

and that at least two-thirds of Apex shareholders approved the actions of the Board for the years the stock options were issued. On cross-appeal, we hold the circuit court did not abuse its discretion when it denied defendants' motion for sanctions pursuant to Illinois Supreme Court Rule 137 or when it denied defendants' motion for attorneys fees and costs pursuant to section 12.60(j) of the Illinois Business Corporation Act.

¶ 1 Plaintiffs Daniel S. Mahru¹, Adam Mahru, Rebekah Mahru, Benjamin Mahru, and Ryan Mahru, individually and derivatively on behalf of Apex Investment Associates, Inc. (Apex), filed a six count first amended complaint² against defendants Alexander A. Lothan, Philip Lewin, Shai Lothan, Rita Kusek, Harry Lake, Alan S. Levin, Tamara Lothian and Apex. Plaintiffs, minority shareholders in Apex, a closely held corporation, alleged that defendants, who either are, or were at the relevant time periods, Apex directors, employees, or shareholders; improperly issued a series of employee stock option plans between the years 1983 and 1999. The circuit court granted defendants' motion for summary judgment as to all counts of plaintiffs' complaint and denied plaintiffs' cross-motion for summary judgment.

¶ 2 Before this court, plaintiffs argue that the circuit court improperly granted summary judgment in defendants' favor as to counts II, III, V, and VI of their complaint. They raise no arguments concerning the granting of summary judgment in defendants' favor as to counts I or IV of their complaint. Common to all of the counts plaintiffs challenge here, plaintiffs argue the

¹ The circuit court dismissed with prejudice plaintiff Daniel S. Mahru based on judicial estoppel. Plaintiffs have not raised any arguments regarding his dismissal. As such, he is not a party to this appeal.

² We will refer to plaintiffs' first amended complaint as simply the complaint to avoid confusion.

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circuit court erred in its application of the Dead-Man's Act. 735 ILCS 5/8-201 (West 2012). In regard to each individual count of plaintiffs' complaint, plaintiffs raise the following issues: whether, as alleged in counts II and III, defendants breached their fiduciary duties in the issuance of stock options; whether, as alleged in count V, defendants violated section 12.56 of the Illinois Business Corporation Act (IBCA) (805 ILCS 5/12.56 (West 2012)); and, as alleged in count VI, whether defendants were unjustly enriched. We hold the circuit court properly granted summary judgment in defendants' favor as to all of the above counts because plaintiffs failed to rebut the evidence presented by defendants that Apex shareholders were properly notified of the employee stock options at issue here and that at least two-thirds of Apex shareholders approved the actions of the Board for the years the stock options were issued.

¶ 3 After plaintiffs filed their notice of appeal, defendants filed a motion for sanctions pursuant to Illinois Supreme Court Rule 137 (Ill. S. Ct. R. 137 (eff. July 1, 2013)), and a motion to recover their attorneys fees and costs pursuant to section 12.60(j) of the IBCA (805 ILCS 5/12.60 (j) (West 2012)). The circuit court denied both motions, and defendants filed a cross-appeal. On cross-appeal, defendants raise the following issues: (1) whether the circuit court abused its discretion when it denied defendants' motion for sanctions pursuant to Rule 137 (Ill. S. Ct. R. 137 (eff. July 1, 2013)); and (2) whether the circuit court abused its discretion when it denied defendants' motion for attorneys fees and costs pursuant to section 12.60(j) of the IBCA (805 ILCS 5/12.60 (j) (West 2012)). We hold the circuit court did not abuse its discretion when it denied defendants' motion for sanctions pursuant to Rule 137 (Ill. S. Ct. R. 137 (eff. July 1, 2013)), or when it denied defendants' motion for attorneys fees and costs pursuant to section

12.60(j) of the IBCA (805 ILCS 5/12.60 (j) (West 2012)).

¶ 4

JURISDICTION

¶ 5 On April 25, 2012, the circuit court granted defendants' motion for summary judgment as to all counts of plaintiffs' complaint and denied plaintiffs' cross-motion for summary judgment in its entirety. On May 7, 2012, plaintiffs' timely filed their notice of appeal. Accordingly, this court has jurisdiction to address plaintiffs' claims regarding the summary judgment order entered against them pursuant to Illinois Supreme Court Rules 301 and 303 governing appeals from final judgments entered below. Ill. S. Ct. R. 301 (eff. Feb. 1, 1994); R. 303 (eff. May 30, 2008).

¶ 6 After plaintiffs' filed their notice of appeal, defendants filed two timely post-judgment motions. On July 12, 2012, this court granted plaintiffs' motion to stay this appeal pending the resolution of defendants' motions. On August 27, 2012, the circuit court issued its memorandum and order denying both motions for sanctions. Plaintiffs, on September 7, 2012, filed a motion to reinstate the appeal; which this court granted on September 17, 2012. Due to the stay of the appeal, defendants were unable to file a cross-appeal of the circuit court's August 27, 2012, order within the 30 days prescribed by Illinois Supreme Court Rule 303(a)(3). Ill. S. Ct. R. 303(a)(3) (eff. June 4, 2008). Upon defendants' motion, we allowed defendants to file a cross-appeal of the circuit court's August 27, 2012, order pursuant to Illinois Supreme Court Rule 303(d). Ill. S. Ct. R. 303(d) (eff. June 4, 2008). Accordingly, we also have jurisdiction to address defendants' cross-appeal in this case.

