2011 IL App (2d) 100624-U
No. 2-10-0624
Order filed November 8, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

CENTER FOR PAIN CONTROL, P.C., GRAND OAKS SURGICAL CENTER, S.C., and GRANT OAKS ANESTHESIA, S.C.,	)	Appeal from the Circuit Court of Lake County.
Plaintiffs-Appellee/Cross-Appellants,	)	
v.	)	No. 08-L-554
ANWULI OKOLI, M.D., and ANWULI OKOLI, M.D., INC.,	)	
Defendants-Appellants/ Cross-Appellees.	)	Honorable Wallace B. Dunn, Judge, Presiding.

PRESIDING JUSTICE JORGENSEN delivered the judgment of the court.
Justices Schostok and Hudson concurred in the judgment.

ORDER

Held: The court's finding that the employee was overcompensated under the contract was not inherently contradictory where, upon expiration of a term employment contract, the parties continued the relationship under an at-will contract and, to the extent the employer modified the terms, the employee's continued employment constituted acceptance of the change. Further, the trial court's entry of a directed finding in employee's favor was not erroneous where the evidence did not reflect that the former employee competed with the former employer while employed.

¶ 1 From 2002 to 2007, defendant Anwuli Okoli was employed as a physician by plaintiff Center for Pain Control, P.C. (Center).[1] In September 2007, Okoli notified the Center that, effective December 2007 (*i.e.*, 90 days later), she would be leaving its employ. In October 2007, however, the Center terminated Okoli's employment. The Center sued Okoli for breach of contract, breach of fiduciary duty, and tortious interference with prospective economic advantage. Okoli counterclaimed that the Center underpaid her by more than $100,000. After a bench trial, the trial court entered judgment in the Center's favor and against Okoli on the breach-of-employment-contract claim in the amount of $48,078.49. The court granted a directed finding in Okoli's favor and dismissed the Center's breach of fiduciary duty and tortious interference claims. Here, Okoli appeals the court's order finding that she breached the employment contract. The Center cross-appeals the trial court's entry of a directed finding on its breach-of-fiduciary-duty claim. For the following reasons, we affirm.

¶ 2 I. BACKGROUND

¶ 3 A. The Center's Case-In-Chief

¶ 4 i. Dr. Bruce Irwin

¶ 5 Dr. Bruce Irwin testified that he specializes in pain medicine and, in January 1995, he opened the Center. In 2001, Irwin opened Grand Oaks Anesthesia to provide anesthesia to chronic pain patients. In 2003, Irwin opened the Grand Oaks Surgical Center as a facility designed to cover the needs of the chronic pain patient and to provide a location for Center physicians to perform their

[1]Neither the remaining plaintiffs nor Okoli's corporation were active parties at trial or on appeal; therefore, we refer in this disposition to only one plaintiff (the Center) and one defendant (Okoli personally).

procedures. Irwin is the sole shareholder and officer of all three corporations. Irwin hired physicians to work for the Center, the physicians received their salaries from the Center, and the physicians did not directly work for the Grand Oaks companies.

¶ 6 In 2002, the Center (via Irwin) and Okoli entered into an employment contract. The one-page, five-paragraph contract was for a 15-month term and was signed by Okoli on November 4, 2002. The contract terms included that Okoli would receive an annual draw of $180,000, payable over 26 pay periods in equal amounts. The draw would be offset against revenues generated by Okoli for the Center as follows:

> "75% of all monies collected for procedures and office visits done by you acting as a pain doctor for [the Center] minus the cost of your malpractice insurance and health insurance will be credited against your draw for the year. At the end of the year if the total monies owed to you based on the above formula exceeds your draw [the Center] will write you a check for the difference. If the monies owed to you amount to a sum less than your draw, the deficit will be carried forward to the next calendar year and added to your draw for that year."

