office. As for the third factor (security measures), plaintiffs had just a password protected computer system, and they did not use most of the security features available through the Medisoft system. Particularly, plaintiffs did not limit Dodson's ability to download, edit, or print information even though she was an at-will employee. Plaintiffs also did not use office training or forms to protect the data, as AIM never told its employees about information it deemed confidential to its business outside of HIPPA and patient rights. Plaintiffs did not present any evidence about the fourth factor, the information's value to the plaintiff and competitors. There was no evidence about the number of active AIM patients, so it was impossible to determine the value of AIM's alleged trade secrets. For the fifth factor (the amount of effort or money the plaintiff expended in developing the information), there was no evidence that plaintiffs paid consideration for the list of patients Dr. Kulczycki brought with him from Premier, or for the patients Dr. Moore brought to AIM. Although Dr. Kulczycki testified about efforts he took to grow the business, there was no proof of advertising costs or the frequency of such efforts, or the number of patients that came to AIM because of them. Finally, plaintiffs offered no testimony on the last factor, the effort with which others could properly acquire or duplicate the information. Dr. Moore already had the contact information for his 2,352 pre-existing patients, and the information was also available from the easily-accessible patient charts. Defendants argue that when the evidence is evaluated in light of the six *ILG Industries* factors, plaintiffs' failure to prove their trade secrets count is clear.

¶ 70 Plaintiffs argue that *ILG Industries* involved a large manufacturer, but the steps that are reasonably necessary to protect confidential information is different for large companies than for small ones. Plaintiffs cites *Elmer Miller, Inc. v. Landis*, 253 Ill. App. 3d 129 (1993). There, the plaintiff purchased a small tailor shop, paying $10,000 for the inventory and $60,000 for the customer list and files. The plaintiff kept the customer files in a closed file drawer, and only salesmen contacting repeat customers were permitted access to the files. *Id.* at 130. Two salesmen who allegedly stole customer information from the files had been informed both when they were hired and when they quit that the information was confidential. *Id.* at 134. The appellate court upheld the trial court's grant of a preliminary injunction on the ground that the information was a trade secret. It stated that "reasonable steps for a two- or three-person shop may be different from reasonable steps for a larger company," and that the store's efforts were "reasonable for a small tailor shop to maintain the secrecy of a customer list and customer information." *Id*; see also *Jackson v. Hammer*, 274 Ill. App. 3d 59, 67 (1995) (the steps reasonably necessary to protect information is different for a large company than for a smaller one).

¶ 71 We conclude that the evidence, when viewed in the light most favorable to plaintiffs, does not so overwhelmingly favor defendants such that no contrary verdict based on the evidence could ever stand. We agree with defendants that the *ILG Industries* factors are not limited to large businesses, but as stated, they are also not an exclusive list. The most important of the factors is whether and how an employer acts to keep the information secret. *Alpha School Bus Co.*, 391 Ill. App. 3d at 740. The employers' efforts must be "reasonable under the circumstances" (765 ILCS 1065/2(d)(2) (West 2006)), with one of the circumstances being the size of the business (see *Elmer Miller, Inc.*, 253 Ill. App. 3d at 134).

¶ 72 Evidence at trial showed that prior to June 23, 2006, AIM had 10 to 12 employees, including three physicians. Thus, it was a small business. Daily patient schedules were printed to facilitate business, and they were shredded at the end of the day, demonstrating that AIM considered them confidential and the employees understood them to be so. The entire patient schedule and patient list was available only on the computer system, which was password-protected, as compared to the unlocked drawer in *Elmer Miller*. Further, there was testimony that only a few individuals had level one security from which they could view and download all of the information. Such clearance for Dodson was not unreasonable, given that she was the office manager and testified that she needed access to almost all of AIM's information, at one time or another, to competently do her job. Further, Dr. Moore's employment agreements contained nondisclosure provisions, and all employees signed confidentiality agreements and had HIPAA training. Thus, even though the employees may not have specifically been instructed on trade secrets, they understood that the information was confidential and subject to limited disclosure. As such, the trial court did not err in denying defendants' motion for a directed verdict on the trade secrets count.