¶ 7

BACKGROUND

¶ 8 On August 11, 2011, plaintiffs filed their complaint for injunctive and other relief. Plaintiffs alleged they are minority shareholders in the closely held company, Apex. They explained that they inherited their shares in Apex from their mother, Gertrude Mahru (Gertrude) upon her death in 2007. Gertrude had inherited the shares in Apex from her husband, Joseph Mahru (Joseph), who had been an Apex director and shareholder from 1962 until his death in 2002. According to plaintiffs, defendants' actions of issuing employee stock option plans during the time period of 1983 to 1999 "significantly diminished and diluted" plaintiffs' ownership interests in violation of its preemptive rights. Specifically, plaintiffs alleged Apex, and its board of directors (Board), failed to provide notice to shareholders or obtain shareholder approval of employee stock options given to employees and defendants Alexander Lothan (Alex), Shai Lothan (Shai), and Rita Kusek (Rita).

¶ 9 Relevant to this appeal, plaintiffs included the following counts in its complaint. In Count II, plaintiffs alleged that defendants, on an individual basis, breached their fiduciary duty to Apex's shareholders. In Count III of the complaint, plaintiffs raised another allegation of breach of fiduciary duty, but on a derivative basis. In Count V, plaintiffs alleged defendants used their positions of power within Apex to improperly issue the employee stock options without shareholder notice or approval in violation of section 12.56 of the IBCA. 805 ILCS 5/12.56 (West 2012). Under count V, plaintiffs alleged that defendants acted improperly on both an individual basis, due to their alleged illegal, oppressive, and fraudulent conduct; and on a derivative basis by allegedly wasting or misapplying Apex's assets. Count VI alleged unjust enrichment on an individual basis against defendants Alex, Shai, and Rita.

¶ 10 On November 3, 2011, defendants moved for summary judgment arguing all stock options at issue were approved by at least two-thirds of Apex shareholders and each shareholder was properly notified. Defendants pointed out that plaintiffs stand in the shoes of their predecessors in title, Joseph and Gertrude. Joseph and Gertrude attended all the shareholder meetings in question here in person or by proxy and never objected. Joseph, for each of the relevant time periods prior to 1986, participated in and voted in favor of stock options during both meetings of the Board and in shareholder meetings. From 1987 until his death in 2002, Joseph participated in and voted in favor of the stock options at the shareholder meetings. Defendants alleged that Gertrude was represented by proxy from 2003 until her death in 2007. As such, defendants argue plaintiffs could not complain that they did not receive notice of the meetings. Defendants argued that because of the shareholder approval of all of the stock options at issue here, they were entitled to summary judgment on plaintiffs claims of breach of fiduciary duty, violation of section 12.56 of the IBCA, and unjust enrichment. Defendants further argued that plaintiffs' claims were barred by ratification, waiver, laches, estoppel, the business judgment rule, and the statute of limitations. Defendants attached over 40 exhibits to its motion for summary judgment, including affidavits, deposition testimony, evidence of proxy votes, minutes from shareholders meetings, financial statements, evidence of board meetings, and letters. Those exhibits, in relevant part, addressed each of the stock options at issue here and presented the following information. Stock options were granted to keep Apex's expenses low while still allowing it to reward its employees' services. In addition to purchasing the options, Alex, Shai, and Rita also provided services.

¶ 11 Alex, one of Apex's founders, served as a director and officer from 1965 until 2011. Alex also provided investment services to Apex. On April 25, 1983, the Board, including Joseph, unanimously agreed to give Alex an option to purchase 6,000 shares at \$40 per share. On October 27, 1983, notice of the annual shareholders' meeting was sent to all shareholders. At the meeting, on December 4, 1983, the shareholders in attendance, which represented 83.79% of the total shares in Apex, unanimously approved and ratified all of the Board's actions for the prior year. This included the 6,000 share option for Alex. Joseph was in attendance and voted in favor of ratifying the actions of the Board.

¶ 12 On November 8, 1993, the Board unanimously approved a 2,000 share option for Alex at \$50 per share. According to the minutes of the meeting, this was given to Alex in lieu of a \$40,000 bonus and because of Alex's services to the company. Notice of the annual shareholders' meeting was sent to all shareholders on September 29, 1994. The shareholders at the annual meeting on November 8, 1994, constituting 98% of Apex's shares, unanimously approved and ratified all of the actions of the Board for the prior year. Joseph attended the meeting. Prior to the meeting, copies of Apex's financial statements were mailed to the shareholders and made part of the minutes. The financial statement reflected the 2,000 share option.

¶ 13 On November 19, 1996, the Board unanimously approved another 2,000 share option for Alex at \$75 per share. According to the minutes of the Board meeting, the new options were part of Alex's new seven-year management agreement. Notice of the annual shareholder's meeting was mailed to shareholders on September 4, 1997. At the annual shareholder's meeting, 91 % of Apex's total shares unanimously approved the Board's actions for the prior year. Copies of

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Apex's financial statements for the year were mailed to shareholders prior to the meeting and were made part of the minutes of the meeting. The financial statement reflected the new 2,000 share option.

