FIRST DIVISION
November 16, 2015

No. 1-14-1430

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

JEAN KULIG,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County
	)	
v.	)	Nos. 2008 L 3388 & 2012 L 1114
	)	
UNGARETTI & HARRIS, LLP, DEAN J. POLALES, and ANNE HAULE,	)	
	)	Honorable
	)	Lorna E. Propes,
Defendants-Appellees.	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Justices Cunningham and Connors concurred in judgment

ORDER

***Held*:** The circuit court's finding after a bench trial that plaintiff failed to show defendants' conduct proximately caused her injury to support her breach of fiduciary duty claim is not against the manifest weight of the evidence. We therefore affirm the circuit court's judgment of no liability in favor of the defendants.

¶ 1 Plaintiff, Jean Kulig, brought an action for breach of fiduciary duty against the law firm Ungaretti & Harris, LLP, and two of its attorneys, Dean J. Polales and Anne M. Haule. Plaintiff, an MRI technician, met with Polales and Haule in May of 2005 to discuss her potential whistleblower action involving illegal leasing agreements between doctors and MRI imaging centers in the Chicago, Illinois area. Defendants indicated to plaintiff that they would look into the matter, but several weeks later informed her that they were not interested in representing her for policy reasons. In February of 2006, defendants filed a whistleblower action, with a longtime client John Donaldson as the relator, based on the same illegal leasing agreements that the firm discussed with plaintiff. The Illinois Attorney General eventually intervened in the matter, and a consent decree was entered. Donaldson was awarded $565,665. Under the relevant whistleblower statutes, Donaldson's suit barred anyone else from bringing suit regarding the same subject matter. Plaintiff learned of Donaldson's recovery in January of 2007, and subsequently filed suit against defendants for breach of fiduciary duty. After a bench trial, the circuit court found that plaintiff failed to prove that defendants' conduct proximately caused her injury and entered a judgment of no liability in defendants' favor.

¶ 2 Initially, plaintiff asks that we review her claim *de novo* based on her characterization of the issue presented as a question of law, *i.e.*, whether the circuit court applied the correct legal test regarding proximate cause to the evidence presented at trial. We reject plaintiff's request to review her claim of error *de novo* because the alleged errors complained of by plaintiff are factual in nature, and do not involve a question of law. Accordingly, at issue is whether the circuit court's finding that plaintiff failed to show that defendants' conduct proximately caused her injury is against the manifest weight of the evidence. We hold that the circuit court's

finding of no proximate cause is not against the manifest weight of the evidence. We therefore affirm the judgment of the circuit court.

¶ 3 JURISDICTION

¶ 4 On February 20, 2014, the circuit court entered judgment after a bench trial in favor of defendants. On May 5, 2014, the circuit court denied plaintiff's posttrial motion to vacate and reconsider. On May 15, 2014, plaintiff timely appealed. Accordingly, this court has jurisdiction 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).

¶ 5 BACKGROUND

¶ 6 Plaintiff filed a multi-count second amended complaint against defendant Ungaretti & Harris, LLP. Plaintiff subsequently voluntarily dismissed the majority of the counts in her second complaint, leaving only two counts pending titled "Breach of Fiduciary Duty: Conflict of Interest," and "Breach of Fiduciary Duty: Use of Confidential Information." Plaintiff alleged she contacted defendants in May of 2005 regarding a potential whistleblower action against her former employer, Insight Health Services Corporation (Insight), a diagnostic imaging company. Plaintiff believed Insight and other similar companies were "involved in kick-back schemes." Plaintiff met with defendants, but defendants contacted her two weeks after the meeting and informed her that they would not represent her. Based on defendants' comments to her, plaintiff concluded that she did not have a viable whistleblower action. Despite defendants' refusal to represent plaintiff, defendants later filed a whistleblower action on behalf of another client, John Donaldson. Plaintiff alleged that, under the relevant statutes, her potential whistleblower suit would be barred due to its similarity to the Donaldson suit. Accordingly, plaintiff alleged that

she lost the right to bring her own whistleblower action, which could have resulted in an award as the interested party.

¶ 7 On January 31, 2012, plaintiff filed a single count complaint alleging breach of fiduciary duty against Dean J. Polales and Anne M. Haule, two attorneys at the firm based on the same operative facts. On September 11, 2012, plaintiff sought consolidation of the two cases, which the circuit court allowed.

¶ 8 Trial

¶ 9 At trial, plaintiff testified on her own behalf. She also presented testimony from Brian Dempsey, a former colleague; Floyd Perkins, an attorney at Ungaretti & Harris and the lead attorney on the Donaldson case; and, as adverse witnesses, Dean Polales and Anne Haule. Defendants presented testimony from John Donaldson, the relator in the Donaldson case; and recalled Floyd Perkins, Dean Polales, and Anne Haule to testify. Additionally, Mary Robinson testified on defendants' behalf as an expert in the standard of professional conduct for attorneys during the relevant time period, *i.e.*, May of 2005. The parties stipulated that Donaldson, as the relator in the Donaldson case, received $566,000 and that Ungaretti & Harris' legal fees in connection with the Donaldson case were $125,000. As discussed *infra*, plaintiff failed to include the trial exhibits in the record. In many instances, the parties relied on various exhibits to elicit testimony from the witnesses. Accordingly, some of the details regarding the communications are not included in this recitation of the facts due to plaintiff's failure to include the trial exhibits in the record.