In addition to deductions against Okoli's retention percentage for insurance, deductions were also taken for any monies paid by the Center on Okoli's behalf for personal expenses, such as automobile expenses or credit card purchases. The contract did *not* contain a restrictive covenant limiting Okoli's ability to compete in the event her employment with the Center terminated. Irwin testified that, after the contract's 15-month term expired (around March 4, 2004), there were no written extensions or modifications of the contract. Okoli remained employed.

¶ 7 In 2005, due to decreasing revenues in the business, Irwin lowered the percentage rates that Center physicians retained from monies collected. According to Irwin, he held a meeting with the

physicians and announced the change. Okoli was present at the meeting. Okoli's percentage rate decreased from 75% to 70%. Irwin did not recall Okoli commenting on the change.

¶ 8 In 2006 or early 2007, Irwin again lowered the rates; Okoli's percentage decreased from 70% to 60%. Irwin testified that he again held a meeting with the physicians to announce the change. According to Irwin, Okoli did not say anything at that meeting.

¶ 9 The Center's practice manager, Jack McCall, was responsible for providing the physicians with periodic statements reflecting their expenses, the balance of their draws, and net pay. In June, 2007, McCall was terminated because of his inability to perform his job. The Center later discovered that McCall had mismanaged funds and, at the time of trial, McCall was being criminally prosecuted for theft. After McCall was terminated, Laura McGuire acquired responsibility for providing the doctors periodic reports on their draws and incomes.

¶ 10 On September 13, 2007, Okoli tendered to Irwin a letter of resignation effective December 10, 2007. Okoli continued to perform office visits and see patients. On October 5, 2007, Okoli's employment was terminated due to alleged irregularities in her scheduling and, more specifically, an allegedly unusual number of cancellations. Irwin testified he never spoke with any of the patients who allegedly cancelled or postponed their appointments.

¶ 11 Irwin agreed that neither he nor anyone on his staff ever advised Okoli in her five years of employment that she had been overpaid. However, according to Irwin, this was, in part, due to the fact that the original contract anticipated that, if the draw ever exceeded the monies owed, the deficit would be rolled over into the next year's draw. Accordingly, he testified, the only time in which a negative sum would become due and owing would be if, after the employment relationship ended, there was a negative balance reflected for the account.

¶ 12 ii. Lisa Fasano

¶ 13 Lisa Fasano testified that she worked for the Center and was responsible for patient billing and maintaining patient medical records and charts. Fasano testified to billing procedures and the process for calculating the doctors' monthly draws. In addition, Fasano testified to patient scheduling procedures. Fasano stated that, in July and August 2007 (before Okoli resigned), she began an internal investigation into cancelled and no-show appointments for Okoli's patients. Upon reviewing the records of cancelled appointments, Fasano noticed that, as to the reason for the cancellation, some entries reflected that the patients were going to go to another office. Therefore, Fasano concluded that patients were being "diverted" to another office. Fasano set a "test patient," *i.e.*, Laura McGuire's sister, onto Okoli's schedule. Apparently, in late August 2007, the test patient received a voicemail message to confirm the appointment. According to Fasano, who listened to the message, the caller sounded like Center receptionist Sue Vonbruenchenhein. After listening to the contents of the message, Fasano shared the information with Irwin. Fasano agreed that patients have the right to choose whether to keep an appointment and that there were times that patients would cancel or simply not appear for their appointments.

¶ 14 iii. Sue Vonbruenchenhein

¶ 15 Sue Vonbruenchenhein testified that she worked for the Center as a receptionist until 2007. Vonbruenchenhein testified that, after Okoli left the Center, Vonbruenchenhein telephoned Okoli, seeking a job. Vonbruenchenhein could not recall the exact date that she began working for Okoli, but, Vonbruenchenhein's signature appeared on medical release forms in Okoli's new office beginning on October 9, 2007. Vonbruenchenhein testified that, when she first went to work for Okoli in Okoli's new office, the office was not fully operational and Okoli was not yet seeing patients.