¶ 73 3. Jury Instruction on Punitive Damages

¶ 74 Defendants additionally argue that the trial court erred in instructing the jury on the issue of punitive damages, because there was no evidence that they acted willfully. The Trade Secrets Act states that "[i]f willful and malicious misappropriation exists, the court may award exemplary damages in the amount not exceeding twice any award made under subsection (a) [for actual loss and unjust enrichment/reasonable royalties]." 765 ILCS 1065/4(b) (West 2006). Defendants argue that although Dr. Moore acknowledged the confidential nature of the information, he was referring to the information being legally privileged in that patients have a right to have their health information protected, as opposed to plaintiffs' right to have their business information protected. Defendants argue that plaintiffs provided no evidence that they knew that the patient list or schedule constituted proprietary business information, as opposed to information protected for patients' benefits. Defendants maintain that the trial court even acknowledged the lack of any evidence that they knew that the patient list and schedule were trade secrets. They cite its June 2, 2010, ruling on attorney fees, in which it found that "there is no evidence that either Dr. Moore, Joan Dodson or

Highland Physician Services had knowledge that the patient list and schedule were proprietary business information."

¶ 75 Plaintiffs respond that there was ample evidence regarding defendants' willful and malicious conduct, in that defendants admitted taking patient information which did not belong to them and they admittedly had no right to possess; they knowingly used the information to steal plaintiffs' patients; Dr. Moore admitted that he knew that the patient list and schedule were confidential; and defendants diverted mail and telephone calls and cashed insurance and patient checks made out to AIM. Plaintiffs argue that Dr. Moore's employment contracts had provisions stating that the patient list was AIM's property and could not be removed by him. Also, the third contract, which he acknowledged receiving, specifically disclosed that certain property was AIM's trade secrets. Plaintiffs argue that the determination of punitive damages does not turn on whether Dr. Moore knew that the patient list was a trade secret, but rather whether he knew that the patient list was AIM's property and confidential, which he admitted at trial.

¶ 76 We first examine the meaning of "willful and malicious." "Willful" means " 'voluntary and intentional, but not necessarily malicious.' " *Chicago's Pizza, Inc. v. Chicago's Pizza Franchise, Ltd. USA*, 384 Ill. App. 3d 849, 868 (2008), quoting Black's Law Dictionary (8th ed. 2004). In the context of tortious interference with prospective economic advantage, " 'malice' means intentional and without justification" (*Small v. Sussman*, 306 Ill. App. 3d 639, 649 (1999)), and it does not connote ill will, hostility, or an intent to injure (*Scholwin v. Johnson*, 147 Ill. App. 3d 598, 607-08 (1986)). See also *Schroeder v. Winyard*, 375 Ill. App. 3d 358, 363 (2007) ("malicious" in context of federal nondischargable debt statute means in conscious disregard of duties or without just cause or excuse, and it does not require ill-will or specific intent to harm). Our supreme court has stated that "[p]unitive damages may be awarded when the defendant's tortious conduct evinces a high degree of moral culpability, that is, where the tort is 'committed with fraud, actual malice, deliberate violence or oppression, or when the defendant acts willfully, or with such gross negligence as to indicate a wanton disregard of the rights of others.' " *Slovinski v. Elliot*, 237 Ill. 2d 51, 58 (2010), quoting *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 186 (1978). The Seventh Circuit has held that "willful and malicious misappropriation" under the Trade Secrets Act means " 'an intentional misappropriation as well as a misappropriation resulting from the conscious disregard of the rights of another.' " *Learning Curve Toys, Inc. v. PlayWood Toys, Inc.*, 342 F.3d 714, 730 (7th Cir. 2003), quoting *Mangren Research & Development Corp. v. National Chemical Co.*, 87 F.3d 937, 946 (7th Cir. 1996). In light of the Illinois case law discussed, we find this definition appropriate.

¶ 77 The trial court may instruct the jury on punitive damages only if the plaintiff has made a *prima facie* case for such damages. *Franz v. Calaco Development Corp.*, 352 Ill. App. 3d 1129, 1138 (2004). The trial court's decision to submit the issue to the jury will be reversed only if it constitutes an abuse of discretion. *Gehrett*, 379 Ill. App. 3d at 179. We conclude that the trial court did not abuse its discretion here. We do agree with defendants that, contrary to plaintiffs' argument, whether they diverted mail and telephone calls and cashed insurance and patient checks made out to AIM is not relevant for this issue, as these actions do not constitute misappropriation of trade secrets. However, we agree with plaintiffs that the Act does not require that a defendant understand that the trade secret is proprietary business information. As mentioned, to state a cause of action for misappropriation of a trade secret, a plaintiff must show: (1) he had a trade secret (2) that was misappropriated and (3) used in the defendant's business. *Alpha School Bus Co.,* 391 Ill. App. 3d at 740. At issue here is whether there was evidence that defendants willfully and maliciously misappropriated the patient list and schedule. The definition of misappropriation includes, among other things, use of a trade secret by a person who knew or had reason to know at the time of its use that it was acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use. 765 ILCS 1065/2(b) (West 2006).