¶ 10 Plaintiff testified she is a certified MRI technician that worked at Insight from 2004 until late 2005. She described Insight as "a national diagnostic imaging company" that "ran different types of outpatient imaging centers." Plaintiff worked at the Lemont, Illinois location, which

had "a closed MRI system." Due to Insight's poor performance, she eventually lost her job in 2005. She was familiar with MRI leasing agreements, which she also referred to as tabletop agreements, which MRI companies such as Insight entered into with medical offices. In her role as an operations manager, she signed various compliance documents. Despite having leasing agreements in place, plaintiff testified that "one of the compliance documents had to do with leasing agreements that basically stated we did not have any in place." She eventually discussed the matter with Insight's legal department, and the document was amended. She explained how she understood the improper lease agreements worked, as follows:

> "What the group of physicians would do would be to lease the MRI tabletop for a specific amount of procedures per month
>
> And then, once those procedures were done at the facility, the facility would send the physicians group a bill for the amount of procedures.
>
> And typically - - say it was 20 procedures a month. The physicians' group typically sent 20 patients. So they would get billed for the 20 patients.
>
> But even if they didn't send 20 patients, they still got billed for the 20 patients. They would, in turn, after they paid the bill, bill the insurance company of the patient as if the procedure was done in office..
>
> So they would basically split the fees. They would pay the center one amount. They would bill for the higher amount."

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>
> So they would basically split the fees. They would pay the center one amount. They would bill for the higher amount."

¶ 11 In May of 2005, she read an article in the Wall Street Journal concerning lease agreements. She contacted defendant Haule by phone and email, who was quoted in the article, regarding a potential whistleblower suit because she knew that Insight and many of Insight's competitors were engaged in the improper practice of entering lease agreements. Haule responded to plaintiff by telephone in early May of 2005 and they spoke for "about 15 minutes." She explained her initial call as follows:

> "So I had given her some background information, just as I had done today, about what was going on in terms of the compliance issues, the leasing agreements, et cetera.
>
> And I was interested, because I felt that she knew a lot about these types of arrangements, in pursuing a whistleblower case. And I wanted to know specifically if her firm would handle that matter for me.
>
> And she went into some of the explanations about how her firm primarily represents the health care industry and whistleblower cases are not something typically her firm engages in and it most likely would not be in the - - you know, publicly a

> good business decision to get into a whistleblower's case, which actually would be adverse to the health care industry. So she said, you know, she couldn't help me."

¶ 12 The next day, May 5, 2005, Haule called plaintiff to see if she would like to have a meeting with her and Dean Polales, an attorney at the firm and a former Assistant U.S. Attorney. Polales had expressed an interest in plaintiff's case to Haule. On May 9, 2005, plaintiff met with Polales and Haule at the firm's office for approximately 45 minutes to an hour. Plaintiff testified that she discussed the research she performed and her understanding of how Insight's business operations were in Illinois as well as Insight's affiliations with two other centers: Holy Cross Hospital and Berwyn Hospital. She also told them she could obtain a contract from M&M Orthopedics. Plaintiff described to Haule and Polales her knowledge of how the leasing agreements worked and how she learned of the illegal agreements from a marketer at Insight, Brian Dempsey. Dempsey told her that other MRI centers in the area had similar agreements, including centers named HITECH, Open MRI, Advocate, and Nydic. Polales at one point took over the meeting and discussed how these types of cases are pursued. He told plaintiff that the firm typically did not work on a contingency fee basis. Plaintiff believed the meeting was positive and Haule and Polales told her they would get back to her.

¶ 13 On May 26, 2005, however, plaintiff received a voicemail message from Haule in which the firm declined her request to represent her in her potential whistleblower action. According to plaintiff, the stated reason was the firm's policy of not taking whistleblower actions. Plaintiff testified that Haule "suggested that I - - you know, I could pursue the case or talk to another attorney and that they wouldn't be handling it." Plaintiff was surprised because she thought defendants were interested in taking the case. She then met with another attorney, who wanted

to know why defendants would not take the case. Plaintiff told the other attorney that defendants would not take her case for policy reasons. The other attorney also refused to represent plaintiff, telling her that the law "can be a grey area" and that she was busy with another case.

¶ 14 In January of 2007, plaintiff learned of the Donaldson case after seeing it on the front page of a newspaper. She noticed that Ungaretti & Harris represented Donaldson. Although she was happy that the authorities were "cracking down on the centers," she was also pretty upset because Ungaretti & Harris "pretty much fil[ed] the exact same case" on behalf of someone else.

¶ 15 On cross-examination, plaintiff testified that she did not bring any documents into her meeting and defendants never solicited her business. She wanted to bring a whistleblower action against the MRI industry in general, but she only had personal knowledge of the one she worked at, Insight. She clarified that her office only participated in one lease agreement, with M&M Orthopedics. She spoke with an attorney before speaking to Haule, but she could not remember the attorney's name. After Haule initially told her no, she called another attorney, Robin Potter. When Haule later called plaintiff to set up the meeting, Haule knew plaintiff planned to meet with Potter. Haule asked her to come into meet with her before she met with Potter. Potter later cancelled on plaintiff. At the time she saw Haule, plaintiff was also suing Alexian Brothers for retaliatory discharge.