¶ 16 According to Vonbruenchenhein, she did not, while she remained employed by the Center: (1) speak with Okoli concerning Okoli leaving the practice; or (2) inform any patients of Okoli's new telephone number at her new office. The Center's attorney played for the court a tape-recording of the message left for the test patient.[2] Vonbruenchenhein testified that the voice on the recording did not sound like her voice, "no." After Okoli left, Vonbruenchenhein received no specific instructions regarding how to handle Okoli's patients who telephoned for appointments. However, in accordance with the procedure followed when another doctor (Dr. Kim - first name unknown) had previously left the practice, Vonbreuenchenhein transferred patients who sought appointments with Okoli to other doctors' schedules.

¶ 17 iv. Okoli

¶ 18 Okoli testified as an adverse witness that she did not notice an inordinately high number of patients cancelling their appointments in September and October 2007. As of September 13, 2007, when she tendered her resignation to the Center, Okoli had not: (1) had conversations with Dr. Kim about leaving the Center or subleasing space at Kim's office; (2) discussed with any Center employee her decision to leave; (3) talked to any patients about going to a new office; or (4) had any telephone conversations with patients in which she told them to contact her at a new office. It was not until after she tendered her resignation that Okoli spoke with Dr. Kim about subleasing space and began telling her patients that she had given three-months notice. Okoli did not give out her new office number, which she established around the time of her resignation, until after she was

[2]The recording was not transcribed by the court reporter at trial, and neither the tape recording nor the transcript of the recording prepared before trial are contained in the record on appeal.

fired. Okoli testified that, after her termination, but on the same day, she telephoned Vonbruenchenhein and asked her to work for Okoli at a new office. Okoli testified that she had a list of some of her patients and their contact information because, beginning in February 2003, the Center gave her on a daily basis a list of the patients that she would be seeing the next day. Okoli kept those lists and, therefore, had accumulated a list of patients and was able to contact some of them after her termination.

¶ 19 Okoli testified that she understood that various expenses, such as insurance, automobile, and credit card expenses, would be deducted from her revenues. She was shown a 2004 document reflecting (per the contract) her 75% retention figure. Although Okoli testified that she did not understand that her percentage was subsequently decreased and that she never agreed to the decrease, she agreed that she had received from McCall a 2007 document reflecting (as the 2004 document had done with the 75% figure) that her share of collections was 60%. Okoli testified that she recalled Irwin holding meetings with all of the physicians, stating that the practice could not meet payroll unless the paychecks were reduced, but he did not explain how. Okoli said she objected at those meetings to the practice's inability to meet payroll by noting the fact that the practice was carrying a high overhead that should be reduced. After voicing her objection, she accepted the paychecks at the reduced amount because she did not have another job. Further, Okoli was shown 2004 documents that she received and that reflected she had been, at that time, overpaid by $61,000. Thus, although Okoli testified that nothing was explained to her, she agreed that the documents reflected the overpayment and that the original contract contemplated that such overpayments would roll into the next year's draw.

¶ 20 v. Laura McGuire

¶ 21 Laura McGuire testified that, in July 2007, she took over accounting responsibilities at the Center. She testified that McCall's financial malfeasance did not adversely effect the compensation paid to any physician. McGuire discussed in detail various financial records, including records involving Okoli's draw from the Center. In the course of reviewing Okoli's records, McGuire discovered that calculations had failed to take into account automobile, health insurance, and other minor dues and expenses that were paid by the Center on Okoli's behalf but were not credited against the draw. McGuire continued to adjust Okoli's draw analysis, even after her departure, as various expenses or revenues became due or were received. To McGuire's knowledge, Okoli did not object to the percentages being applied to her draw account. A May 3, 2010, financial exhibit reflected that Okoli was overpaid by $64,811.84.

