2019 IL App (2d) 170740-U
No. 2-17-0740
Order filed June 13, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

EDWARD M. CAULFIELD, Plaintiff-Appellee, v. PACKER ENGINEERING, INC., THE PACKER GROUP, INC., and MARK LANGILLE, as Personal Representative of the Estate of Kenneth F. Packer, Deceased, Defendants-Appellants.	)	Appeal from the Circuit Court of Du Page County. No. 11-CH-1619 Honorable Bonnie M. Wheaton, Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Presiding Justice Birkett and Justice Hutchinson concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court did not err in denying defendants' motion for summary judgment, dismissing counterclaims, or entering judgment for plaintiff on most claims.

¶ 2 Internal conflict led to the demise of two of the defendants, Packer Engineering, Inc. (PEI) and The Packer Group, Inc. (TPG), and resulted in the filing of several lawsuits asserting various claims against those defendants and their founder, defendant Kenneth F. Packer

(Packer).[1] Following a four-day bench trial, the trial court found in favor of the plaintiff, Edward Caulfield, on most of his claims. The trial court had previously dismissed Packer's counterclaims, and had denied the defendants' motion for summary judgment arguing that the suit was barred by principles of claim preclusion. The defendants now appeal all of these rulings.

¶ 3 I. BACKGROUND

¶ 4 A. Preliminary Events

¶ 5 Packer founded PEI in 1962, and it grew into a well-respected professional engineering firm based in Du Page County. PEI was wholly owned by its parent holding company, TPG. Packer was the chairman of the boards of PEI and TPG and the two closely-held corporations shared many of the same directors and officers.

¶ 6 PEI hired Caulfield in 1979 as its director of mechanical engineering. In June 2002, Caulfield became president and chief technical officer of PEI. Caulfield and PEI entered into an employment agreement (Agreement) covering, among other things, the amount of his compensation and severance pay, and restrictions on his business activities in the event he resigned from PEI. In 2008, Caulfield and PEI modified the terms of compensation. Thereafter, Caulfield's base salary was $500,000.

¶ 7 On December 2008, Michael Koehler was hired as the chief executive officer of PEI and TPG. Caulfield and Koehler were also shareholders of TPG.

¶ 8 Sometime in 2007, Packer personally obtained a loan to purchase a shuttered foundry that he reopened and named New Vermillion. Packer did not seek or receive approval for this

[1] Packer passed away after the trial of this matter and after this appeal was filed. His estate was substituted as a defendant-appellant.

purchase from the boards of PEI or TPG. Packer was New Vermillion's president, and TPG's executive vice president of finance, Charlotte Sartain, was its corporate treasurer. Packer asserted that he viewed this personal business venture as offering potential benefit to PEI if it became profitable (in which case he planned to give it to PEI/TPG) and as a place for young PEI engineers and technicians to gain hands-on experience. However, New Vermillion did not achieve financial sustainability.

¶ 9 In 2008, Packer's personal assets declined in value and the lender for New Vermillion demanded additional security. At that point, Packer transferred $357,550 of the outstanding balance on his personal line of credit to TPG's line of credit. Packer and Sartain transferred the debt without the prior knowledge or approval of the board of directors, Koehler, or Caulfield.

¶ 10 In March or April of 2009, Sartain told Koehler that she was concerned about TPG's cash flow. When Koehler investigated, he learned that TPG had made a series of unidentified payments totaling more than $1.2 million on behalf of New Vermillion. In addition, between 2007 and 2009, Packer and Sartain had sent numerous PEI employees to work at New Vermillion while keeping them on the PEI payroll.

¶ 11 In September 2009, Packer, Sartain, and Koehler held a meeting with the senior staff of PEI including Caulfield at which New Vermillion was discussed. (Caulfield maintained that this was the first time he realized that New Vermillion was owned by Packer personally but was being funded by PEI. The defendants disputed this assertion.) TPG continued to make payments on behalf of New Vermillion and to have PEI employees work there during the fall of 2009. An independent audit completed in December 2009 showed that Packer owed TPG over $1.6 million for payments "related to New Vermillion." Koehler expressed concern to Caulfield about this diversion of funds.

¶ 12 In January 2010, a former long-time employee of PEI filed a charge with the Equal Employment Opportunity Commission alleging, among other things, sexual harassment by Caulfield. PEI conducted an internal investigation that concluded that some of the allegations appeared to be untrue but no conclusions could be reached about other allegations.

¶ 13 On March 16, 2010, an attorney for Caulfield wrote a letter to TPG board members regarding New Vermillion, in Caulfield's "capacity as a shareholder in and employee of" PEI/TPG. The letter stated that there was evidence that Packer had engaged in financial irregularities that could amount to millions of dollars and threaten the financial health of PEI/TPG, and that certain "key financial personnel" (presumably, this meant Sartain) had assisted him. The letter demanded an independent investigation into the matter.

¶ 14 In response to the letter, the board formed a special committee of outside directors. On April 13, 2010, the special committee sent Packer a letter demanding, among other things, that Packer reimburse PEI/TPG the full amount of the money he had diverted to New Vermillion and that Packer and Sartain immediately resign from PEI's board and cease any management role. Packer did not comply with these demands and instead shut down the investigation. In response, the independent board members resigned. In May 2010, Koehler was fired.