¶ 16 On redirect examination, plaintiff testified that Haule and Polales did not restrict their conversation to just Insight, they also asked about other MRI centers in the Chicago area. During the meeting, she mentioned Nydic because Brian Dempsey possessed Nydic marketing literature and she mentioned HITECH, because she knew they were participating in the lease agreements. She testified that so-called open MRI centers were notorious for lease agreements

because their images were not very good. She testified that she told Haule and Polales how marketing people in the industry fed her information and how the marketing people knew of the illegal transactions. She described her litigation with Alexian Brothers as an employment matter, not related to the MRI centers and lease agreement contracts.

¶ 17 Brian Dempsey, a former colleague of plaintiff's at Insight, testified he worked in marketing, sales, and due diligence for MRI centers. He was aware of MRI leasing agreements and testified that he viewed lease agreements with plaintiff. He saw three drafts, one was executed. He knew that plaintiff was going to meet with a law firm regarding a possible whistleblower action, but he did not want to participate.

¶ 18 Anne Haule testified that Premier Health Imaging International (Premier) was a client of hers, and she was the main contact person for Premier at the firm. The work performed for Premier usually consisted of licensing matters, acquisitions, and regulatory advice. In approximately 2003 or 2004, John Donaldson, an executive for Premier, expressed concerns to her about MRI leasing arrangements and asked her to spearhead a media campaign to raise awareness of the illegal leasing arrangements. She contacted various trade journals to see if she could write an article, and Imaging Intelligence published one in 2004. The plan was for Donaldson to contact insurers to get their attention to the problem. According to Haule, litigation was always on the table, but it was not the preferred strategy.

¶ 19 Haule testified that she received a call and an email from plaintiff. According to Haule, plaintiff asked her if the firm would be interested in representing her against her employer. Plaintiff's counsel, however, introduced evidence showing that during a prior evidence deposition, Haule testified that plaintiff wanted to meet with her to discuss MRI center leasing agreements for a possible whistleblower action. Haule was aware that plaintiff had already

contacted another attorney. Haule told plaintiff that the firm typically did not do this type of litigation, but she sent an email out to the other attorneys in the firm to see if anyone would be interested in representing plaintiff. Dean Polales, who had recently joined the firm, quickly responded. Haule and Polales met with plaintiff on May 9, 2005.

¶ 20 Haule admitted that previously, on May 5, 2005, she received an email from Polales which referenced John Donaldson's inquiries to Blue Cross Blue Shield (Blue Cross) regarding the improper MRI leasing agreements. On that date, she also knew that Donaldson had considered whistleblower litigation, but only as a last resort. She further admitted that prior to meeting with plaintiff, she received an email from Blue Cross indicating that Donaldson was considering a whistleblower lawsuit; and received a call from Assistant Illinois Attorney General Christopher McClellan regarding the Wall Street Journal on leasing agreements in which she was quoted. McClellan told her they just had a similar case and that he would send her a copy.

¶ 21 At the May 9, 2005 meeting, Haule took notes regarding what plaintiff said, but Polales did not take notes. Haule testified that on her notes she wrote the names HIGHTEC, OPEN MRI, Advocate. She also testified that they discussed leasing agreements. At the end of the meeting, Polales told plaintiff he would make some further inquiries and that he knew some people at Blue Cross. Haule testified that Polales discussed contingency fee arrangements with plaintiff, but that Polales did not appear very encouraged by plaintiff's potential case.

¶ 22 By May 13, 2005 Haule knew that Polales was talking to Blue Cross about being a cooperating victim in plaintiff's potential case. She also knew that Polales discussed with Blue Cross the leasing agreement issues that Donaldson had brought up. By May 23, 2005, Assistant Attorney General McClellan was interested in meeting with her regarding leasing agreements. On May 26, 2005, Haule left plaintiff a voicemail and told her that the firm decided as a policy

matter not to get into whistleblower representation. She also suggested that she consult an attorney. On February 7, 2006, Ungaretti & Harris filed the Donaldson case. On January 22, 2007, the Attorney General's office intervened in the Donaldson case.

¶ 23 In response to questioning from the court, Haule testified that the firm did not accept plaintiff as a client because "[w]e had a firm meeting and decided that that wasn't something we weren't set up to do a contingency with a similar case. We hadn't done one before. We didn't know her." She also stated that "there was a concern *** about the industry." She recalled that she found out that plaintiff had a case against Alexian Brothers, one of her major clients, after the firm informed plaintiff that they would not represent her. Tom Fahey, the managing partner at the firm and the head of the firm's healthcare department, made the decision not to accept plaintiff as a client.

¶ 24 Dean Polales testified that at the meeting with plaintiff, he discussed his own employment history and his knowledge of whistleblower actions in federal court. He further testified that "I told [plaintiff] at the very beginning *** that I was not interested in eliciting any information from her regarding any of her employers or what she knew about this because I explained that it was my understanding that she might be interested in bringing a suit against a health care provider, and *** I told her I knew that we represented many health care providers." Unlike plaintiff and Haule, Polales thought the meeting lasted less than 45 minutes. He wanted to give his background to see if it would be helpful in her decision of which lawyer to hire. He explained to her how a contingency fee worked and told her that he would make some inquiries and see if they could receive assistance in bringing it in federal court. He contacted Blue Cross investigator Paul Passolano.