¶ 22 B. Okoli's Case-in-Chief

¶ 23 i. David Zbaraz

¶ 24 Dr. David Zbaraz testified that he is an assistant professor of obstetrics and gynecology at the Feinberg School of Medicine at Northwestern University and an attending physician at Northwestern Memorial Hospital. Zbaraz was president of and director on the board of a medical corporation (Association for Women's Health Care) that employed 10 physicians and 30 employees; Zbaraz was one of three persons who, in 1970, started the corporation, and he remained there for 36 years. Zbaraz is experienced in running a medical practice, including hiring, firing, and, in the event a physician leaves a practice, notifying and transferring patients. In sum, Zbaraz testified that Okoli's actions, while working for the Center, to inform her patients of her impending departure were appropriate. According to Zbaraz, because a physician, especially in an ongoing, therapeutic relationship for pain control, develops a relationship of trust with patients, "it would be highly wrong [and] inappropriate" for a physician to "just leave a practice without informing her patients.

She must tell them that she is leaving. *** To disappear from the practice without notifying the patient would be cruel and wrong. It would lead to hardship on the part of the patient." Zbaraz noted that Okoli's contract did not contain a restrictive covenant and that patients do not belong to a practice, but, rather, elect where they wish to seek or continue their treatment.

¶ 25 ii. Dmitri Polyakov

¶ 26 Dmitri Polyakov, a certified public accountant, testified that he reviewed financial documents provided to him by Okoli's counsel. Based on those documents, he performed various calculations to determine whether and to what degree Okoli was undercompensated once her percentage was twice reduced from 75% to 70% and then to 60%. In other words, Polyakov was asked to recalculate Okoli's compensation for the entirety of her employment based on the original employment agreement percentage (75%). Polyakov performed calculations using four scenarios, with the following results: (1) underpaid by $133,000; (2) underpaid by $132,000; (3) overpaid by $5,000; and (4) underpaid by $91,000. On cross-examination, Polyakov testified that, when he performed the calculations, he was not aware that Okoli had agreed to compensate the Center for various expenses, including automobile, credit cards, membership dues, or conference charges. Further, Polyakov testified that: (1) he expressed no opinion as to the accuracy of the numbers that he was provided and that formed the basis of his calculations; (2) that various figures provided were similar to snapshots of the finances at the date upon which the program was run, as opposed to final figures; (3) he could not render an opinion as to which version of his four calculations was most accurate; and (4) he could not render an opinion as to whether Okoli was, in fact, underpaid, because that conclusion would depend on various factors that were not available to him. Polyakov agreed, however, that if Okoli never agreed to a modification in her compensation, she was, per his first calculation, underpaid.

¶ 27 iii. Okoli

¶ 28 In her case-in-chief, Okoli reiterated that, while working for the Center, she never (before or after she tendered her resignation) told patients to defer their appointments until she opened her new office. She did not see patients in another office while working for the Center. Before her termination, Okoli did not discuss her departure with Vonbruenchenhein or ask anyone to divert patients to her forthcoming practice, nor does she know if anyone ever tried to do so. Okoli testified that she did not believe that the recording involving the test patient was, essentially, legitimate, because the test patient was, in August 2007, allegedly told to call her new office number and that number did not yet exist. Okoli agreed that, the same day she was terminated, she contacted Dr. Kim about leasing office space and telephoned Vonbruenchenhein to offer her a job, stating "I needed to get going quickly."

¶ 29 Okoli testified that the Center never advised her during her employment that she had ever been overpaid. Okoli testified that, throughout her employment, she asked for explanations of her draw, income and receipts, etc., but that the numbers presented to her were inconsistent and differed monthly. She agreed that, in 2006 and 2007, financial reports reflected that her percentages were decreasing. The Center never presented to Okoli a written amendment to her 2002 employment contract, nor did it ask her to approve any amendment of that agreement. Okoli again disagreed that she approved a decrease in her compensation, and she testified that she accepted paychecks after the decrease because she continued to treat patients and generate revenue.