¶ 15 B. The Lawsuits and Their Effects

¶ 16 1. The Shareholder Derivative Suit

¶ 17 On July 1, 2010, Caulfield and Koehler filed a shareholders' derivative lawsuit (Shareholder Suit) in Cook County against Packer, Sartain, and certain other directors of PEI and TPG. The suit, which was brought on behalf of all shareholders, alleged the misappropriation of company assets diverted to New Vermillion as well as other improper self-dealing by Packer and other board members.

¶ 18 The next business day after the Shareholder Suit was filed, Packer began barring Caulfield from the premises of PEI. Caulfield was required to schedule in advance any visits to his office to work or meet with staff. Packer also instituted a new loyalty policy and demoted Caulfield, changing his job title. Packer removed Caulfield from company projects and prohibited him from working with clients. Packer repeatedly demanded that Caulfield dismiss the Shareholder Suit.

¶ 19 On January 1, 2011, PEI (at Packer's direction) unilaterally reduced Caulfield's salary and refused to pay him his bonus from 2010. In March 2011, Packer informed Caulfield that he would have to sit for a seven-hour performance review with Packer. Caulfield declined to do so.

¶ 20 2. Caulfield's Personal Suits: The Cook County Suit and the Du Page County Suit

¶ 21 On April 1, 2011, Caulfield was terminated by PEI. That same day, he filed two lawsuits in different counties. The suit filed in Cook County (the Cook County Suit) eventually included claims against PEI and TPG for declaratory judgment regarding the enforceability of the restrictive covenant in the Agreement, breach of contract (the Agreement), retaliatory discharge, and statutory prejudgment interest for amounts owed under the Agreement but unpaid.

¶ 22 A second suit filed in Du Page County against PEI, TPG, and Packer (the suit being appealed here: "this suit" or the Du Page County Suit), asserted claims of shareholder oppression (count I), violation of the Illinois Wage Payment and Collection Act (Wage Act) (820 ILCS 115/2 (West 2010)) (count II), tortious interference with contract (count III), tortious interference with business expectancy (count IV), and violations of the Illinois Whistleblower Act (Whistleblower Act) (740 ILCS 174/20 (West 2010)) (count V). Counts I, II, and V were directed toward all three defendants, while counts III and IV were directed solely toward Packer.

¶ 23 In neither the Cook County Suit nor this suit did any of the parties move to transfer the case to the other county for consolidation. Nor did the defendants in this suit move to dismiss on the basis of claim-splitting. (They did move to dismiss this suit so that the claims could be arbitrated, but when the trial court directed them to first file a demand to arbitrate, they did not do so.) Instead, in both suits, the defendants answered the complaint.

¶ 24 PEI and TPG ceased operations in January 2012, laying off all employees.

¶ 25 In November 2012, in the Du Page County Suit, Packer filed counterclaims against Caulfield. These were subsequently dismissed, amended, and refiled. Packer's second amended counterclaim was dismissed with prejudice in July 2013.

¶ 26 3. Judgments Entered in the Cook County Suit

¶ 27 In April 2012, the trial court in the Cook County Suit granted partial summary judgment in favor of Caulfield on one of his claims—the breach of contract claim—finding that PEI had not paid Caulfield all of his salary in 2011, his annual bonus for 2010, or his severance pay. The judgment on this claim totaled $988,777.

¶ 28 In May 2012, PEI and TPG executed an assignment for the benefit of creditors without first paying Caulfield. In July 2012, the assets of the Packer companies were sold. All of the proceeds went to their secured lender.

¶ 29 In September 2013, the Cook County Suit went to trial. The bench trial lasted four days. In February 2014, the trial court issued its judgment. It found in favor of Caulfield on his remaining claims, declaring the restrictive covenant in the Agreement unenforceable because Caulfield had been terminated by PEI, and finding that he had been discharged in retaliation for opposing the diversion of funds to New Vermillion. The defendants appealed this judgment, as

well as the trial court's earlier grant of summary judgment in favor of Caulfield on his breach of contract claim.

¶ 30 The First District appellate court affirmed the trial court's grant of summary judgment on Caulfield's breach of contract claim and the amount of that judgment. See *Caulfield v. Packer Engineering, Inc.*, 2015 IL App (1st) 140463-U, ¶ 124 (*Packer I*). As part of this ruling, the appellate court found that the trial court's conclusion that PEI had at least some disposable income in 2010 was not against the manifest weight of the evidence. However, the appellate court reversed the judgment for Caulfield on the retaliatory discharge claim, finding that Caulfield was not an at-will employee, which is a requirement for a retaliatory discharge claim. The appellate court upheld the rest of the trial court's judgment. *Id.* ¶ 126.

¶ 31 4. Subsequent Events in the Other Suits

¶ 32 After the decision in *Packer I* was issued, the defendants moved for summary judgment in the Du Page County Suit, arguing that Caulfield's claims were barred by *res judicata* and the prohibition against claim-splitting. Caulfield filed a cross-motion for summary judgment on counts I and II (his shareholder oppression and Wage Act claims) on the basis that the judgment entered in the Cook County Suit established all of the elements of those claims and the defendants were barred from relitigating any of those elements under the principle of collateral estoppel.