¶ 25 On May 13, 2005, Polales sent Haule an email because he wanted to see if Blue Cross would be a cooperating victim. On May 18, 2005, he received email from Passolano. Polales was eventually named as an attorney on the Donaldson complaint, but he testified that he had minimal involvement in the matter. He explained that he was named as an attorney on the complaint because he would assist if the matter went to trial. Tom Fahey, the aforementioned managing partner, had a meeting with Polales and Haule where he expressed concern about the contingency fee arrangement. Polales also had doubts about representing plaintiff as a relator in federal court due to a variety of facts, including whether she had personal knowledge of the practice. Tom Fahey decided that the firm was not taking the case. He had no knowledge of whether Fahey's decision was based on the Donaldson case or because plaintiff was also in litigation against one of the firm's major clients, Alexian Brothers. He stressed that any information gleaned from the plaintiff during the interview was kept confidential.

¶ 26 Floyd Perkins testified that the Donaldson case was his first experience with Illinois insurance fraud and with whistleblower law. The Illinois Attorney General's Office encouraged the firm to file the whistleblower action. Despite this encouragement, Perkins recalled that there was concern over whether the Attorney General would actually intervene in the matter. Eventually, the Attorney General did intervene.

¶ 27 At the close of plaintiff's case, defendants moved for a directed finding, which the circuit court denied.

¶ 28 During defendants' case-in-chief, John Donaldson testified that he helped start Premier in the Chicago area in 1996. Donaldson, the executive vice president, also owned 15% of the company. Ungaretti & Harris performed most of Premier's legal work, with Anne Haule serving as lead attorney and Premier's main contact person with the firm. Donaldson explained

that new legislation caused physicians to lose ancillary income that they had been receiving from owning MRI centers. Accordingly, physicians and the centers entered into the improper lease agreements at issue here. From 2003 through 2005, the agreements proliferated and Premier saw a decline in their business due to their competitor's predatory practice of entering into the illegal lease agreements. He explained that a physician would lease a block of time from an MRI center, send their patients in for an exam, bill the insurance company, and pay back to the center a discounted amount. Premier hired Ungaretti & Harris to give them an opinion on whether they should enter into lease agreements. Premier did not enter into any lease agreements because Ungaretti & Harris advised them that they were illegal in Illinois.

¶ 29 In an attempt to shine light on the practice of the improper lease agreements, Premier and Ungaretti & Harris developed a two pronged approach where they began a media campaign and contacted Blue Cross, a major insurance company, to alert them to the practice. Blue Cross investigators Paul Passolano and Neil O'Malley interviewed Donaldson on August 18, 2004. During the interview, Donaldson explained the situation to the investigators and how the insurance companies were possibly enabling the illegal practice. Donaldson also filed an anonymous complaint with Blue Cross concerning the lease agreements.

¶ 30 Donaldson, by late 2005 and early 2006, felt that they had no choice but to go forward with the whistleblower suit. On February 7, 2006, Ungaretti & Harris filed the whistleblower suit naming Donaldson as the relator. In January of 2007, the Illinois Attorney General intervened in the matter and the named defendants eventually settled. Donaldson testified that Insight, plaintiff's former employer, was not named in his whistleblower action. He did not know if Dean Polales ever worked on his case, but testified that he always worked with Haule and Floyd, with Floyd serving as the lead attorney for the subsequent litigation. Premier

personnel, not defendants, gathered the information regarding which medical offices were engaged in improper leasing agreements. Donaldson had never heard of plaintiff before this litigation.

¶ 31 On cross-examination, Donaldson admitted that he knew of Insight, but stated that they were not a direct competitor of Premier. Premier would discover its competitors' improper leasing agreements due to Premier's practice of asking clients why it lost their business. Premier would then be told that the potential client had an arrangement with a competitor. Donaldson further testified that "we had been advised by counsel in the late 90s that it was illegal and I had been constantly speaking to our attorneys about, well, if it is illegal, why are they doing it and how can we get them to stop." Donaldson testified that Ungaretti & Harris billed hourly, and did not work on a contingency fee basis. Ungaretti & Harris never told him that they did not do whistleblower cases.

¶ 32 Floyd Perkins testified during defendants' case-in-chief that he drafted the Donaldson complaint and that Dean Polales did not participate in the drafting. Polales was only on the complaint to help try the case if the matter went to trial. Donaldson, not Haule, gave him the factual information in support of the complaint. The initial complaint brought a claim under the Insurance Frauds Prevention Act and the Consumer Fraud Act, not the Whistleblower Act. Ann Haule also did not provide any factual information for the complaint. According to Perkins, Donaldson's goal in the litigation was to halt the improper leasing agreements. The Illinois Attorney General negotiated the settlements. He did not know plaintiff and did not learn of her May 9, 2005 interview with Polales and Haule until the present lawsuit was filed.

¶ 33 Anne Haule testified on her own behalf that she researched plaintiff's employer, Insight. From her perspective, she did not form an attorney-client relationship with plaintiff. Plaintiff

told her she was going to see another lawyer that day, and it was her understanding that plaintiff was going to meet with that other lawyer. Other people had called her regarding articles in which she was named. She denied dropping plaintiff's case in favor of Donaldson's case. She testified that she never used, disclosed, or talked to Floyd Perkins about plaintiff and she never breached any duty of confidentiality to plaintiff.