¶ 78 Dr. Moore's 2002 and 2004 employment contracts both stated that AIM's patient list, with the exception of Dr. Moore's preexisting patients that he brought to the practice, was AIM's property and was confidential, and any copies of the employer's property had to be returned upon termination of employment. Thus, there was evidence that Dr. Moore knew or should have known that the patient list, which he admittedly used at HPS, was acquired under circumstances under which he had a duty to maintain its secrecy or limit its use. Based on these same circumstances, the jury could also have reasonably determined that his acquisition of the list was willful and malicious in that he obtained and used it voluntarily and intentionally and in conscious disregard of AIM's rights. Similar considerations apply to Dodson, as she knew that Dr. Kulczycki had reduced Dr. Moore's security level on the computer system in April 2006 and that Dr. Moore was planning to leave AIM, but she downloaded the patient list and schedule for Dr. Moore and thereafter continued to assist him in using that information in the new practice. We determined earlier in our disposition that there was evidence that HPS misappropriated a trade secret. With both Dodson and HPS, a jury could also have reasonably determined that they acted voluntarily and intentionally and in conscious disregard of AIM's rights.

¶ 79 E. Conspiracy Claim

¶ 80 1. Leave to File Fifth Amended Complaint

¶ 81 Defendants argue that plaintiffs should not have been granted leave to file a fifth amended complaint with new allegations of a civil conspiracy. Defendants point out that plaintiffs' third amended complaint, filed in October 2008, alleged that they "conspired and agreed to solicit AIM patients using the stolen AIM patient list and computer records and to promote the medical practices of MOORE and HPS through conduct which breached MOORE'S Employment Agreement [and] violated the Trade Secrets Act and such other negligent acts as alleged in this Complaint." In February 2009, plaintiffs sought leave to file a fourth amended complaint, but the trial court denied their motion. It allowed them to file a fifth amended complaint on the first day of trial, May 3, 2010. Defendants argue that the conspiracy count in the fifth amended complaint alleged that defendants conspired and agreed to eight actions different than those identified in the third amended complaint. Defendants argue that none of the actions were new since the completion of discovery, and filing the fifth amended complaint during trial should have been denied as untimely.

¶ 82 Plaintiffs argue that the trial court properly allowed the filing of the fifth amended complaint to revise the conspiracy count because defendants did not move to strike the conspiracy count in the third amended complaint until the start of trial. Plaintiffs argue that the factual allegations and claims made in the conspiracy count were substantially similar to those in the third amended complaint, except for the deletion of the claim that defendants conspired to steal plaintiffs' trade secrets. Plaintiffs argue that all of the factual claims and allegations were known before trial. Plaintiffs argue that the fifth amended complaint did not take defendants by surprise, and they were not prejudiced by its filing.

¶ 83 Illinois courts are encouraged to liberally allow the amendment of pleadings, but a party's right to amend is not absolute. *Lee v. Chicago Transit Authority*, 152 Ill. 2d 432, 467 (1992). The trial court should consider the following factors, among others, in determining whether to permit an amendment to the pleadings: whether the amendment would cure a defect in the pleadings; whether the opposing party would be prejudiced or surprised by the amendment; the proposed amendment's timeliness; and whether there were prior opportunities to amend. *Id.* at 467-68. Whether to allow an amendment is within the trial court's discretion, and we will not disturb its decision absent an abuse of that discretion. *Janis v. Graham*, 408 Ill. App. 3d 898, 905 (2011).

¶ 84 We conclude that the trial court did not abuse its discretion in allowing plaintiffs to file their fifth amended complaint. Defendants filed their motion to strike the conspiracy count in the third amended complaint after ME Computers, which was named in that count, was dismissed from the case. While defendants may not have been able to successfully obtain dismissal of that count earlier, it follows that plaintiffs had no previous need to amend that count, and thus their motion to amend thereafter was timely. We agree with defendants that the amended conspiracy count listed many allegations not directly stated in the prior version. However, the third amended complaint's conspiracy count incorporated 31 paragraphs, which included the majority of the factual allegations at issue. Further, the trial court stated that the conspiracy count in the fifth amended complaint involved "the same issues that have been discussed and been the center of discovery process for months" and did not take anyone by surprise. Accordingly, the trial court acted within its discretion in allowing plaintiffs to file their fifth amended complaint.