¶ 33 The trial court denied both motions. It found that the defendants had forfeited their right to assert any defense of claim-splitting by failing to seek dismissal or transfer of either of the two suits based on that defense. The trial court further held that, although there had been a final judgment and the parties in the two suits were either identical or in privity, it could not conclude

that the causes of action or issues were identical, and thus neither *res judicata* nor collateral estoppel had been established.

¶ 34 In 2015, the Shareholder Suit was dismissed by the trial court presiding over it, on two grounds. First, the trial court held that, because the Packer companies were now insolvent, only creditors (and not shareholders) could pursue claims alleging the mismanagement of PEI and TPG. Second, the trial court held that the individual judgments obtained by Koehler and Caulfield in their own suits against the defendants rendered them improper plaintiffs in the Shareholder Suit because any judgment against the defendants would primarily benefit Koehler and Caulfield as compared with other shareholders.

¶ 35 On appeal, the First District reversed the trial court's first ruling, holding that the insolvency of a corporation did not prevent shareholders from continuing to pursue a derivative action. *Caulfield v. The Packer Group, Inc. [Shareholder Suit]*, 2016 IL App (1st) 151558, ¶ 42. The appellate court affirmed the trial court's second ruling that Koehler and Caulfield were no longer proper plaintiffs once they had obtained sizeable individual judgments against PEI and TPG, but remanded the case to allow other shareholders to intervene as plaintiffs. *Id.* ¶ 54. As of 2016, this suit was still pending in Cook County.

¶ 36 The Du Page County Suit proceeded to a bench trial in May 2017. The trial court granted judgment for Packer on count IV, holding that he could not be held liable for interference with Caulfield's business expectancy given PEI and TPG's insolvency in 2012. However, the trial court ruled in favor of Caulfield on all of the remaining claims. The trial court stated that, after listening to all of the testimony, it found Caulfield's testimony "extremely credible" despite "some minor instances" in which he was either impeached or proved incorrect. By comparison,

the trial court found Packer's testimony "confused, self-serving, contradictory and in many regards just plain wrong."

¶ 37 On count I, the claim for minority shareholder oppression, the trial court noted that Packer began harassing Caulfield after the Shareholder Suit was filed, thereby oppressing Caulfield's exercise of "his legitimate rights as a shareholder." Further, the voting records regarding the May 2012 assignment for the benefit of shareholders showed that Packer and Sartain were the only shareholders who voted in favor of it; all of the other listed shareholders abstained, and Caulfield and Koehler were not even listed as shareholders, although there was no record of how their shares were terminated, if in fact they were terminated. The trial court awarded $250,000 in damages on this claim.

¶ 38 On the Wage Act claim (count II), the trial court found that PEI "was solvent at all times" and its failure to make payments under the Act was not justified. The trial court set the damages on this claim at $513,636.94 (the amount of the verdict on the breach of contract claim in the Cook County Suit plus statutory interest, minus a $500,000 insurance payment Caulfield had received on that judgment).

¶ 39 As for count III, the claim of tortious interference with contract, the trial court found that Packer interfered with Caulfield's ability to perform his job duties following the filing of the Shareholder Suit by preventing him from coming to work and meeting with clients, and by removing him from projects. The trial court stated that the damages it was awarding on this count ($429,416—the amount of the unpaid verdict on the contract claim in the Cook County Suit) overlapped with and were in the alternative to the damages for the Wage Act claim.

¶ 40 Finally, as to count V, the claim under the Whistleblower Act, the trial court adopted the holding of the circuit court in the Cook County Suit (made as part of its ruling on the retaliatory

discharge claim in that case) that the defendants' retaliation against Caulfield for his filing of the Shareholder Suit violated the public policy of Illinois. The trial court noted that, although in *Packer I* the appellate court had reversed the judgment for Caulfield on the retaliatory discharge claim, that reversal was based solely on the legal issue of whether Caulfield was an at-will employee and did not address (and therefore left standing) the lower court's holding regarding public policy, which the trial court found to be well-reasoned. The trial court found that, as with the finding on count I, damages of $250,000 were appropriate on count V.

¶ 41 The defendants moved for reconsideration of the judgment on a variety of grounds. The trial court denied the motion and this appeal followed.

¶ 42 II. ANALYSIS

¶ 43 On appeal, the defendants challenge several of the trial court's rulings, including its denial of summary judgment in their favor, its bench trial judgment in favor of Caulfield on four of his five claims, and its dismissal of Packer's counterclaims. We begin with the denial of the defendants' motion for summary judgment.

¶ 44 A. Summary Judgment: Claim Preclusion

¶ 45 Summary judgment is appropriate when the facts relating to a claim are undisputed and the claim can only be decided one way as a matter of law. 735 ILCS 5/2-1005 (West 2016). The preclusive effect of a prior judgment may be properly resolved via summary judgment when it is undisputed that the legal elements for such preclusion are present. *McNamee v. Sandore*, 373 Ill. App. 3d 636, 648 (2007). We review the grant of summary judgment *de novo*. *Valfer v. Evanston Northwestern Healthcare*, 2016 IL 119220, ¶ 19.