¶ 34 Dean Polales also testified on his own behalf. Due to his prior federal whistleblower experience, Polales thought he could help with a potential federal case. He testified that he did not use plaintiff's confidences or secrets, and stated that "I didn't understand in the meeting that I had with her that she conveyed any pertinent information to me." He did not believe he had an attorney-client relationship with plaintiff. He told plaintiff that he would reach out and see if there was anything to help the firm in deciding whether to take the case. On cross-examination, Polales testified that he called Passolano after meeting with plaintiff to see whether they should take a whistleblower action. He did not tell Passolano about plaintiff. He did not speak with plaintiff again after the May 9, 2005 meeting.

¶ 35 Mary Robinson testified as an expert in the standards of professional conduct and ethical duties attorneys owed to prospective clients. According to Robinson, attorneys in May of 2005, when the parties met, owed two obligations to potential clients: keep confidential the information that the lawyer learns from the client in the context of that discussion; and to use reasonable care in giving advice, if any advice is given. Robinson testified that a lawyer can never tell a client about another client without permission and opined that there can be no fiduciary relationship if no attorney-client relationship exists.

¶ 36 After trial, defendants renewed their motion for a directed verdict, which the circuit court denied. The circuit court invited the parties to file supplemental briefs, and noted its preference

for the briefs to focus on the element of proximate cause. Relevant here, plaintiff argued that her injury was the "pre-emption/loss of the whistle-blower action." According to plaintiff, her potential case and the Donaldson case were substantially related and thus she and Donaldson "were essentially interchangeable as potential relators." Therefore, defendants were prohibited from filing the Donaldson case because a presumption arose that she exchanged confidential information with defendants. Plaintiff further argued that she proved that defendants investigated her case, used her confidential information, and failed to obtain her consent or waiver before proceeding with the Donaldson case. Plaintiff argued that defendants failure to inform her that the Illinois Attorney General was interested in a meeting, their failure to tell her they had a client who might later decide to pursue a whistle-blower action, their failure to inform her of recent case law regarding a similar action, and defendants failure to obtain both Donaldson's and her consent before proceeding, established causation. Plaintiff further argued that once she established the existence of an attorney-client relationship, and that her case was substantially related to the Donaldson case, the burden shifted to defendants to prove compliance.

¶ 37 Defendants, in their closing brief, argued that plaintiff failed to prove that a fiduciary duty arose between the parties because she failed to prove that an attorney-client relationship existed between the parties. As a prospective client, defendants argued their only ethical obligation to plaintiff was to keep her information confidential. Defendants argued that plaintiff failed to present any credible evidence showing that plaintiff's information was used in the Donaldson case. Rather, the evidence shows that Donaldson and Premier were aware of the facts underlying their action long before plaintiff met with defendants.

¶ 38 Regarding damages, defendants argued that even if plaintiff established the existence of a duty and breach, she failed to prove that defendants were the proximate cause of her injury. Defendants argued that plaintiff failed to show that defendants' actions precluded her from bringing her own cause of action or that she would have taken any action had the Donaldson case not been filed. Defendants maintained that plaintiff failed to present any evidence showing the substance, or likelihood of success, of her hypothetical case, and pointed out that none of the MRI centers plaintiff mentioned in her meeting with defendants were named as defendants in the Donaldson case. According to defendants, plaintiff caused her own damages because she did not pursue an action and did not have any inclination to do anything until she learned of the Donaldson case in January of 2007. Even after learning of the Donaldson case, she never tried to file a suit or intervene.

¶ 39 On February 20, 2014, the circuit court entered its judgment order with findings of fact and conclusions of law. The circuit court noted that to recover for breach of fiduciary duty, the plaintiff must prove: the existence of a fiduciary duty; breach of that duty; proximate cause; and injury. The circuit court issued the following findings. First, the court found that plaintiff proved that defendants owed her a fiduciary duty. The court explained that defendants knew that they had a long-term client facing the same issues as defendant, but did not disclose the conflict to plaintiff and invited her to meet with them. During the meeting, plaintiff communicated confidential information to defendants. After the meeting, defendants' declined to represent plaintiff, telling her that the firm was not interested in whistleblower litigation. Despite this, the firm began working several weeks later on the Donaldson whistleblower case, which the court found to be "in all important respects, the same." The court commented that

"[t]he idea that Ungaretti & Harris could meet with [plaintiff] under these circumstances, but never be liable simply because the potential client never became a client strains credulity."

¶ 40 The court next found defendants breached their duty to plaintiff. The court discounted defendants' contention that none of the offenders listed by plaintiff in her initial interview were later named defendants in the Donaldson case. The court found that "[w]hat was important, and every single witness agreed upon, was the Attorney General's interest and eventual involvement in the case." In that vein, the court found defendants learned of the Attorney General's interest in such cases during their investigation of plaintiff's case. The court found that "[t]his information inherently bled over from [plaintiff's] potential case to Donaldson's actual case."