¶ 85 2. Motion to Dismiss Conspiracy Count

¶ 86 Defendants next argue that the trial court erred in denying their oral motion to dismiss the conspiracy count in the fifth amended complaint. Defendants argue that plaintiffs merely alleged the existence of an agreement among them and did not allege conduct in furtherance of that agreement, or damages proximately caused by the conduct.

¶ 87 A section 2-615 (735 ILCS 5/2-615 (West 2010)) motion to dismiss attacks the legal sufficiency of the complaint. We must determine whether the allegations, when construed in the light most favorable to the plaintiff, sufficiently state a cause of action upon which relief can be granted. *Turner v. Memorial Medical Center*, 233 Ill. 2d 494, 499 (2009). A cause of action should not be dismissed under section 2-615 unless no set of facts can be proved entitling the plaintiff to recover. *Id.* at 499. We review *de novo* the denial of a section 2-615 motion to dismiss. *In re Detention of Welsh*, 393 Ill. App. 3d 431, 445 (2009).

¶ 88 Civil conspiracy is two or more people acting together to accomplish either an unlawful purpose or a lawful purpose by unlawful means. *McClure v. Owens Corning Fiberglass*, 188 Ill. 2d 102, 133 (1999). "In order to state a claim for civil conspiracy, a plaintiff must allege an agreement and a tortious act committed in furtherance of that agreement." *Id.* We agree with plaintiffs that allegations incorporated into the conspiracy count, liberally construed, allege tortious conduct in furtherance of the conspiratorial agreement. We further agree with plaintiffs that, liberally construed, the count includes in their prayer for relief the damages they allegedly suffered as a result of the tortious acts. As such, the trial court properly denied defendants' motion to dismiss the conspiracy count.

¶ 89 3. Double Recovery

¶ 90 Defendants additionally argue that the jury verdicts under the trade secrets and conspiracy counts constituted a double recovery. Defendants note that the conspiracy count states that it was "plead[ed] in the alternative pursuant to section 2-613(b) of the Code of Civil Procedure [735 ILCS 5/2-613(b) (West 2010)] ." Defendants surmise that plaintiffs pleaded in the alternative in the event that they did not prevail on their trade secrets count. Defendants argue that the allegations of misconduct in the two counts were identical, with the exception that plaintiffs alleged in the conspiracy count that defendants solicited AIM patients using non-trade secret AIM records. Defendants argue that the prayer for relief is also identical for the two counts.

¶ 91 Plaintiffs argue that the conspiracy count was not pleaded in the alternative to the trade secrets count, but rather was plead in the alternative because they were in doubt as to which of two or more statements of fact were true. They further argue that the damages do not constitute a double recovery because the damages sought in the two jury instructions differ. Plaintiffs argue that they presented evidence of stolen and improperly cashed checks for treatment rendered at AIM when Dr. Moore was still employed there, and these damages were not sought in their trade secrets count. According to plaintiffs, the amount of the misappropriated checks was about $3,000, the amount awarded by the jury for the conspiracy claim.

¶ 92 Defendants respond that for plaintiffs to suggest that they requested damages for stolen checks is disingenuous, as plaintiffs' closing argument shows that they sought only punitive damages for the conspiracy count.

¶ 93 We agree with plaintiffs that their complaint shows that they were pleading factual alternatives in the conspiracy count, as opposed to the count being a legal alternative to the trade secrets count. Section 2-613(b), which they cited in their complaint, specifically relates to alternative factual pleading. See 735 ILCS 5/2-613(b) (West 2008). A party may make alternative factual statements that are inconsistent as long as the statements are made in good faith and with genuine doubt as to which contradictory allegation is true. *Bureau Service Co. v. King*, 308 Ill. App. 3d 835, 841 (1999). We further agree with plaintiffs that the subject of patient and insurance checks was not at issue in the trade secrets counts but was alleged in the conspiracy count and argued at trial. Further, contrary to defendants' contention, plaintiffs did argue damages from these checks in closing argument and referenced related exhibits. Accordingly, the jury verdicts under the trade secrets and conspiracy counts do not legally constitute a double recovery.