¶ 14 On October 21, 1997, the Board unanimously approved another 2,000 share option for Alex at the rate of \$75 per share. On September 1, 1998, the Board unanimously approved an additional 2,000 share option for Alex at the rate of \$75 per share. At the annual shareholder meeting on September 24, 1998, the attending shareholders, which represented 95% of Apex shares, unanimously approved and ratified all actions taken by the Board the previous years, including the two new 2,000 share options granted to Alex. Joseph attended this meeting. Prior to the meeting, Apex's annual financial statement, reflecting the two new options given to Alex, was mailed to all shareholders. The annual financial statement was included in the minutes of the meeting.

¶ 15 On September 14, 1999, the Board unanimously voted to grant Alex a new 1,000 share option at \$75 per share. At the December 6, 1999, shareholders meeting, shareholders consisting of 97% of Apex's total shares unanimously approved and ratified all of the actions taken by the Board the previous year, including the new 1,000 share option granted to Alex. Joseph attended the meeting. Apex's annual financial statement, reflecting the new 1,000 share option, was inserted into the minute book and mailed to all shareholders prior to the meeting.

¶ 16 Shai Lothan provided real estate management services for Apex. Deposition testimony established that he was compensated below market rate for his services. On December 12, 1990, the Board unanimously voted to grant Shai 2,000 share options at \$75 a share. The shareholders

attending the annual meeting on November 18, 1991, which constituted 95% of Apex's total shares, unanimously approved and ratified all actions of the Board for the prior year. Apex's financial statement which reflected the stock options granted to Shai, was mailed to all shareholders prior to the annual meeting and inserted into the minutes of the meeting.

¶ 17 Rita Kusek had been a full-time assistant secretary and administrative assistant for Apex since 1987. Her salary was described as modest despite the numerous services she provided to Apex. The Board, on September 14, 1999, unanimously voted to grant Rita an option to purchase 1,000 share options at \$75 a share in recognition of her ten years of service to Apex. On December 6, 1999, the shareholders attending the annual shareholders meeting constituting 97% of Apex's total shares unanimously approved and ratified all actions of the Board for the prior year. Joseph attended the shareholder meeting. Prior to the meeting, the Apex financial statement which reflected the stock options granted to Rita was mailed to all shareholders. The financial statement was also inserted into the minutes of the meeting.

¶ 18 Defendants also showed, through deposition testimony, that all of the plaintiffs, except for Daniel Mahru³, did not have any knowledge of any of the facts behind the lawsuit, or Joseph's or Gertrude's involvement with Apex's stock options. None of the plaintiffs knew what services Alex, Shai or Rita provided for Apex.

¶ 19 On January 30, 2012, plaintiffs filed a combined response to defendants' motion for summary judgment and a cross-motion for summary judgment. Plaintiffs argued that notice was

³ Defendants provided evidence that Daniel Mahru, who is not part of this appeal, had actual knowledge of the relevant stock options.

not proper because the notice sent to shareholders did not specifically list employee stock options as a matter for discussion at the annual meetings. Plaintiffs further argued that shareholders cannot ratify a board's decision by way of a general approval of the board's acts,

¶ 20 In response, defendants argued that plaintiffs failed to rebut any of the evidence they presented that showed that Apex shareholders were aware of the employee stock options. Furthermore, defendants pointed out that the IBCA does not require that notices to annual shareholders' meetings specifically mention employee stock option plans. Defendants also contended that the IBCA provides that attendance at a meeting constitutes waiver of notice of that meeting. Defendants stated that Joseph and Gertrude attended shareholder meetings in person or by proxy.

¶ 21 In reply, plaintiffs argued that the Dead-Man's Act barred any evidence that took place in the presence of either Joseph or Gertrude, that Apex's corporate records do not reflect that the stock options were properly granted, and that defendants' affirmative defenses were without merit.

¶ 22 On April 25, 2012, the circuit court issued its memorandum and order granting defendants' motion for summary judgment and denying plaintiffs' cross-motion for summary judgment. Initially, the circuit court found that neither the statute of limitations nor the doctrine of laches barred plaintiffs' claims. The circuit court also noted that both sides relied on certain corporate minutes, notices, and financial statements of Apex to support their respective motions but did not lay a proper foundation for the documents as business records. Neither party, however, objected to the documents. As such, the circuit found that both sides waived any

objections to the documents. The circuit court found that plaintiffs in this action inherited their shares of Apex from Gertrude, who in turn, inherited the shares from her husband, Joseph, who had been a shareholder of Apex from 1965 until his death in 2002. Joseph was also a director of Apex from 1965 until 1986.

¶ 23 The circuit court disagreed with plaintiffs' argument that the Dead-Man's Act (735 ILCS 5/8-201 (West 2012)) applied to all the evidence of events which took place in the presence of Joseph or Gertrude. The circuit court explained that plaintiffs' cause of action was not brought to protect the interests of the estate of Joseph or Gertrude or to protect plaintiffs' interest in the estate. Rather, plaintiffs' claims were based on their current ownership of the shares, not based on their status as heirs to Joseph and Gertrude. Accordingly, the circuit court found the Dead-Man's Act did not apply because plaintiffs brought suit as current Apex shareholders as opposed to heirs in the estate of Joseph or Gertrude.