¶ 41 The court did not, however, find that defendants' conduct proximately caused plaintiff's injury. The court first noted that plaintiff's alleged injury was the preemption of her whistleblower suit. The court found that under the relevant statutes, Donaldson's suit barred anyone else from bringing a suit concerning the same subject matter. The court acknowledged that the loss of a right to bring a cause of action is actionable, but found that plaintiff failed to show proximate cause. Specifically, plaintiff failed to present any evidence at trial showing that she intended or actually attempted to file a whistleblower suit after defendants declined representation. The court found plaintiff "did next to nothing" from May 26, 2005, the date defendants told her they would not represent her, to January of 2007, when she learned of the Donaldson case. The court pointed out that plaintiff did not learn of the Donaldson case because she filed a case which was barred. Rather, plaintiff "sat on her rights despite the fact that [defendants] explicitly instructed her to consult another attorney about taking the case." The court further found that "[d]efendants never told [plaintiff] she did not have a good case nor did they engage in any activity to dissuade her from pursuing her case." After defendants told

plaintiff they would not represent her, she had 8 months to file her case, but did not do anything for 20 months. Accordingly, the court found that plaintiff failed to prove "the critical element of damages" and that "[t]here was no evidence presented at trial that [d]efendants' conduct, however wrongful, actually caused any injury."

¶ 42 Plaintiff filed a motion to vacate and reconsider the judgment. In her motion, plaintiff argued that defendants investigated her claim and had a duty to disclose to her the results of their investigation. Plaintiff, therefore, argued that defendants' actions proximately caused her to not pursue her cause of action. Plaintiff further argued that the court burdened her with a requirement to file her case within eight months without a full disclosure of the facts. On May 5, 2014, after hearing oral argument on the matter, the circuit court denied plaintiff's motion to vacate and reconsider the judgment. On May 15, 2014, plaintiff timely appealed.

¶ 43 ANALYSIS

¶ 44 In her opening brief, plaintiff acknowledges that, typically, the standard of review utilized by this court when reviewing the decision of the circuit court after a bench trial is whether that decision is against the manifest weight of the evidence. Plaintiff, however, insists that our review is *de novo* because "the issue presented for review is not whether the trial court's judgment is supported by sufficient evidence, but rather whether the trial court applied the correct legal test to the evidence presented." Accordingly, plaintiff argues that the circuit court improperly required her to prove that she actually pursued her whistle blower action after defendants declined to represent her by seeking other representation. Plaintiff also contends that the circuit court failed to comprehend the reason for her inaction, which she claims was due to defendants' failure to convey to her vital information concerning her cause of action, and failed to account for the inequality of the parties' respective positions. Despite her contention

that her claim of error presents a question of law, plaintiff also argued that she presented sufficient evidence to establish proximate cause.

¶ 45 In response, defendants argue that we should affirm the judgment of the circuit court because plaintiff failed to challenge the circuit court's finding that she failed to prove injury and causation, and because the circuit court did not apply the incorrect legal standard for the element of proximate cause. Alternatively, defendants maintain that even if this court construes plaintiff's brief to be a challenge to the circuit court's findings as to damages, those findings are not against the manifest weight of the evidence. Defendants point out that plaintiff failed to include any of the exhibits from trial in the record and that plaintiff is mistaken in her contention that the circuit court found that she satisfied the element of injury at trial.

¶ 46 We first acknowledge that defendants are correct that the exhibits from the trial were not included in the record. The burden of presenting a sufficiently complete record falls on the appellant, plaintiff in this matter, and any doubts regarding the record will be resolved against her. *In re Marriage of Gulla*, 234 Ill. 2d 414, 422 (2009). It appears from our reading of the record that the trial exhibits did play an important role in this matter due to the existence of documentary evidence, including several emails, presented by the parties in support of their respective positions. Although some of the documents may have been included in various pretrial motions contained in the record, we cannot presume that they were the same documents presented at trial. Accordingly, we must review plaintiff's claim of error under this limitation.

¶ 47 We must also discuss the circuit court's written order resolving the bench trial and its findings contained therein in order to resolve plaintiff's claim of error. In doing so, we disagree with plaintiff's characterization of the circuit court's findings in this matter. Specifically, we disagree that the circuit court found that plaintiff proved that she was injured and that the circuit

court created a new legal requirement. The record shows that the circuit court allowed the parties, after the trial completed, to file posttrial briefs and mentioned that it would like the briefs to address the issue of proximate cause. The court subsequently filed a written order resolving the trial. The circuit court's findings, therefore, are in the record in the form of a written order. The circuit court's order shows that it found defendants owed plaintiff a fiduciary duty because she was a prospective client that communicated confidential information to defendants with the aim of retaining defendants as her legal counsel. The circuit court further found that defendants breached their duty to plaintiff because defendants knew that the Illinois Attorney General had expressed an interest in similar litigation and that "[t]his information inherently bled over from [plaintiff's] case to Donaldson's actual case." The circuit court therefore found that plaintiff proved that defendants owed her a fiduciary duty which they subsequently breached.

¶ 48 The parties disagree over whether the circuit court found that plaintiff proved that she was injured in this matter. Plaintiff claims the circuit court found she was injured, but that she failed to prove the element of proximate cause. Defendants maintain that the circuit court found that plaintiff failed to prove damages, which defendants imply encompasses both proximate cause and injury. The following two paragraphs in the circuit court's order resolves this issue:

> "However, in addition to proving that a fiduciary duty exists and that it has been breached, the plaintiff must also prove that the wrongful conduct proximately caused an injury to her. [Plaintiff] contends that her injury in this case is the preemption of her whistleblower suit which proximately resulted when [defendants] filed the Donaldson suit. Under the relevant statutes, Donaldson's

suit barred anyone else from bringing a suit concerning the same subject matter. [Citation.] In a memorandum related to this matter, the Attorney General confirmed this point.