¶ 30 Okoi denied using, after her termination, materials that were copyrighted or belonged to the Center. Okoli agreed that, in 2002, she received and signed an employee manual or handbook and that she read the section on confidential information, which provides in part that "all clinic information and publications not intended for public distribution (policies and procedures,

organizational charges, patients and provider information, etc.) are the property of [the Center]." She denied that the patient lists given to her daily to plan her patients' care were Center property. "Nobody told me they belonged to [the Center] *** Nobody had ever asked for them in five years." Okoli agreed that her termination letter asked that all property belonging to the Center be returned, but testified that she did not, as a treating physician, think that she could not keep the daily lists provided to her for patient care. Okoli again testified that she did not notice an increase in patient cancellations prior to her termination. In the remaining months of October, November, and December 2007, Okoli collected $38,000 in her new practice. She attributed her ability to "hit the ground running" in the new practice to the fact that she spent five years in practice in the area, worked to research patient addresses on websites for Yellowpages, Google, and AT&T, and mailed a postcard to patients notifying them of her new practice.

¶ 31 C. Center's Rebuttal Case

¶ 32 Irwin testified as the Center's sole rebuttal witness. Irwin explained that it is the Center's position that Okoli breached the 2002 employment agreement, which was modified when he met with the physicians and explained to them that he needed to change reimbursement terms. He did not put the compensation changes in writing because he believed the physicians clearly understood and agreed with them.

¶ 33 D. Court's Rulings

¶ 34 i. Directed Finding

¶ 35 At the close of the Center's case-in-chief, Okoli moved for a directed finding on all counts. The court granted the motion on the breach-of-fiduciary duty and tortious-interference claims. It noted that, as to breach of fiduciary duty, the basis for the Center's argument that Okoli was not entitled to take patient lists was a handbook provision protecting confidentiality of medical records,

the purpose of which was to comply with privacy laws, *not* to prohibit a physician from taking them. It noted, however, that a breach of fiduciary duty would exist if the patient lists were used *prior* to Okoli terminating work, stating, "You can't take it and then use it prior. You can't go ahead and have patients come in and tell patients 'I don't want you to come now. I am opening a newer practice. I want you to come there.' " The court found that there was only circumstantial evidence that someone, *not* Okoli, communicated to patients that Okoli could be reached at her new phone number. Further, the court found that the Center did not meet its burden of showing by clear and convincing evidence that Okoli made communications directing patients to a new office or even that she had an office prior to her termination. As to tortious-interference-with-future-interest claim, the court noted that it heard no expert testimony regarding future damages. The court denied the motion for a directed verdict as to the breach-of-contract claim.

¶ 36 ii. Trial

¶ 37 At the conclusion of trial, the court ruled in the Center's favor on the breach-of-contract claim. First, the court found that the 2002 contract expired in 2004. At that time, Okoli remained employed pursuant to an at-will agreement, the terms of which the court found included a draw offset against expenses and 75% retention figure. The Center subsequently increased its percentage of take against the draw by reducing Okoli's retention figure to 70% and then to 60%. Because the terms of the agreement contemplated that there would be carry-over from year to year, the question was whether there had been a "reckoning" under the agreement after Okoli's employment ended. Based upon the testimony, financial documents entered into evidence, and the court's own, personal business knowledge, the court determined that the Center was entitled to judgment in the amount of $48,078.49. Okoli's counsel asked the court whether it wished to expand upon its calculation of

damages, and the court replied "Well, you asked for a general verdict, and I gave you a general verdict. Nobody requested specifics."

¶ 38 Second, the court rejected the Center's claim that Okoli breached the employment contract by taking the list of her patients. The court also noted it had received no testimony regarding damages, which would constitute loss of profits, not gross receipts. For example, the court noted, even if Okoli's gross receipts in her new practice from October to December 2007 totaled $38,000, the Center would not have received that full amount. Both parties appeal.

¶ 39 II. ANALYSIS

¶ 40 A. Okoli's Appeal - Breach of Contract

¶ 41 Generally, a judgment after a bench trial will not be set aside unless it is contrary to the manifest weight of the evidence. *Brynwood Co. v. Schweisberger*, 393 Ill. App. 3d 339, 351 (2009). A judgment is against the manifest weight of the evidence where the opposite conclusion is clearly evident. *Id.*