¶ 24 The circuit court further found that counts II, III, V, and VI of the complaint all pertained to whether the granting of stock options violated the shareholders' preemptive rights, and addressed these counts collectively.⁴ The circuit court explained that the parties did not dispute that Apex shareholders had preemptive rights under the IBCA. 805 ILCS 5/6.50 (West 2012). The circuit court found defendants were entitled to summary judgment on counts II, III, V, and VI because the evidence shows that the stock options at issue were all approved by both the Apex board of directors and by two-thirds of Apex's shareholders. Additionally, the circuit court found

⁴ As discussed *supra*, plaintiffs have not argued that the circuit court erred in granting summary judgment in defendants' favor as to counts I and IV of the complaint.

that plaintiffs failed to provide any evidence to the contrary.

¶ 25 The circuit court also found that count II of plaintiffs' complaint was also subject to summary judgment in defendants' favor because plaintiffs attempted to bring both individual and derivative actions based on the same conduct. The circuit court reasoned that count II and count III each alleged breach of fiduciary duty, but count II was brought on an individual basis while count III was brought derivatively. Accordingly, the circuit court found defendants were entitled to summary judgment on count II because it was brought as an individual action, not a derivative one.

¶ 26 The circuit court disagreed with plaintiffs' contention that specific notice of the employee stock options had to be included in the notice of annual shareholders meetings. The circuit court found that, under the IBCA, notice for annual shareholder meetings only needed to list the time, day, and place of the meeting. The circuit court disagreed with plaintiffs' contention that the ratification of the Board's actions by a general approval was improper. The circuit court found that in this matter there was no concealment of the stock options. As such, the general approval of the Board's actions for the previous year was not improper.

¶ 27 On May 7, 2012, plaintiffs timely filed their notice of appeal. On May 22, 2012, defendants filed two concurrent motions: one for sanctions under Illinois Supreme Court Rule 137 (Ill. S. Ct. R. 137 (eff. July 1, 2013)); and one for attorneys fees and costs under section 12.60(j) of the IBCA (805 ILCS 5/12.60 (j) (West 2012)).

¶ 28 On August 27, 2012, the circuit court issued its memorandum and order denying defendants' motion for sanctions under Rule 137 (Ill. S. Ct. R. 137 (eff. July 1, 2013)), and

defendants motion for attorneys fees and costs under section 12.60(j) of the IBCA (805 ILCS 5/12.60 (j) (West 2012)). Regarding defendants' motion for sanctions under Rule 137, the circuit court found that although plaintiffs were ultimately unsuccessful, they did reasonably argue the facts and law that supported their position. Regarding section 12.60(j) of the IBCA, the circuit court found that although plaintiffs were not successful, they did present an objectively reasonable basis for their action. Accordingly, the circuit court found that defendants failed to establish that sanctions were warranted under Section 12.60(j) of the IBCA. As discussed *supra*, this court allowed defendants to file a cross-appeal of the circuit court's decision to deny its motion under Rule 137 and its motion for attorneys fees and costs pursuant to section 12.60(j) of the IBCA.

¶ 29

ANALYSIS

¶ 30 Before this court, plaintiffs argue the circuit court improperly granted summary judgment in defendants' favor as to four of the six counts of the complaint. Common to all of the counts plaintiffs challenge here, plaintiffs first argue the circuit court erred in its application of the Dead-Man's Act. 735 ILCS 5/8-201 (West 2012). We will first address whether the Dead-Man's Act bars evidence in this matter before determining whether summary judgment was properly entered in defendants' favor as to each count of plaintiffs' complaint.

¶ 31

Dead-Man's Act

¶ 32 Plaintiffs first argue the circuit court misapplied the Dead-Man's Act when it refused to bar any and all evidence regarding events that took place in the presence of Joseph or Gertrude, who are both deceased. According to plaintiffs, they characterize themselves as representatives

under the Dead-Man's Act because they are heirs of Joseph and Gertrude.

¶ 33 In response, defendants argue the Dead-Man's Act has no application in this case because plaintiffs are suing for themselves. Defendants maintain that plaintiffs are not asserting claims on behalf of Joseph or Gertrude or acting as representatives of an estate.

¶ 34 Our review of the circuit court's application of the Dead-Man's Act involves the construction of a statute. Issues of statutory construction are reviewed *de novo*. *Kean v. Wal-Mart Stores, Inc.*, 235 Ill. 2d 351, 361 (2009). Our objective in construing a statute is to determine and give effect to the intent of the legislature. *Id.* The best indicator of the legislature's intent is the plain language of the statute itself. *Id.* The Dead-Man's Act provides, in relevant part:

"In the trial of any action in which *any party sues or defends as the representative of a deceased person ****, no adverse party or person directly interested in the action shall be allowed to testify on his or her own behalf to any conversation with the deceased *** or to any event which took place in the presence of the deceased [.]" (Emphasis added.) 735 ILCS 5/8-201 (West 2012).