¶ 94 4. Jury Instructions

¶ 95 Defendants further argue that the jury was improperly instructed on the conspiracy claim. Defendants argue that the introductory instruction to the conspiracy claim improperly referenced misappropriation of trade secrets; some of the claimed acts do not constitute tortious acts; and the trial court improperly instructed the jury on HIPPA.

¶ 96 Plaintiffs argue that the jury instructions at issue were proper; any error was harmless; the introduction instruction was actually prepared by defendants; and defendants forfeited the remainder of this issue by failing to submit remedial instructions. We agree with the last two points. Defendants drafted the introductory instruction, so they may not now claim that it was erroneous. See *People v. Patrick*, 233 Ill. 2d 62, 76-77 (2009). Regarding the remaining instructions, as stated, a party forfeits the right to challenge a jury instruction unless he offers an alternative, remedial instruction. *Mikolajczyk*, 231 Ill. 2d at 557. Defendants originally offered instructions on the conspiracy count but then withdrew them, retendering only the introductory instruction. Defendants maintain that they withdrew the instructions after the denial of their motion for a directed finding on the conspiracy count to "avoid any inconsistency in their position." However, defendants cite no authority for the proposition that they were required to withdraw their instructions in order to preserve review of the denial of their motion for a directed verdict. Instead, by withdrawing the instructions, defendants have forfeited their right to challenge the jury instructions on conspiracy.

¶ 97 F. Counterclaim

¶ 98 Defendants next argue that the trial court erred in denying their motion for judgment *n.o.v.* on their counterclaim for breach of contract. Defendants argue that plaintiffs admitted that the restrictive covenants were no longer in effect as of June 26, 2006. Defendants cite: the letter Dr. Moore received from AIM's attorney stating that their was no restrictive covenant between him and AIM, and he could practice medicine where he saw fit; the letter AIM's attorney wrote to HPS stating that the former employees did not have written contracts with AIM or restrictive covenants; and the letter Dr. Kulczycki wrote to Dr. Moore stating that they did not have an active contract.

Defendants argue that Dr. Moore fulfilled all of his contractual obligations yet plaintiffs withheld his compensation from him, so the trial court should have granted their motion for judgment *n.o.v.*

¶ 99 Plaintiffs argue that the contract required Dr. Moore to return all AIM property, not use it or disclose it to a competing business, not participate in a competing business prior to October 2006, and not solicit AIM's patients or employees. Plaintiffs maintain that Dr. Moore admitted to doing all of these things, so the denial of the motion for judgment *n.o.v.* was proper.

¶ 100 We conclude that the trial court committed no error in denying defendants' motion for judgment *n.o.v.* on their counterclaim. Defendants cannot rely on Dr. Kulczycki's letter stating that they had no active contract, for if there was no contract, Dr. Moore could not recover for breach of contract. Defendants cite no authority for the proposition that AIM's attorney's letters were legally binding admissions on AIM regarding whether the restrictive covenants were enforceable. Rather, evidence of the letters was submitted to the jury to consider in making its factual determinations. Moreover, Black's Law Dictionary defines a "restrictive covenant" as, among other things, a "noncompetition covenant" (Black's Law Dictionary 371 (7th ed. 1999)), which in turn is defined as a provision "in which one party agrees to refrain from conducting business similar to that of the other party" (Black's Law Dictionary 370 (7th ed. 1999)). Thus, the phrase would not necessarily cover all of the restrictions in the employment agreement, such as the prohibition against taking AIM's property. As plaintiffs note, there was ample evidence that Dr. Moore violated numerous provisions in the employment agreement, by, among other things, taking AIM's patient list and charts.

¶ 101 Defendants argue in their reply brief that AIM was the first to breach its contract with Dr. Moore by reducing the amount of his paychecks starting in March 2006. Defendants argue that because AIM committed the first breach, it cannot maintain an action for subsequent breach against

Dr. Moore. However, by first making this argument in their reply brief, defendants have forfeited it for review. Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008). Even otherwise, the employment contract does not state how much of his revenue Dr. Moore was entitled to receive on a monthly basis, and AIM had historically rolled over tens of thousands of dollars at times. Further, the jury could have determined that Dr. Moore's participation in HPS, which predated the reduction in paychecks, constituted the first breach of the contract. Although defendants cite the trial court's finding that the service he provided to HPS did not constitute a competing business, this finding related to the trial court's judgment on the issues before it, and the finding was not binding on the jury, which entered its verdict before the finding was even made.