¶ 46 Our supreme court "has long recognized that few rules are more essential or more firmly embedded in our jurisprudence than that of *res judicata*," also called claim preclusion. *Village of*

Bartonville v. Lopez, 2017 IL 120643, ¶ 49. Under the doctrine of claim preclusion, "a final judgment on the merits rendered by a court of competent jurisdiction acts as a bar to a subsequent suit between the parties involving the same cause of action." *Id.* This bar encompasses not only the matters actually decided in the first action but also those matters that could have been decided in that action. *Id.* Claim preclusion extends to all grounds of recovery and defense that might have been raised in the first action as well as those grounds that actually were raised. *Id.*

¶ 47 There are three requirements for the doctrine of claim preclusion to apply: (1) a final judgment on the merits was rendered by a court of competent jurisdiction, (2) the parties in the later action were identical to or in privity with the parties in the action that went to judgment, and (3) the cause of action is the same. *Id.* ¶ 50. Illinois courts apply a transactional test to determine whether the cause of action is the same. Under that test, different theories or kinds of relief may still constitute a single "cause of action" if a single group of operative facts gives rise to the assertion of relief. *Id.*

¶ 48 The doctrine of claim preclusion seeks to prevent a plaintiff from splitting a single cause of action into separate proceedings. *Rein v. David A. Noyes & Co.*, 172 Ill. 2d 325, 339-40 (1996). However, there are exceptions to the bar against claim-splitting. In *Rein*, the supreme court adopted the exceptions found in section 26(1) of the Restatement (Second) of Judgments (Restatement) (Restatement (Second) of Judgments § 26(1) (1980)):

> "[T]he rule against claim-splitting does not apply to bar an independent claim of part of the same cause of action if: (1) the parties have agreed in terms or in effect that plaintiff may split his claim or the defendant has acquiesced therein; (2) the court in the first action expressly reserved the plaintiff's right to maintain the second action; (3) the

> plaintiff was unable to obtain relief on his claim because of a restriction on the subject-matter jurisdiction of the court in the first action; (4) the judgment in the first action was plainly inconsistent with the equitable implementation of a statutory scheme; (5) the case involves a continuing or recurrent wrong; or (6) it is clearly and convincingly shown that the policies favoring preclusion of a second action are overcome for an extraordinary reason."

In this case, the trial court held that the defendants could not use the doctrine of claim preclusion to bar Caulfield from proceeding with the Du Page County Suit because their actions fell within the first of these exceptions: they had acquiesced to litigating Caulfield's claims in two separate suits. We agree.

¶ 49 In April 2011, the defendants knew that Caulfield had filed suit against them in two different counties. Rather than seek dismissal of one of the suits on the basis that the two suits constituted claim-splitting, they answered the complaints. Specifically, in July 2011, they filed an answer to the complaint in this case that did not contain any affirmative defenses and that admitted that venue was proper in Du Page County. When they later sought to dismiss this case for arbitration, they filed an amended answer contesting venue solely on the basis of the arbitration clause in the Agreement. However, they never asserted that Caulfield's claim-splitting rendered venue improper in Du Page County. Instead, in May 2012, they sought leave to file a counterclaim that itself alleged that venue was proper in Du Page County. We recognize that the counterclaim also mentioned the Cook County Suit: it asserted that the claims in that suit should be arbitrated in Du Page County and that Caulfield's splitting of his claims into two proceedings constituted "harassment." However, the defendants did not seek to dismiss either suit on the basis of claim-splitting or to consolidate the two suits—even as they conducted

discovery and litigated substantive matters in both proceedings and the Cook County Suit went to trial, where a final judgment was entered. The defendants did not file their motion for summary judgment based on claim preclusion until May 2015, more than four years after the two suits were filed. Under these circumstances, we have no difficulty affirming the trial court's finding that the defendants acquiesced to the claim-splitting and could not raise claim preclusion as a basis for summary judgment in their favor in the Du Page County Suit.

¶ 50 The defendants argue that they were not required to "lodge a claim preclusion defense in the first suit in order to preserve the defense in the second suit." But this is mere misdirection: regardless of whether they were obliged to do anything in the "first" suit (*i.e.*, the Cook County Suit), they were obliged to raise the issue of claim preclusion promptly in at least *one* of the two suits if they wished to preserve that defense. *Thorlief Larsen & Son, Inc. v. PPG Industries, Inc.*, 177 Ill. App. 3d 656 (1988), involves similar facts and is illustrative. There, the plaintiff filed two actions against the defendant in two separate counties on the same day, raising related claims. One suit sought foreclosure of a mechanic's lien, while the other sought recovery for breach of contract. *Id.* at 658. A little over two years later, after obtaining a favorable outcome in the lien action, the defendant moved for summary judgment in the contract action on the basis of claim preclusion, and the trial court granted the motion. *Id.*

¶ 51 The reviewing court reversed. It cited comment *a* to section 26 of the Restatement:

> "Where the plaintiff is simultaneously maintaining separate actions based upon parts of the same claim, and in neither action does the defendant make the objection that another action is pending based on the same claim, judgment in one of the actions does not preclude the plaintiff from proceeding and obtaining judgment in the other action. The failure of the defendant to object to the splitting of the plaintiff's claim is effective as

> an acquiescence in the splitting of the claim." Restatement (Second) of Judgments § 26, comment *a*, at 235 (1982).