The Dead Man's Act defines "Representative" as "an executor, administrator, heir or legatee of a deceased person and any guardian or trustee of any such heir or legatee[.]" *Id.* Under the plain language of the statute, plaintiffs must sue or defend as a representative of a deceased person and not as an individual for the Dead-Man's Act to apply. *Coleman v. Heidke*, 291 Ill. App. 3d 670,

672-73 (1997); see also *Harry W. Kuhn, Inc. v. State Farm Mutual Automobile Insurance Co.*, 201 Ill. App. 3d 395, 403 (1990) ("The only parties entitled to object to the testimony of an interested witness under this statute are adverse parties suing as representatives of the deceased or incompetent persons.").

¶ 35 We hold the circuit court did not err in finding the Dead-Man's Act did not apply in this matter because plaintiffs brought this suit on their own behalf based on their current ownership of Apex shares. As such, plaintiffs were not suing as a representative of a deceased person in this case. 735 ILCS 5/8-201 (West 2012). It is not disputed that plaintiffs are the owners of the Apex shares that they inherited from Gertrude. The damages they seek are based on their status as Apex shareholders, not in their status as heirs of Gertrude. Plaintiffs did not bring this suit to protect the estate of either Joseph or Gertrude, or in an effort to protect their own status as heirs to Joseph or Gertrude; rather, they brought suit as the current owners of Apex shares.

¶ 36 Plaintiffs, both before this court and the circuit court, rely solely on *Gunn v. Sobucki* (216 Ill. 2d 602 (2005)) to support their position. In *Gunn*, the plaintiff brought suit against the defendant to contest the defendant's right to ownership of a coin collection the defendant inherited from her deceased husband. *Id.* at 604-08. In the case presently before us, the circuit court found *Gunn* distinguishable and noted that "[w]hile [the suit in *Gunn*] was being brought against the defendant individually, the lawsuit was, in effect, an attack on the husband's estate and the defendant's rights as an heir to the estate. This is not the situation in this case." We agree with defendants and the circuit court that *Gunn* is distinguishable to the case at bar. Plaintiffs here are not seeking to protect their status as heirs, or to protect Joseph or Gertrude's

estate. It is undisputed that plaintiffs are the proper owners of Apex shares. Plaintiffs in this case are not acting as representatives under the Dead Man's Act. 735 ILCS 5/8-201 (West 2012). Rather, they are suing on their own behalf based on their current status as Apex shareholders. Accordingly, the circuit court did not misapply the Dead Man's Act in this case.

¶ 37 Summary Judgment

¶ 38 Plaintiffs next argue that even if the Dead-Man's Act does not apply here, the circuit court still erred when it granted defendants' motion for summary judgment. Common to all four counts of plaintiffs' complaint at issue here, is plaintiffs' contention that from the time period of 1983 until 1999, Apex improperly issued stock options to Alexander, Shai, and Rita. According to plaintiffs, the shareholders had no notice regarding the issuance of the options and the options were issued without the required two-thirds approval of the shareholders. The stock options issued, plaintiffs allege, diluted their interest in the company.

¶ 39 Summary judgment is proper where "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." 735 ILCS 5/2-1005(c)(West 2008). "When parties file cross-motions for summary judgment, they agree that only a question of law is involved and invite the court to decide the issues based on the record." *Pielet v. Pielet*, 2012 IL 112064, ¶ 28. Our supreme court has cautioned that "the mere filing of cross-motions for summary judgment does not establish that there is no issue of material fact, nor does it obligate a court to render summary judgment. *Id.* Summary judgment is proper where a plaintiff fails to establish an element of a cause of action. *Pyne v. Witmer*, 129 Ill. 2d 351, 358 (1989).

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We review summary judgment rulings *de novo*. *Espinoza v. Elgin, Joliet & Eastern Ry. Co.*, 165 Ill. 2d 107, 113 (1995).

¶ 40 We note that plaintiffs also list as an issue presented in their argument that they had preemptive rights. This fact, however, is not disputed. The parties agree that Apex's shareholders have preemptive rights under section 6.50 of the IBCA. 805 ILCS 5/6.50 (West 2012). Section 6.50 of the IBCA, provides, in relevant part, that

"any corporation having preemptive rights may issue and sell its shares to its employees *** without first offering the same to its shareholders, for such consideration and upon such terms and conditions as shall be approved by the holders of two-thirds of its shares entitled to vote with respect thereto or by its board of directors pursuant to like approval of the shareholders." 805 ILCS 5/6.50(c) (West 2012).

Therefore, in order for Apex to issue the employee stock options it issued here, two-thirds of its voting shareholders must approve the options. Plaintiffs alleged that Apex failed to do so here, whereas, defendants allege that all stock options contested by plaintiffs here were properly approved by more than two-thirds of Apex's voting shareholders..