¶ 102 G. Cross-Appeal

¶ 103 1. Breach of Fiduciary Duty

¶ 104 In their cross-appeal, plaintiffs first argue that the trial court erred in granting judgment in favor of Dr. Moore and Dodson on the breach of fiduciary duty count. We will not disturb a trial court's ruling on a claim of breach of fiduciary duty unless its decision is against the manifest weight of the evidence. See *Veco Corp. v. Babcock*, 243 Ill. App. 3d 153, 160 (1993); see also *Gambino v. Boulevard Mortgage Corp.*, 398 Ill. App. 3d 21, 51 (2009) (trial court's decision following a bench trial is reviewed under the manifest weight of the evidence standard).

¶ 105 To state a claim for breach of fiduciary duty, a plaintiff must prove that a fiduciary duty existed; the duty was breached; and the breach proximately caused the plaintiff's injuries. *Neade v. Portes*, 193 Ill. 2d 433, 444 (2000). In its findings on this claim, the trial court stated that Dr. Moore was an AIM employee and not an officer, director, or shareholder, "and therefore there was no fiduciary relationship that existed between the parties." The trial court further found that Dr. Moore's role as a supervising physician at HPS was in the category of directorships "etc." that were allowed by the contract, and the services he provided there did not constitute a competing business in relation to AIM. The trial court entered judgment in favor of Moore and Dodson on the breach of fiduciary duty claim.

¶ 106 Plaintiffs argue that contrary to the trial court's finding, all employees, not only officers and directors, owe a duty of loyalty to their employers. We agree that employees can be held liable for breach of fiduciary duties (See *Lawlor*, 409 Ill. App. 3d at 172), and thus the trial court was incorrect in stating that there was no fiduciary relationship between Dr. Moore and AIM. Still, employees are held to a different standard for fiduciary duties than corporate officers. *Enterprise Recovery Systems, Inc. v. Salmeron*, 401 Ill. App. 3d 65, 80-81 (2010). An employee generally owes a duty to not compete with the employer while still employed by it. *Id.* at 81. An "employee may plan, form, and outfit a rival company in the same industry as the employer while still employed, so long as he does not engage in competition until after his resignation." *Id.* An officer owes a heightened duty to not actively exploit his position in the company for his personal gain or hinder its ability to continue its business. *Id.* Here, the trial court apparently did not base its decision on the lack of a fiduciary duty, as the majority of its findings on this issue relate to Dr. Moore's work with HPS.

¶ 107 Plaintiffs also argue that the trial erred in focusing on Dr. Moore's work for HPS. Plaintiffs argue that the trial court ignored other breaches of Dr. Moore and Dodson alleged in their fifth amended complaint and proved at trial, specifically the taking of AIM's patient list; the solicitation of employees; and the breach of restrictive covenants.

¶ 108 In their fifth amended complaint, plaintiffs alleged that Dr. Moore breached his fiduciary duty to AIM by participating in and/or owning a competing business, and in diverting patients from AIM to HPS. It alleged that Dodson breached her fiduciary duty by assisting Dr. Moore in the competing business, diverting patients, and by violating her confidentiality agreement by downloading confidential AIM information and providing it to Dr. Moore and HPS. Thus, contrary to their argument, plaintiffs did not allege that Dr. Moore and Dodson breached their fiduciary duties by soliciting employees or breaching unspecified restrictive covenants. The trial court fully addressed plaintiffs' allegations regarding Dr. Moore. The trial court's finding that the services Dr. Moore provided to HPS did not constitute a competing business is not against the manifest weight of the evidence, as there was evidence that Dr. Moore only supervised Dr. Boer and did not see any patients directly; Dr. Boer focused on pain management, unlike AIM; and Dr. Boer sometimes referred patients to Dr. Moore at AIM for matters that he considered beyond his expertise. The same reasoning applies to Dodson on the allegation of HPS as a competing business.