¶ 42 We note first that Okoli is *not* appealing the damages amount of $48,078.49 or how the court arrived at that figure. The overcharges argued by the Center at trial (that Okoli retained excessive payments made on her physician's draw account for malpractice and health insurance premiums, auto payments, credit card charges, medical dues, and conferences) are not disputed on appeal. Instead, Okoli argues that, where the court found both that the 2002 contract expired and that she committed a breach of contract, its ruling is inherently contradictory. She argues, with no citation to authority, that she cannot be found to have improperly retained overpayment of compensation where, after her 15th month of employment, she was an employee at-will. We could, given Okoli's failure to support her argument with relevant authority, find it forfeited and dismiss the appeal. *Vancura v. Katris*, 238 Ill. 2d 352, 369-70 (2010) (failure to cite legal authority is a violation of

Supreme Court Rule 341(h)(7) and results in forfeiture of the issue). Nevertheless, because it is easily resolved, we choose to address, and reject, Okoli's substantive argument that the trial court improperly found a breach of contract where it also determined that the 2002 contract had expired.

¶ 43 Okoli's argument appears to reflect a misapprehension of at-will employment. At-will employment means that the term or duration of employment is indefinite and that the employment relationship may be terminated by either the employer or the employee at any time; it remains, however, a contractual relationship (contemplating, at its most simplistic form, that compensation will be provided in exchange for labor). See *Fellhauer v. Geneva*, 142 Ill. 2d 495, 512 (1991) (recognizing that employment at will constitutes an employment *contract* with indefinite duration); see also *Walker v. Abbott Laboratories*, 340 F.3d 471, 476-77 (7th Cir. 2003) (applying Illinois law) (noting that lack of fixed duration does not make at-will employment relationship less contractual and, although at-will employment may terminate at any time, enforceable contractual rights, including those regarding wages, may give rise to a cause of action for breach of contract); *Curtis 1000, Inc. v. Suess*, 24 F. 3d 941, 943 (7th Cir. 1994) (applying Illinois law) ("employment at will is of course a contractual relationship ***differing from a term or tenure contract only in being terminable by either party at any time"); *McKnight v. GMC*, 908 F. 2d 104, 109 (7th Cir. 1990) (employment at will may terminate abruptly, but it remains a contract). An at-will employment agreement may be modified by the employer as a condition of its continuance. *Geary v. Telular Corporation*, 341 Ill. App. 3d 694, 698 (2003). "This right to modify unilaterally at-will employment terms applies to modifying compensation terms" and, when an at-will employee continues to work after the change, he or she is deemed to have accepted the change. *Id.*

¶ 44 Thus, Okoli incorrectly argues that, because the 2002, fixed-term contract had expired, she could not have retained compensation exceeding that to which she was entitled under the at-will

employment contract. Rather, as the trial court correctly determined, upon expiration of the 2002, 15-month, term contract, the parties' contractual relationship converted to an at-will agreement with no fixed duration. The court found, based upon the evidence, that the parties initially continued the at-will agreement under the terms of the original contract, which included a reduction in Okoli's earnings for various expenses, such as insurance, credit cards, and automobile costs. The court further found that the Center unilaterally modified the compensation terms, twice reducing Okoli's retention percentage. These findings were not contrary to the manifest weight of the evidence. Indeed, Irwin testified that he announced the changes to all physicians, including Okoli. Okoli agreed that financial records reflected the lower retention percentages and that she saw those documents, but asserts that she did not agree to the reduction. However, it is clear that Okoli continued to work for the Center for a period after the 2005 and 2007 changes. The legal effect of Okoli's continued employment reflects acceptance of the modified terms of compensation. *Geary*, 341 Ill. App. 3d at 698. As we have rejected Okoli's argument that the court could not have found a breach of an at-will agreement, and as Okoli does not dispute on appeal the amount to which the court found her overcompensated, we affirm the court's judgment.

¶ 45 B. The Center's Cross-Appeal: Breach of Fiduciary Duty

¶ 46 The Center argues in its cross-appeal that the trial court erred where it entered a directed finding on the breach-of-fiduciary-duty claim. It contends that, while employed by the Center, Okoli breached her fiduciary duty of loyalty by soliciting patients to leave the Center and go to her new practice. For the following reasons, we reject the Center's argument.