¶ 41 We agree with defendants that based on the evidence presented, all the relevant share options here were approved by at least two-thirds of the voting Apex shareholders at the annual shareholders meetings. Specifically, defendant presented the following evidence regarding the 18,000 share options at issue in this case. In 1983, 83.97% of shareholders approved and ratified

all of the Board's actions for the prior year, including a 6,000 share option issued to Alex. In 1991, 95% of shareholders approved and ratified all of the Board's actions for the prior year, including a 2,000 share option issued to Shai. In 1994, 98 % of shareholders approved and ratified all of the Board's actions for the prior year, including a 2,000 share option issued to Alex. In 1996, 91 % of shareholders approved and ratified all of the Board's actions for the prior year, including a 2,000 share option issued to Alex. In 1998, 95 % of shareholders approved and ratified all of the Board's actions for the prior year, including two 2,000 share options issued to Alex. In 1999, 97 % of shareholders approved and ratified all of the Board's actions for the prior year, including a 1,000 share option issued to Alex and a 1,000 share option issued to Rita. Plaintiffs, however, failed to rebut any of this evidence. Accordingly, we hold, based on the record before us, at least two-thirds of the voting Apex shareholders approved the 18,000 share options at issue in this matter.

¶ 42 Plaintiffs contend that two-thirds of the shareholders in this case did not approve any of the stock options at issue because a general approval of the Board's actions at the annual shareholder's meetings was insufficient to constitute approval of the options. Plaintiffs rely solely on the case of *Corn Belt Bank v. Lincoln Savings & Loan Assoc.*, 119 Ill. App. 3d 238 (1983). The circuit court found *Corn Belt Bank* to be distinguishable to the case at bar, and we agree. *Corn Belt Bank* involved an officer of a corporation actively concealing his actions from the corporation's board of directors. *Id.* at 249. That is not the case here as the Board approved the stock options, and information regarding the stock options was provided to shareholders prior to the annual meetings. Plaintiffs have presented no other authority in support of their argument.

Therefore, in the absence of any evidence of active concealment of information from the shareholders in this case, we agree with the circuit court that *Corn Belt Bank* is distinguishable to the case at bar.

¶ 43 Breach of Fiduciary Duty

¶ 44 Plaintiffs argue defendants breached their fiduciary duty by improperly issuing stock options that had the effect of diluting plaintiff's shares in Apex. Accordingly, plaintiffs contend the circuit court erred when it granted summary judgment in defendants' favor as to counts II and III of plaintiffs' complaint.

¶ 45 In response, defendants argue that the circuit court properly entered summary judgment against plaintiffs because plaintiffs cannot show how defendants breached their fiduciary duty. Specifically, all stock options were approved according to section 6.50 of the IBCA. 805 ILCS 5/6.50 (West 2012).

¶ 46 In order to recover for breach of fiduciary duty, it must be established: "(1) that a fiduciary duty existed; (2) that the fiduciary duty was breached; and (3) that the breach proximately caused damages." *Garrick v. Mesirov Financial Holdings, Inc.*, 2013 IL App (1st) 122228, ¶31. Where an unlawful underlying act is not present, however, a claim for breach of fiduciary duty is not actionable. *Kern v. Arlington Ridge Pathology, S.C.*, 384 Ill. App. 3d 528, 539 (2008).

¶ 47 In this case, we hold that summary judgment was properly entered in defendants' favor as to both counts of plaintiffs' complaint alleging breach of fiduciary duty because plaintiffs failed

to present any evidence to support their argument that a fiduciary duty was breached.

Defendants, however, presented substantial documentary evidence showing the shareholders were both informed of the Board's approval of the relevant stock options, and that at least two-thirds of Apex shareholders approved the Boards' actions for the years the relevant stock options were issued. For each of the stock options issued to Alex, Shai, and Rita, defendants provided, as exhibits to their motion for summary judgment, documentary evidence that notice was sent to shareholders, that the Board voted to award the share options in question, and that at the annual shareholders meeting, at least two-thirds of Apex shareholders approved the actions of the board for the prior year. Furthermore, defendants showed, through deposition testimony, that plaintiffs in this appeal were unaware of the facts underlying the lawsuit and did not know Joseph or Gertrude's involvement with Apex's stock options.⁵ They were unaware of what services Alex, Shai, or Rita performed for Apex and they were not aware of what information Joseph or Gertrude had regarding the stock options. Plaintiffs failed to contradict any of this evidence.

¶ 48 Plaintiffs contend that notice of the annual shareholders' meetings did not specify that stock options would be discussed at the annual shareholder meetings in question here. We hold this argument is without merit. Section 7.15 of the IBCA does not require that the purpose of a meeting to be in the notice of the meeting except for "in the case of a special meeting." 805 ILCS 5/7.15 (West 2012). Rather, all that is required for meetings that are not special meetings,

⁵ This statement does not include Daniel Mahru, who defendants alleged had actual knowledge of the stock options. Daniel Mahru, however, is not part of this appeal as previously discussed.

is written notice of the hour, day, and location of the meeting. 805 ILCS 5/7.15 (West 2012).

Defendants presented evidence that the meetings in question were the annual shareholders meetings, not special meetings. Plaintiffs presented no evidence to contradict this fact. As such, we disagree with plaintiffs' contention that notice in this case was improper due to a lack of specificity.