¶ 109 Regarding the taking of AIM's patient list, the Trade Secrets Acts states that it is intended to displace conflicting tort, restitutionary, unfair competition, and other laws providing civil remedies for misappropriating a trade secret. 765 ILCS 1067/8 (West 2006). As plaintiffs recovered for the taking of the patient list under their trade secrets claim, they were not entitled to recover again for the patient list under a claim of breach of fiduciary duty. See *Motorola, Inc. v. Lemko Corp.*, 607 F. Supp. 2d 760, 771 (N.D. Ill. 2009) (Act preempts related common law claims, including breach of fiduciary duty, where claims are based on the same conduct as claims under the Act). Similarly, the damages for the trade secrets count included use of the patient list, and diverting patients from AIM to HPS would fall under this category. Accordingly, the trial court did not err in not making factual findings on these issues.

¶ 110 2. Attorney Fees

¶ 111 Last, plaintiffs argue that the trial court improperly reduced their requested attorney fees. Plaintiffs sought $126,100 in attorney fees but were awarded $45,000. The trial court found that plaintiffs did not meet their burden of proving that certain charges, totaling $8,837.50, were reasonable and necessary. Plaintiffs agree that these items were properly subtracted, but they maintain that they should have been awarded the balance of $117,262.50.

¶ 112 The trial court made the following additional findings. In determining whether to award fees under the Consumer Fraud and Deceptive Business Practice Act (815 ILCS 505/1 *et seq.* (West 2010)), courts have considered several factors, including the degree of the defendant's culpability, his ability to satisfy a fee award, whether a fee award would deter others, and the relative merits of the parties' positions, and such considerations were also relevant in this case. Dr. Moore was a credible and believable witness; he instructed Dodson to download his patient information; and the defendants did not know that the patient list and schedule were proprietary business information. Dr. Moore's conduct in mailing 5,557 notices to patients when he knew he had brought about 2,300 patients to AIM was careless and reckless rather than malicious. That he did not mail the notices to all of the approximately 10,000 patients on the list meant that this factor did not weigh in favor of awarding attorney fees. Defendant's ability to satisfy a fee award weighed in favor of awarding fees. The deterrence potential also weighed in favor, though not significantly. On the merits of the parties' positions, the issue of whether the information was a protected trade secret was a close question for the jury to decide. This factor weighed in favor of awarding fees, though not significantly. The trial court also considered the parties' litigation behavior and found that the defendants did not delay the disposition of the case or increase its costs, whereas plaintiffs' conduct increased litigation costs through unnecessary and avoidable discovery disputes and motions. This consideration did not weigh in favor of awarding fees. The hourly rate of plaintiffs' attorney was fair and reasonable and their court costs were necessarily incurred. The trial court awarded plaintiffs $45,000 in attorneys fees; $7,297.54 for forensic computer examination fees; and court costs of $721.50.

¶ 113 Plaintiffs argue that the factors to consider in determining the amount of attorney fees to award in a trade secrets case are clearly set forth in *RKI, Inc. v. Grimes*, 233 F.Supp. 2d 1018, 1020 (N.D. Ill. 2002). Plaintiffs argue that according to that case, the calculation begins with the "lodestar" amount, which is the number of hours reasonably expended multiplied by a reasonable hourly rate. Plaintiffs point out that defendants never disputed the reasonableness of the $250 per hour rate claimed by their attorney. Plaintiffs argue that the degree of success is a critical factor, and their results were excellent on the trade secrets claim in that they obtained both compensatory damages of $213,000 and punitive damages of $74,000, which far exceeded prior settlement offers. They argue that the fact that they did not prevail on all counts is not determinative of the degree of success, and that a common core of facts ran through their complaint.

¶ 114 Defendants argue that plaintiffs' reliance on *RKI* is misplaced because there the plaintiff asserted five causes of action and prevailed on all of those counts. *Id.* at 1019. Further, the plaintiff excluded from its attorney fee request the time expended on claims other than the trade secrets claim, and the court found the exclusion to be proper. *Id.* at 1020. Defendants also argue as follows. The attorney fees must be reasonably related to the petitioning party's successful claims. Plaintiffs did not exclude their fees for time spent on claims other than the trade secrets claim. They filed complaints with 10 counts and defended against Dr. Moore's counterclaim. Plaintiffs voluntarily dismissed two counts in October 2008 and another two just before trial. Of the six claims that went to trial, only two resulted in verdicts for plaintiffs, and only one of these was brought under the Trade Secrets Act. To assist the trial court, defendants categorized the work performed by plaintiffs' attorney, noting that: plaintiffs sought about $20,000 in fees for their 2006 appeal, on which plaintiffs did not succeed; plaintiffs sought fees for the two counts against ME Computers; miscellaneous charges did not relate to the case; and plaintiffs sought fees for their work in response to discovery motions defendants filed, including one of which resulted in a discovery sanction against plaintiffs. The claims at trial did not involve a common core of facts, as Dr. Moore's counterclaim and plaintiffs' breach of contract claim included completely separate proof such as Dr. Moore's overhead expenses and income, the solicitation of employees, and the opening of a nearby medical practice. Defendants further argue that plaintiffs had limited success, in that they sought more than $1 million in damages; the jury did not even award plaintiffs all of the actual damages they sought for the trade secrets claim; plaintiffs recovered only $3,002 for the conspiracy claim; and plaintiffs lost all other counts.