The *Thorlief Larsen* court found that, by answering the complaint, asserting other affirmative defenses, and engaging in pretrial discovery for over two years without objecting to the claim-splitting, the defendant acquiesced in defending the contract action and could not invoke the doctrine of claim preclusion. *Id*. at 662-63.

¶ 52 Similarly, in *Thornton v. Williams*, 89 Ill. App. 3d 544, 547 (1980), the trial court denied the defendant's motion for judgment on the basis of claim preclusion, and the reviewing court affirmed, agreeing the defendant had forfeited the issue by waiting too long to raise it. *Thornton* centered on a car accident. The first action was filed in February 1974 by the injured person's insurance company against the other driver, seeking to recover for the property damage to the car. The insurance company obtained a default judgment in that action. *Id*. at 545. Shortly after that, the injured person filed his own action against the defendant, seeking damages for both personal injury and property damage. The defendant litigated the second case for over four years. Then, on the second day of trial, the defendant moved for a directed finding dismissing the property damage claim, for the first time informing the trial court (and the plaintiff) of the existence of the first action and the judgment obtained therein. The trial court denied the motion. The jury awarded the plaintiff damages that included a set-off of the amount received by the insurance company. The defendant appealed, arguing that there should have been no award at all under the doctrine of claim preclusion. *Id*. at 546.

¶ 53 The reviewing court affirmed the verdict, stating that it would be inequitable to allow the defendant to benefit from his silence and delay in asserting his defense. *Id*. at 548. The court

noted that section 48 of the Civil Practice Act[2] gave a defendant the right to seek dismissal of a suit on the grounds that (1) another action was currently pending involving the same parties and the same cause of action or (2) the current action was barred by a prior judgment. However, such a motion had to be brought within the time for answering the complaint. *Id.* at 547. Because the defendant knew about the judgment entered in the first case but did not mention it until more than four years after the second suit was filed, he had forfeited the ability to raise claim preclusion as a defense in the second suit. *Id.* ("If the defendant fails to make such a timely assertion [of the defense], he waives the right to make such a claim and in effect acquiesces in the splitting.").

¶ 54 Just as in *Thorlief Larsen* and *Thornton*, the defendants here had the obligation to raise their potential defense of claim preclusion promptly after the two suits were filed if they wished to preserve it. Our supreme court has held that, once a second proceeding putatively involving the same cause of action is filed, a defendant has grounds to object on the basis of claim-splitting. See *Rein*, 172 Ill. 2d at 342; see also 735 ILCS 5/2-619(a)(3) (West 2016). When years go by without a defendant raising that defense, the defendant has acquiesced in litigating

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[2] Section 48 of the Civil Practice Act was the forerunner of section 2-619(a) of the Code of Civil Procedure (Code), which likewise states:

> "Defendant may, within the time for pleading, file a motion for dismissal of the action or for other appropriate relief upon any of the following grounds ***:
>
> * * *
>
> (3) That there is another action pending between the same parties for the same cause.
>
> (4) That the cause of action is barred by a prior judgment." 735 ILCS 5/2-619(a) (West 2016).

the second action. See *Curtis v. Lofy*, 394 Ill. App. 3d 170, 188 (2009) (defendant acquiesced to claim-splitting where he litigated the second case for three and a half years without raising claim preclusion as an affirmative defense); *Piagentini v. Ford Motor Co.*, 387 Ill. App. 3d 887, 898 (2009) (where defendant answered the complaint, pled different affirmative defenses, answered discovery, retained experts, and otherwise defended second lawsuit for three and a half years before seeking summary judgment on the basis of claim preclusion, it had acquiesced to the claim-splitting); *Thorlief Larsen*, 177 Ill. App. 3d at 663 (acquiescence found after two years).

¶ 55 The defendants argue that the record shows that they did not acquiesce to claim-splitting. These arguments either misstate the record or misapprehend the applicable law. For instance, the defendants contend that they "challenged venue early on in the case," but the record is clear that they did so only on the basis that the claims should be arbitrated, and not on the basis of Caulfield's claim-splitting. They also assert that they "objected" to the claim-splitting by mentioning the existence of the Cook County Suit and labeling the claim-splitting as "harassment" in their motion to dismiss to arbitration (and in an allegation in Packer's counterclaim). Similarly, they argue that Caulfield "conceded" that he had engaged in claim-splitting through statements he made in pleadings and during court proceedings.

¶ 56 But the question is not whether Caulfield engaged in claim-splitting. Nor is the characterization of the claim-splitting as "harassment" dispositive. Instead, the sole question is whether the defendants promptly raised the claim-splitting as a basis for either consolidating the two lawsuits or dismissing one of them. The record is clear that they did not. Instead, the record suggests that the defendants made the choice to proceed with both actions, hoping for a favorable outcome in one that they could use in the other. Under these circumstances, they acquiesced in the splitting of Caulfield's claims and could not belatedly assert that as grounds for the dismissal

of the Du Page County Suit. We find no error in the trial court's denial of the defendants' motion for summary judgment.