¶ 49 Accordingly, plaintiffs have failed to show that defendants' breached their fiduciary duty, a necessary element of the cause of action of breach of fiduciary duty. Summary judgment is proper where a plaintiff fails to establish an element of the cause of action. *Pyne*, 129 Ill. 2d at 358. Therefore, the circuit court did not err when it granted summary judgment as to counts II and III of plaintiffs' complaint.

¶ 50 Section 12.56 of the IBCA

¶ 51 Plaintiffs next argue that defendants violated section 12.56 of the IBCA (805 ILCS 5/12.56 (West 2012)) by acting illegally and oppressively when Apex allegedly improperly issued the relevant stock options. As such, plaintiffs contend that the circuit court erred when it granted defendants' summary judgment motion as to count V of plaintiffs' complaint.

¶ 52 In response, defendants contend that plaintiffs provided no evidence of any conduct that would violate section 12.56 of the IBCA and maintain that all stock options were properly approved of by at least two-thirds of the shareholders.

¶ 53 Section 12.56 of the IBCA provides remedies to shareholders of non-public corporations. 805 ILCS 5/12.56 (West 2012). Specifically, subsections (3) and (4) of section 12.56 allow the circuit court to order an appropriate remedy if it is established that either:

"(3) The directors or those in control of the corporation have acted, or acting, or will act in a manner that is illegal, oppressive, or fraudulent with respect to the petitioning shareholder whether in his or her capacity as a shareholder, director, or officer; or (4) the corporation assets are being misapplied or wasted." 805 ILCS 5/12.56 (3), (4) (West 2012).

¶ 54 In this case, we hold that plaintiffs claim that defendants violated section 12.56 of the IBCA fails because, as discussed *supra*, plaintiffs have presented no evidence showing that shareholders were not notified of the relevant employee stock options or that two-thirds of shareholders did not approve the Board's actions in awarding the stock options. Defendants, however, presented evidence showing shareholders were notified of the stock options and that two-thirds of the shareholders approved the Board's actions for the years the stock options were issued. Plaintiffs failed to rebut any of this evidence. Significantly, they were not even aware of what Joseph and Gertrude, who owned the stock options during the relevant time periods, knew of Apex's actions. Accordingly, we cannot say that plaintiffs presented any facts to establish that the directors or anyone in control of Apex acted illegally, oppressively, or fraudulently or that they wasted or misapplied corporation assets. Therefore, the circuit court did not err when it granted summary judgment in defendants' favor as to count V of plaintiffs' complaint.

¶ 55 Unjust Enrichment

¶ 56 Plaintiffs' final contention is that defendants' were unjustly enriched by the allegedly improper issuance of stock options. According to plaintiffs, defendants' actions diluted plaintiffs'

Apex stock while defendants received a windfall in dividends. Accordingly, plaintiffs contend the circuit court erred when it granted defendants' motion for summary judgment as to count VI of plaintiffs' complaint.

¶ 57 In response, defendants argue that the undisputed evidence shows that Apex shareholders approved all stock options. As such, defendants contend that shareholder approval precludes plaintiffs' unjust enrichment claim. Furthermore, defendants allege that the stock options in question provided compensation to employees who provided services to Apex for many years at modest salaries.

¶ 58 To sustain a claim of unjust enrichment, a plaintiff must show "that the defendant has unjustly retained a benefit to the plaintiff's detriment, and the defendant's retention of the benefit violates the fundamental principles of justice, equity, and good conscience." *HPI Health Care Services, Inc. v. Mt. Vernon Hospital, Inc.*, 131 Ill. 2d 145, 160 (1989). In this case, in addition to the substantial evidence presented that notice of the relevant stock options was provided to the shareholders and that at least two-thirds of the shareholders approved of the Board's conduct in the year the stock options were issued, defendants also presented evidence that the stock options were given as a form of compensation to its employees. Defendants showed Alex and Shai's salaries were below market rate. Rita's salary was described as modest. Plaintiffs, however, failed to contradict any of this evidence. Accordingly, plaintiffs failed to rebut evidence presented by defendant that showed that shareholders were properly notified, that at least two-thirds of the shareholders approved of the Board's actions in the years the relevant stock options were issued; and that the stock options were a way to compensate its employees. Plaintiffs,

therefore, have not shown defendants have acted unjustly in any way. As such, we hold the circuit court properly granted summary judgment in defendants' favor as to count VI of plaintiffs' complaint.

¶ 59 Cross-Appeal

¶ 60 On cross-appeal, defendants raise two issues: (1) whether the circuit court abused its discretion when it denied defendants' motion for sanctions pursuant to Illinois Supreme Court Rule 137 (Ill. S. Ct. R. 137 (eff. July 1, 2013)); and (2) whether the circuit court abused its discretion when it denied defendants' motion for attorneys fees and costs pursuant to section 12.60(j) of the IBCA (805 ILCS 5/12.60 (j) (West 2012)).

¶ 61 Illinois Supreme Court Rule 137

¶ 62 Defendants contend that sanctions pursuant to Rule 137 are appropriate in this case because plaintiffs' complaint had no reasonable basis in fact or law, plaintiffs failed to conduct a proper pre-filing investigation, and because plaintiffs' actions needlessly increased the costs of litigation.