The loss of the right to a cause of action can be a sufficient basis for the recovery of damages. [Citation.] However, [plaintiff] did not present any evidence at trial that she intended or actually attempted to file the whistleblower suit after [defendants] declined to represent her. From the time [defendants] declined representation on May 26, 2005, [plaintiff] did next to nothing about her claim until she learned about Donaldson's recovery in January of 2007. The plaintiff exclusively bears the burden of proof to establish the element of causation and also to establish the conduct of the defendant is the proximate cause of the injury. [Citation.] [Plaintiff] did not find out about the Donaldson suit because she tried to bring one on her own and it was barred. [Plaintiff] simply sat on her rights despite the fact that [defendants] explicitly instructed her to consult another attorney about taking the case. The Defendants never told her she did not have a good case nor did they engage in any activity to dissuade her from pursuing her case. Due to the fact that [plaintiff] had eight months to file her lawsuit after her case was rejected by Defendants, and she did not act on her claim for 20 months, she has not proven the critical element of damages in this case. There

> was no evidence presented at trial that the Defendants' conduct, however wrongful, actually caused any injury and, thus, [plaintiff] cannot recover."

¶ 49 Based on our reading of the above findings of the circuit court, we conclude that the circuit court did not make an explicit finding that plaintiff proved her injury. Rather, the circuit court noted that plaintiff claimed her injury to be the preemption of her whistleblower lawsuit. The circuit court then explained that the Donaldson case, as confirmed by the Illinois Attorney General, barred anyone else from bringing a suit on the same subject matter. In the next paragraph, the circuit court found that plaintiff failed to prove that defendants proximately caused plaintiff's injury and supported its findings by listing the evidence, or lack of evidence in this matter, to support its findings. Therefore, the circuit court did not, as plaintiff contends, find that defendants injured plaintiff but that plaintiff failed to prove the element of proximate cause. Rather, the circuit court found that plaintiff failed to prove defendants' conduct proximately caused her alleged injury, the preemption of her potential whistleblower suit. In other words, plaintiff failed to prove damages.

¶ 50 Our review of the circuit court's written findings also lead us to reject plaintiff's contention that we should review her claim of error *de novo*. According to plaintiff, the circuit court "committed reversible error in its brazen creation of a new legal requirement (*i.e.* actual pursuit of the whistleblower action before January of 2007) as an additional condition to entering judgment in [p]laintiff's favor." This court reviews purely legal questions, without any deference to the circuit court, *de novo*. *Zebra Technologies Corp. v. Topinka*, 344 Ill. App. 3d 474, 480 (2003). *De novo* review is appropriate, even after a bench trial, where the question presented is whether the circuit court applied the correct legal test to the evidence presented.

Reliable Fire Equipment Co. v. Arredondo, 2011 IL 111871, ¶13. In most instances, however, the findings of the circuit court after a bench trial will not be reversed unless they are against the manifest weight of the evidence. *Commercial Mortgage & Finance Co. v. Life Savings of America*, 129 Ill. 2d 42, 49 (1989). The manifest weight of the evidence standard acknowledges the deference accorded to the circuit court's factual findings. *Zebra Technologies Corp.*, 344 Ill. App. 3d at 480. "A finding is against the manifest weight of the evidence when an opposite conclusion is apparent or when the findings appear to be unreasonable, arbitrary, or not based on the evidence." *Vancura v. Katris*, 238 Ill. 2d 352, 374 (2010).

¶ 51 Our review of the circuit court's written order does not show, as plaintiff contends, that the circuit court brazenly created a new legal requirement for her to prove in support of her claim for breach of fiduciary duty. It also does not show that the circuit court applied the improper legal test to the evidence presented. Rather, the circuit court's order shows that the court made the factual finding that plaintiff failed to present any evidence showing that defendants' conduct proximately caused her injury. Those facts showing a lack of proximate cause relied upon by the circuit court included plaintiff's failure to show any intent to actually file a whistleblower lawsuit after defendants declined to represent her, how she "did next to nothing about her claim until she learned about the Donaldson recovery," and she did not actually bring a whistleblower suit that was barred. The circuit court pointed out that defendants never persuaded her to not file a case, and explicitly told her to consult an attorney. The circuit court further found that plaintiff had eight months to file a suit after being rejected by defendants, but did nothing. Accordingly, the circuit court found plaintiff failed to prove damages. A review of the circuit court's proximate cause finding shows that the circuit court's finding was factual in nature and

was not an attempt to create an additional legal requirement for breach of fiduciary duty actions. Factual findings, such as those issued by the circuit court here, will not be reversed unless they are against the manifest weight of the evidence. *Zebra Technologies Corp.*, 344 Ill. App. 3d at 480. The manifest weight of the evidence standard of review is also proper in this instance because it is well-established that the issue of proximate cause is a factual matter reserved for the trier of fact. *Lee v. Chicago Transit Authority*, 152 Ill. 2d 432, 454 (1992). Accordingly, we will consider plaintiff's claim of error under the more deferential manifest weight of the evidence standard of review.