¶ 47 To state a claim for breach of fiduciary duty, a plaintiff must prove that a fiduciary duty exists, the duty was breached, and the breach proximately caused injury. *Neade v. Portes*, 193 Ill. 2d 443, 444 (2000). Generally, where, as here, there is no covenant-not-to-compete nor other

restrictive covenant, an employee may nevertheless breach a fiduciary duty to his or her employer if he or she disclosed confidential business information to a competitor while still employed. *Lawlor v. North American Corp.*, 409 Ill. App. 3d 149, 172 (2011).

¶ 48 Specifically, a physician may breach his or her fiduciary duty to an employer by directing patients to the physician's new practice. *Dolezal v. Plastic & Reconstructive Surgery, S.C.*, 266 Ill. App. 3d 1070, 1085-86 (1994). An employee may form a rival corporation and outfit it for business while remaining employed with a competitor, but, where the employee goes beyond preliminary competitive activities and, while employed, commences business as a rival, he or she may be held accountable for breaching his or her fiduciary duty to the employer. *E.J. McKernan Co. v. Gregory*, 252 Ill. App. 3d 514, 530 (1993). Absent fraud, a contractual restrictive covenant, or the improper taking of a customer list, the former employee may solicit the former employer's customers as long as there is no demonstrable business activity prior to the termination of his or her employment. *Lawlor*, 409 Ill. App. 3d at 172; *Veco Corp. v. Babcock*, 243 Ill. App. 3d 153, 160 (1993).

¶ 49 At issue here is whether the court's decision to grant Okoli's motion for a directed finding was error. Specifically, in a bench trial, a motion for directed finding is governed by section 2-1110 of the Code of Civil Procedure, which requires the trial court to weigh the evidence and consider witness credibility. 735 ILCS 5/2-1110 (West 2008). The court does not view the evidence in the plaintiff's favor; rather, it determines whether the plaintiff has established a *prima facie* case, weighs the evidence, and, if the court decides that the evidence necessary to the plaintiff's *prima facie* case has been negated, the court should grant the motion for a directed finding and enter judgment in the defendant's favor. *Orbeta v. Gomez*, 315 Ill. App. 3d 687, 689-90 (2000). If the trial court finds that the plaintiff failed to present a *prima facie* case as a matter of law, our review is *de novo*. *People ex rel. Sherman v. Cryns*, 203 Ill. 2d 264, 275 (2003). However, where the trial court finds,

based on the weight of the evidence, that no *prima facie* case remains, we will not reverse the court's decision unless it is contrary to the manifest weight of the evidence. *Orbeta*, 315 Ill. App. 3d at 690. Here, the court's determination was proper under either standard of review.

¶ 50 The Center argues that the court's ruling was contrary to the manifest weight of the evidence because Okoli admitted that: (1) on the day that she resigned, she spoke to Dr. Kim about possibly leasing office space; (2) after she announced her resignation, but before her termination, she started to tell her patients that she was leaving; (3) she obtained a new telephone number around the day she resigned; and (4) that she did not view patient lists as being Center property. The Center points to Fasano's conclusion, based upon patient cancellations beginning prior to Okoli's resignation, that Okoli's patients were being directed elsewhere. Further, the Center notes, Okoli testified in her own case-in-chief (but after the directed finding was granted) that: (1) on the day she was terminated, she called and hired Vonbruenchenhein; and (2) she received the 2002 handbook and read the section regarding confidential information. The Center further argues that the trial court incorrectly believed it needed an expert witness as to damages.

¶ 51 We do not need to reach the Center's argument regarding damages because we conclude that the court's ruling on the motion was not contrary to the manifest weight of the evidence. None of the foregoing actions reflect that Okoli went beyond preliminary competitive activities. Establishing a phone number and merely discussing the possibility of leasing office space do not reflect that, after announcing her resignation, Okoli commenced business. Indeed, Okoli testified that she did not have an office prior to her termination, and Vonbruenchenhein testified that, when she started working with Okoli in October 2007, Okoli's new practice was not fully operational and Okoli had not yet begun seeing patients.