¶ 63 In response, plaintiffs argue the circuit court properly denied defendants' motion for sanctions under Rule 137. Plaintiffs question why defendants immediately answered their complaint instead of first challenging the complaint's factual and legal sufficiency if they believed the allegations to be baseless. Additionally, plaintiffs maintain their action was based on fact and law, and note that their interpretation of the Dead-Man's Act, in particular, was reasonable despite the circuit court's ultimate disagreement with their position.

¶ 64 Rule 137 provides, in relevant part:

"Every pleading, motion and other document of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. ***

The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other document; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. ***

If a pleading, motion, or other document is signed in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of reasonable expenses incurred because of the filing of the pleading, motion or other document, including a reasonable attorney fee." Ill. S. Ct. R. 137 (eff. July 1, 2013).

¶ 65 Sanctions pursuant to Rule 137 are designed "to prevent parties from abusing the judicial process by imposing sanctions on litigants who file vexatious and harassing actions based upon

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unsupported allegations of fact or law." *Dismuke v. Rand Cook Auto Sales, Inc.*, 378 Ill. App. 3d 214, 217 (2007). The party moving for sanctions under Rule 137 must show that the opposing party made false allegations without reasonable cause. *Id.* Rule 137 is strictly construed. *Id.* The circuit court's decision to deny or impose sanctions under Rule 137 is entitled to great weight on appeal. *Pritzker v. Drake Tower Apartments, Inc.*, 283 Ill. App. 3d 587, 590 (1996).

Therefore, we will not reverse the circuit court's decision regarding sanctions under Rule 137 absent an abuse of discretion. *Id.* " 'Abuse of discretion' means clearly against logic; the question is not whether the appellate court agrees with the circuit court, but whether the circuit court acted arbitrarily, without employing conscientious judgment, or whether, in view of all the circumstances, the court exceeded the bounds of reason and ignored recognized principles of law so that substantial prejudice resulted." *State Farm and Casualty Co. v. Leverton*, 314 Ill. App. 3d 1080, 1083 (2000).

¶ 66 We hold the circuit court did not abuse its discretion when it denied defendants' motion for sanctions under Rule 137. Plaintiffs' arguments focused on the Dead-Man's Act, notice of shareholder meetings, and shareholder approval of the stock options. The circuit court found plaintiffs' arguments reasonable, even though it ultimately disagreed with plaintiffs' position. The circuit court noted that although plaintiffs were unsuccessful, they should not be punished for their conduct in litigating the case. We reiterate that the circuit court's decision on sanctions is entitled to great weight on review. *Pritzker*, 283 Ill. App. 3d at 590. After reviewing the record before us, we cannot say that the circuit court's findings regarding whether to apply Rule 137 sanctions were "clearly against logic," arbitrary, or "exceeded the bounds of reason and ignored

principles of law so that substantial prejudice resulted." *State Farm and Casualty Co.*, 314 Ill. App. 3d at 1083. Accordingly, we hold the circuit court did not abuse its discretion when it denied defendants' motion for sanctions pursuant to Illinois Supreme Court Rule 137.

¶ 67 Section 12.60(j) of the IBCA

¶ 68 Defendants next argue that they should be awarded attorneys fees and costs under section 12.60(j) of the IBCA because plaintiffs acted arbitrarily, vexatiously, and not in good faith when they brought this lawsuit.

¶ 69 In response, plaintiffs maintain that their interpretation of the facts and law in this case was objectively reasonable. Accordingly, plaintiffs argue that the circuit court properly denied defendants' motion for attorneys fees and costs.

¶ 70 Section 12.60(j) of the IBCA provides:

"If the court finds that a party to any proceeding under Section 12.50, 12.55, or 12.56 acted arbitrarily, vexatiously, or otherwise not in good faith, it may award one or more other parties their reasonable expenses, including counsel fees and the expense of appraisers or other experts, incurred in the proceeding." 805 ILCS 5/12.60 (j) (West 2012).

¶ 71 The circuit court has broad discretionary powers in deciding whether to award costs and fees to a prevailing party. *In re Estate of Callahan*, 144 Ill. 2d 32, 43-44 (1991). Accordingly, we will not reverse its decision absent an abuse of that discretion. *Id.*

¶ 72 We hold the circuit court did not abuse its discretion when it denied defendants' motion

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for attorneys fees and costs pursuant to section 12.60(j) of the IBCA. Similar to its findings regarding defendants' motion for sanctions pursuant to Rule 137, the circuit court found that defendants failed to establish that sanctions were warranted under Section 12.60(j) of the IBCA and noted that although plaintiffs were not successful, they did present an objectively reasonable basis for their action. After reviewing the record and the circuit court's findings in this case, we cannot say the circuit court abused its discretion in denying defendants' motion for attorneys fees and costs pursuant to section 12.60(j) of the IBCA. Plaintiffs were ultimately unsuccessful, but they did present argument that was objectively reasonable. Accordingly, we hold the circuit court did not err when it denied defendants' motion for attorneys fees and costs pursuant to section 12.60(j) of the IBCA.

¶ 73

CONCLUSION

¶ 74 For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 75 Affirmed.