¶ 115 We note that *RKI* applied federal precedent for determining the reasonableness of attorney fees (see *id.*), so its manner of determining the reasonableness of the fees is not binding here. Instead, we look to Illinois law. The Trade Secrets Act states that if "willful and malicious misappropriation exists, the court *may* award reasonable attorney fees to the prevailing party." (Emphasis added.) 765 ILCS 1065/5 (West 2010). Statutes allowing attorney fees are in derogation of the common law and must be strictly construed. *Pietrzyk v. Oak Lawn Pavilion, Inc.*, 329 Ill. App. 3d 1043, 1051 (2002). Under the plain language of the statute, the trial court is not required to award attorney fees if willful and malicious misappropriation exists, but rather may do so in its discretion. In determining the reasonableness of attorney fees, the trial court should consider the attorney's skill and standing; the controversy's nature; the novelty and difficulty of the issues; the subject matter's importance; the degree of responsibility in the case's management; the usual and customary charge in the community; and the benefits to the client. *City of McHenry v. Suvada*, 2011 Ill. App. (2d) 100534, ¶18. We will not disturb a trial court's award of attorney fees absent an abuse of discretion. *Id.* at ¶17.

¶ 116 The common-core-of-facts doctrine provides:

> "a way for the court to award attorney fees to the plaintiffs who otherwise would have received insufficient attorney fees because of the limited success of their covered causes of actions allowing for attorney fees or where the time charged in litigating the covered causes of actions was indistinguishable from the time charged in litigating the covered causes of actions, regardless of whether all of the claims were successful." *Pietrzyk*, 329 Ill. App. 3d at 1051.

The doctrine may be used as a shield to prevent the reduction of attorney fees based on the limited success of recovery, but it may not be used as a sword to obtain attorney fees that are not otherwise covered by the statute allowing the attorney fees. *Id.*

¶ 117 Here, we agree with defendants that plaintiffs' trade secrets claim, which involved the theft of AIM's patient list and charts, was not the central focus of the remaining claims. Therefore, the trial court could have correctly limited the attorney fees to just those directly related to the trade secrets claim. Further, the statute gave the trial court the discretion of whether to award any attorney fees, and factors the trial court considered under the Consumer Fraud and Deceptive Business Practice Act assisted it in making that determination. Given the trial court's findings that defendants did not know that the patient list and schedule were proprietary business information, Dr. Moore's act of mailing the postcards was reckless rather than malicious, the issue of whether the information was a protected trade secret was a close question, and plaintiffs' conduct increased litigation costs, the trial court acted well within its discretion in awarding plaintiffs $45,000 in attorney fees.

¶ 118 Last, plaintiffs argue that they should receive attorney fees for this appeal, noting that the Act does not limit an award of attorney fees to those incurred in the trial court. They attached to their brief an affidavit of fees. However, we agree with defendants that attachments to briefs that are not otherwise part of the record are not properly before the reviewing court. *Taylor v. Frey*, 406 Ill. App. 3d 1112, 1115 (2011). We further agree with defendants that to the extent that plaintiffs may be entitled to attorney fees for the appeal under the Act, the issue should be reserved for the trial court. We therefore remand the cause to allow plaintiffs to petition for attorney fees for this appeal. We express no opinion on whether the trial court should award such fees or in what amount. See *Melton v. Frigidaire*, 346 Ill. App. 3d 331, 341 (2004) (remanding cause for the trial court to determine whether to award the plaintiffs for attorney fees and costs incurred on appeal for consumer fraud claims).

¶ 119 III. CONCLUSION

¶ 120 For the foregoing reasons, we affirm the Kane County circuit court's judgment, and we remand the cause to allow plaintiffs to petition the trial court for attorney fees and costs for the appeal.

¶ 121 Affirmed and remanded.