¶ 57 B. Bench Trial: Shareholder Oppression

¶ 58 We turn to the defendants' challenges to the bench trial judgment. The defendants first argue that the trial court erred in entering judgment for Caulfield on the shareholder oppression claim. Generally speaking, we will not reverse the trial court's judgment in a bench trial unless it is against the manifest weight of the evidence; that is, unless "the opposite conclusion is clearly evident or the finding is arbitrary, unreasonable, or not based in evidence." *Samour, Inc. v. Board of Election Commissioners of the City of Chicago*, 224 Ill. 2d 530, 544 (2007). Here, however, the defendants argue that the trial court committed a legal error, because a finding of shareholder oppression must be based on actions that harm a person's ability to exercise shareholder rights, and they argue that the evidence showed only actions taken against Caulfield in his capacity as an employee. To the extent that this is a legal argument, we review the argument *de novo*. *People v. Brown*, 225 Ill. 2d 188, 198 (2007).

¶ 59 Caulfield asserts that the defendants' argument rests on foreign case law that is contrary to Illinois law. He is correct that this portion of the defendants' brief does not refer to any Illinois case law. We confine our analysis of this issue to Illinois law.

¶ 60 Under section 12.56(a)(3) of the Business Corporations Act, shareholder oppression occurs where "those in control of the corporation have acted *** 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*." (Emphasis added.) 805 ILCS 5/12.56(a)(3) (West 2010). Thus, if the defendants acted oppressively against Caulfield in his capacity as an officer (the president) of PEI, he could assert a claim of shareholder oppression. Here, the trial

court found that the defendants sought to hinder Caulfield from being able to carry out his duties as president by, among other things, barring him from the corporate offices, changing his title, and pressuring him in meetings to dismiss the Shareholder Suit. Further, as the trial court noted, the listing of shareholders entitled to vote in May 2012 on whether to assign all of the defendants' assets for the benefit of creditors did not include Caulfield's and Koehler's names, suggesting that the two men somehow had been divested of either their shares or their voting rights although no such divestment was documented in the corporate records. All of this evidence supports the trial court's finding that the defendants acted oppressively toward Caulfield in both his roles of shareholder and officer. We therefore affirm the trial court's finding of shareholder oppression.

¶ 61 C. Bench Trial: Wage Act

¶ 62 The defendants next attack the trial court's finding that the Wage Act was violated by Packer individually as well as by the corporate defendants. They note that, generally speaking, corporate officers such as Packer are immune from liability for corporate wrongdoing, and they argue that the trial court's inclusion of Packer in its finding on this claim was improper.

¶ 63 Under the Wage Act, liability for nonpayment of wages applies not only to the employer itself but also extends to "any officers of a corporation *** who knowingly permit" the nonpayment. 820 ILCS 115/13 (West 2010). However, that "knowing permission" can only exist when it is possible for the employer to pay wages, and thus an officer cannot be personally liable under the Wage Act if the employer was unable to pay wages due to lack of funds. *Ashley v. IM Steel, Inc.*, 406 Ill. App. 3d 222, 242 (2010) ("a corporation's inability to pay employees eliminates any possibility that the employer acted willfully when failing to compensate employees, thereby negating liability under the Act"). The defendants argue that, on the issues

of both Packer's involvement and the company's ability to pay Caulfield, the trial court's findings were not supported by the evidence. Because these arguments relate to the weight of the evidence presented, we apply the manifest weight of the evidence standard of review. See *In re Estate of Bennoon*, 2014 IL App (1st) 122224, ¶ 72 (the trial court "is in a superior position to observe the demeanor of the witnesses while testifying, to judge their credibility, and to determine the weight their testimony and the other trial evidence should receive," and thus the reviewing court will not reverse unless the trial court's factual findings are against the manifest weight of the evidence).

¶ 64 As to the first point, the defendants argue that Packer himself was not directly responsible for paying the employees of PEI and that he was neither aware of any nonpayment of Caulfield's compensation nor able to effect (or prevent) such compensation. In support, they cite the testimony of Packer and Sartain that Sartain was the officer responsible for administering employee compensation. Caulfield responds by pointing to evidence in the record that Packer himself took actions that prevented Caulfield from receiving the compensation owed to him. For instance, after Caulfield sued PEI for breach of contract (*i.e.*, failure to pay the compensation due under the Agreement) and received a judgment against PEI, Packer directed the assignment of corporate assets for the benefit of creditors in an effort to prevent Caulfield from collecting on that judgment. Further, the trial court found Packer's testimony not credible. Thus, the trial court's conclusion that Packer knowingly permitted the nonpayment of Caulfield's compensation is not against the manifest weight of the evidence.

¶ 65 We likewise find no merit to the defendants' second argument about Packer's purported inability to arrange for the payment of Caulfield's compensation. The defendants argue that the evidence showed that PEI and TPG were in "financial difficulties" as early as 2008, with raises

and bonuses being suspended in 2009 and the companies laying off all employees and going out of business in January 2012. Caulfield counters that whether PEI was in "financial difficulties" is not legally relevant; the issue is whether Packer had the ability to arrange for PEI to pay Caulfield's final compensation when it became due. See *Elsener v. Brown*, 2013 IL App (2d) 120209, ¶ 66. Under the Act, that compensation was due at the next scheduled pay period after Caulfield's termination on April 1, 2011. 820 ILCS 115/5 (West 2010) (an employee's final compensation is due in full no later than "the next regularly scheduled payday for such employee"); see also *Andrews v. Kowa Printing Corporation*, 217 Ill. 2d 101, 112 (2005). Caulfield presented substantial evidence that PEI remained a going concern and had assets from which it could have paid him at any point between his termination in April 2011 and the assignment for the benefit of creditors in May 2012. This evidence amply supports the trial court's determination that PEI had the ability to pay Caulfield the compensation owed to him. See *Elsener*, 2013 IL App (2d) 120209, ¶ 76 (where employer continued to pay other business expenses after plaintiff's termination, defendant could not evade individual liability on the ground that the employer was in financial difficulties). We therefore affirm the trial court's finding that Packer was personally liable for PEI's violations of the Wage Act.