¶ 52 Further, there is a critical distinction between *informing* patients that one is leaving the practice (so as to not surprise them when they appear for their next appointment and their physician is gone) and *directing* the patients to seek treatment at the physician's new practice. In *Dolezal* (which, incidentally, involved a physician who was a shareholder in the practice and had a non-competition agreement), the court found that a physician breached his fiduciary duty where he undisputedly opened his own practice while employed by the defendant, saw patients from his own practice in the defendant-employer's offices, and told patients to go to his private practice instead of his employer's. *Dolezal*, 266 Ill. App. 3d at 1085-86. Here, there was no evidence presented that Okoli directed any patients to leave the practice. Fasano's conclusion that patients were being directed elsewhere by *someone* was based on patient cancellations, yet she conceded that there are many reasons why a patient might cancel an appointment, and the Center did not present any evidence from those patients reflecting that they cancelled because they were told to go elsewhere. Instead, as the court noted, there was circumstantial evidence, a tape recording not contained in the record here, that apparently suggested that, in August 2007, someone other than Okoli gave the test patient a phone number for Okoli's new practice. However, the Center did not establish who that caller was, let alone that Okoli directed that person to make those calls. To the contrary, Okoli testified that her new office phone number did not exist in August 2007, that she did not direct patients to her new practice, and that she did not direct anyone else to do so. Further, Vonbruenchenhein testified that she did not make the call that was recorded. Thus, the court's finding that the Center did not establish that, prior to her termination, Okoli directed patients to her new practice, was not contrary to the manifest weight of the evidence.

¶ 53 Further, we note that the patient lists that Okoli received and kept from the Center are of minimal relevance to the breach-of-fiduciary-duty issue. Again, there is no restrictive covenant here

barring solicitation of customers[3] and, for purposes of breach of fiduciary duty, there was no evidence that Okoli used those lists to the Center's disadvantage while she remained employed. In *Lawler*, the appellate court reversed the trial court's conclusion that a breach of fiduciary duty occurred where there was no evidence that the at-will employee used confidential information to compete with the employer prior to termination. *Lawlor*, 409 Ill. App. 3d at 173 (collecting cases and stating that "our research has not disclosed any Illinois decision where an at-will employee was held liable for breaching the duty of loyalty for disclosing information unless the information was used to compete against the employer prior to termination."). Here, the evidence reflected that the Center *gave* Okoli patient lists on a daily basis and did not, in five years of employment, request that she return them. In that sense, Okoli did not improperly *take* customer lists. Perhaps Okoli violated the 2002 handbook (which the Center does not appear to argue was a contract in and of itself) by keeping the patient lists *after* her employment was terminated, but the fundamental question is whether she used those lists to compete *prior* to her termination. We cannot conclude that the trial court erred in entering a directed finding in Okoli's favor.

¶ 54 We note that the Center briefly suggests that the court also erred in entering a directed finding on the tortious interference with expectancy claim, but that argument is largely related to an argument regarding evidence of damages, which we need not reach, and is otherwise undeveloped. Therefore, we reject the argument as forfeited. *Vancura*, 238 Ill. 2d at 370 ("Both argument and

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[3]We note that " 'while an enforceable restrictive covenant may protect material which does not constitute a trade secret, an employer's protection absent a restrictive covenant is narrower and extends only to trade secrets [citation], or near-permanent customer relationships.' " *Lawlor*, 409 Ill. App. 3d at 172 (quoting *Cincinnati Tool Steel Co. v. Breed*, 136 Ill. App. 3d 267, 274 (1985)).

citation to relevant authority are required. An argument that is merely listed or included in a vague allegation of error is not 'argued' and will not satisfy the requirements" of Rule 341(h)(7) and results in forfeiture).

¶ 55 III. CONCLUSION

¶ 56 For the foregoing reasons, the judgment of the circuit court of Lake County is affirmed.

¶ 57 Affirmed.