¶ 52 Before applying the manifest weight of the evidence standard of review to plaintiff's claim of error, we point out that defendants make a strong argument that plaintiff forfeited any claim of error challenging the sufficiency of the evidence. See Ill. S. Ct. R. 341(h)(7) (eff. Feb.1, 1994). ("Points not argued are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing.") Plaintiff, in her opening brief, stated that "where, as here, the issue presented for review *is not whether the trial court's judgment is supported by sufficient evidence*, but rather whether the trial court applied the correct legal test to the evidence presented." (Emphasis added.) Plaintiff, however, also arguably put forth an argument that she presented sufficient evidence of causation by arguing that defendants' conduct was both the cause in fact and legal cause of her injury. Despite plaintiff initially disavowing any challenge to the sufficiency of the evidence, we will review the circuit court's finding under the manifest weight of the evidence standard of review because the substance of plaintiff's argument addresses the circuit court's factual finding regarding proximate cause.

¶ 53 We also note that defendants propose, alternatively, that we may affirm the circuit court's judgment because the evidence did not show that they owed plaintiff a fiduciary duty or that they

breached that duty. We acknowledge that we may affirm the circuit court on any basis that appears in the record. See *Trustees of Wheaton College v. Peters*, 286 Ill. App. 3d 882, 887 (1997). Due to our conclusion in this matter, however, we do not need to address the elements of fiduciary duty and breach of that duty in this decision. Accordingly, we only need to address whether defendants' actions were the proximate cause of plaintiffs alleged injury.

¶ 54 Plaintiff argues that she presented sufficient evidence of proximate cause because she established that defendants' filing of the Donaldson case caused her injury, *i.e.*, the preemption of her own proposed whistleblower action. Defendants maintain the record provides ample support for the circuit court's finding that plaintiff failed to establish proximate cause. Specifically, defendants argue that plaintiff failed to prove their actions were the cause in fact of plaintiff's alleged injuries. Plaintiff did not show that she would have proceeded differently but for defendants' alleged breaches, or that she would have won any race to the courthouse absent their conduct, or that her hypothetical action would have been successful.

¶ 55 A plaintiff raising a claim of breach of fiduciary duty must allege and prove: "(1) that a fiduciary duty exists; (2) that the fiduciary duty was breached; and (3) *that such breach proximately caused the injury of which the party complains*." (Emphasis added.) *Lawlor v. North American Corp. of Illinois*, 2012 IL 112530, ¶ 70. The element of proximate cause includes "two distinct requirements: cause in fact and legal cause." *Lee v. Chicago Transit Authority*, 152 Ill. 2d 432, 455 (1992). "Cause in fact can only be established when there is a reasonable certainty that a defendant's acts caused the injury or damage." *Id.* Defendant's conduct is the factual cause of defendant's injury where it is a substantial factor and a material element in bringing about the injury. *Krywin v. Chicago Transit Authority*, 238 Ill. 2d 215, 226 (2010). "Conduct is a material element and a substantial factor if, absent the conduct, the injury

would not have occurred." *Id.* Legal cause, on the other hand, presents a question of foreseeability: whether a reasonable person would foresee the conduct to be the likely outcome of the actions in question. *Lee*, 152 Ill. 2d at 456. Additionally, a plaintiff must establish proximate cause with reasonable certainty, and may not rely on surmise, guess, speculation, or conjecture. *Mack v. Viking Ski Shop, Inc.*, 2014 IL App (1st) 130768, ¶ 20.

¶ 56 After reviewing the record in this matter, we hold that the circuit court's finding of no proximate cause is not against the manifest weight of the evidence because we cannot say that the "opposite conclusion is apparent or *** the findings appear to be unreasonable, arbitrary, or not based on the evidence." *Vancur*a, 238 Ill. 2d at 374. Plaintiff failed to present any evidence that she intended or actually attempted to file her proposed whistleblower suit after defendants declined her request to provide her with representation. Defendants even instructed plaintiff to consult another attorney. The record does not show that defendants told plaintiff that her case could not succeed or try to dissuade her from filing suit in any way. Of crucial importance the Plaintiff failed to present any evidence showing that she would have filed a whistleblower action had she not learned of the Donaldson matter. The cause in fact requirement was not satisfied here because there is no evidence that defendants' actions actually caused plaintiff to not file her proposed whistleblower lawsuit. *Lee*,152 Ill. 2d at 455 ("Cause in fact can only be established when there is a reasonable certainty that a defendant's acts caused the injury or damage."). Due to plaintiff's inaction, her proposed whistleblower litigation was uncertain and best described as potential or hypothetical. The element of proximate cause cannot be established by speculation. *Mack*, 2014 IL App (1st) 130768, ¶ 20. The circuit court found, and we agree, that plaintiff's inaction after being told by defendants that they would not represent her is fatal to her claim. Accordingly, we hold that the circuit court's finding of

no proximate cause is not against the manifest weight of the evidence. We therefore affirm the circuit court's judgment of no liability in favor of defendants.

¶ 57 CONCLUSION

¶ 58 The judgment of the circuit court of Cook County is affirmed.

¶ 59 Affirmed.