¶ 66 D. Bench Trial: Whistleblower Act

¶ 67 The defendants mount a number of attacks on the judgment on the Whistleblower Act claim. First, they argue that Caulfield was not the one who discovered the alleged wrongdoing; the evidence showed that Koehler uncovered the diversion of funds to New Vermillion and told Caulfield. But the defendants have not provided us with any legal authority that being the first to uncover wrongdoing is a requirement for Whistleblower Act claim, and so we disregard this argument. See Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016); *People ex rel. Illinois Department of*

Labor v. E.R.H. Enterprises, Inc., 2013 IL 115106, ¶ 56 ("[A] reviewing court is not simply a depository into which a party may dump the burden of argument and research. *** A court of review is entitled to have the issues clearly defined and to be cited pertinent authority. A point not *** supported by citation to relevant authority fails to satisfy the requirements of Supreme Court Rule 341(h)(7) [and] *** results in forfeiture.").

¶ 68 The defendants next assert that a plaintiff under the Whistleblower Act must show that his or her termination violated a clear mandate of public policy because the wrongdoing reported by the plaintiff affected the health, safety, or welfare of Illinois residents. Caulfield cites his filing of the Shareholder Suit seeking to uphold the rights of other shareholders as the basis for his claim. The defendants argue that this was insufficient to meet the public policy requirement because that suit involved only "an intra-company dispute." But the defendants misstate the plain language of the statute.

¶ 69 Section 15(a) of the Whistleblower Act prohibits an employer from retaliating against an employee "who discloses information in a court *** proceeding, where the employee has reasonable cause to believe that the information discloses a violation of a State or federal law, rule, or regulation." 740 ILCS 174/15(a) (West 2010). The defendants assert that the complaint in the Shareholder Suit filed by Caulfield did not allege any such violations and thus it cannot qualify as a protected disclosure under the Whistleblower Act. However, their assertion is incorrect. The Shareholder Suit alleges that, in retaliation for pushing for PEI and TPG to cease diverting funds to New Vermillion, Koehler (the CEO and a shareholder) was prevented from (1) accessing the companies' financial information and (2) attending various shareholder meetings at which Packer asked the board to fire Koehler and/or the companies' financials were discussed. The complaint also alleges that the defendants took steps to prevent Koehler and Caulfield from

having access to financial records regarding the New Vermillion expenses. Although these allegations do not cite the Business Corporation Act, they essentially charge the defendants with violating section 12.56(a) of that statute, which prohibits those "in control of the corporation" from acting oppressively toward officers and shareholders of the corporation. 805 ILCS 5/12.56(a) (West 2010). The complaint also alleged corporate waste by the defendants (a separate violation of section 12.56(a)), improper self-dealing, and forgery, among other illegal actions. Thus, the Shareholder Suit sufficiently alleges the violation of state laws to qualify as a protected disclosure.

¶ 70 The defendants next contend that the Shareholder Suit cannot serve as Caulfield's protected disclosure under the Whistleblower Act because Caulfield and Koehler were later dismissed from that suit. The defendants claim that Caulfield and Koehler were "found to have improperly acted on conflicts of interest." That is simply untrue. Rather, the appellate court found that, once the two men had obtained judgments in their personal suits against the defendants, their individual interests in recovering the defendants' corporate assets outweighed their more generalized and derivative interests as shareholders, creating a potential conflict of interest requiring that they be dismissed as plaintiffs and that other shareholders be permitted to intervene. *Shareholder Suit*, 2016 IL App (1st) 151558, ¶ 54. Further, their dismissal from the Shareholder Suit had not yet occurred in April 2011, when the defendants retaliated against Caulfield for filing that suit by firing him. Thus, Caulfield's later dismissal from the suit is no bar to a claim under the Whistleblower Act.

¶ 71 The defendants' final contention regarding this count is that Packer himself cannot be liable under the Whistleblower Act because it applies only to "employers," and Caulfield's employer was PEI, not Packer individually. Caulfield responds that the statute defines

"employer" to include anyone acting within the scope of his authority in dealing with employees, and that Packer fits this definition: he had control over PEI and TPG as chairman of the board and member of the executive committee, and he was acting within the scope of that authority and control when he directed the retaliatory actions against Caulfield. The defendants argue that Caulfield should be estopped from asserting that Packer was acting within his authority because Caulfield took a contrary stance at trial. However, the pages of the record they cite do not support this contention. As the defendants have not carried any of their arguments, we affirm the judgment for Caulfield on his claim under the Whistleblower Act.

¶ 72 E. Bench Trial: Damages

¶ 73 The defendants next challenge the trial court's award of damages on the shareholder oppression and Whistleblower Act claims ($250,000 on each claim) and on the claim of tortious interference with contract ($429,416, the amount of the Cook County breach of contract judgment that remained unpaid). The plaintiff must produce sufficient evidence to justify the damages awarded, but "[d]amages need not be proven with mathematical certainty, and a plaintiff need only present evidence that allows the court to compute damages within a fair degree of probability." *Pyramid Development, LLC v. Dukane Precast, Inc.*, 2014 IL App (2d) 131131, ¶ 37. "The issue of damages is a question of fact, and we will not reverse the trial court's determination unless it was against the manifest weight of the evidence." *Id*.

¶ 74 As to the shareholder oppression damage award, the defendants argue that $250,000 is simply a nice round number that the trial court plucked out of the air and that it bore no relation to any harm sustained by Caulfield. At trial Caulfield requested twice that—$500,000—arguing that this amount would appropriately compensate him for the defendants' mistreatment of him as an officer and shareholder. Although the appropriate compensation for this type of claim is

inherently somewhat subjective, the trial court's award of $250,000 is a reasonable approximation of the diminished monetary value of Caulfield's former position as the president of PEI (at an annual salary of $500,000) and one of a limited number of shareholders in a formerly-lucrative corporation. Accordingly, it is not against the manifest weight of the evidence. See *Samour,* 224 Ill. 2d at 544 (against the manifest weight of the evidence means that "the opposite conclusion is clearly evident" or the trial court's decision is arbitrary or unreasonable).

¶ 75 The defendants make the same argument with respect to the damage award for the Whistleblower Act claim—that the $250,000 awarded by the trial court was an arbitrary figure. We again reject this argument, as the trial court's award was reasonable in light of Caulfield's previous level of compensation and the defendants' retaliation against him for filing the Shareholder Suit. The defendants also argue that the monetary remedies available under the Whistleblower Act include only back pay, interest, and attorney fees. This argument lacks merit: as the defendants concede, the statute also expressly permits the recovery of "all relief necessary to make the employee whole, including but not limited to *** compensation for any damages sustained as a result of the violation." 740 ILCS 174/30 (West 2016). Accordingly, the defendants have not established that the trial court's award of damages on this claim was against the manifest weight of the evidence.

¶ 76 The defendants next challenge the damages awarded on the claim for tortious interference with contract. Those damages were $429,416 (the amount of the unpaid verdict on the breach of contract claim in the Cook County Suit), but the trial court specified that the damages it was awarding on this count overlapped with and were in the alternative to the damages for the Wage Act claim and that only a single recovery was permitted for both claims.

¶ 77 The defendants argue that the tortious interference award improperly relies upon speculation that Caulfield would have continued to receive pay after May 2012 despite the fact that TPG and PEI had ceased doing business, laid off all their employees, and transferred their assets to a creditor. This argument misstates the record. The trial court made clear that the damages on this claim were based on the amount remaining unpaid of the judgment on the breach of contract claim in the Cook County Suit (a judgment that was *res judicata*). This was a proper basis for the award. See *Koehler*, 2016 IL App (1st) 142767, ¶ 64 (damages recoverable for tortious interference with contract include lost pecuniary benefits of the contract, actual reputational harm, and consequential losses caused by the interference). Finally, given that the damages on this claim are in the alternative to the damages awarded on the Wage Act claim (which the defendants do not challenge on appeal), there would be no practical effect even if we were to reverse the tortious interference damage award. Accordingly, the defendants' argument on this point is moot. See *In re Marriage of Eckersall*, 2015 IL 117922, ¶ 9.

¶ 78 In sum, none of the damages awarded by the trial court in this case were against the manifest weight of the evidence.

¶ 79 F. Bench Trial: Equity of the Judgment

¶ 80 Raising a new argument for the first time on appeal, the defendants contend that allowing the trial court's judgment to stand would be inequitable because the judgment rewards Caulfield at the expense of other shareholders. This argument is forfeited, however, as it was not raised below. *Hytel Group, Inc. v. Butler*, 405 Ill. App. 3d 113, 127 (2010). Further, the defendants cite no legal authority for their main argument—a second basis for forfeiture. *E.R.H. Enterprises*, 2013 IL 115106, ¶ 56. As the argument is forfeited, we need not address it.

¶ 81 G. Dismissal of Packer's Counterclaims

¶ 82 The last challenge raised by the defendants is the trial court's dismissal with prejudice of Packer's second amended counterclaims. Those counterclaims included breach of fiduciary duty, civil conspiracy, and intentional infliction of emotional distress. The factual basis alleged for the claims included: Caulfield's March 2010 letter to the board (which Packer characterized as attempting to change the management of TPG and PEI); Caulfield's contacting various regulatory agencies regarding potential violations by TPG and PEI, which led to subpoenas being issued; Caulfield's filing of the Shareholder Suit; and Caulfield's injury to employee morale and the customer base of TPG and PEI by reporting "falsehoods" (such as the allegations of the Shareholder Suit). Packer alleged that the New Vermillion project (and the undisclosed support provided by TPG and PEI) was a reasonable business venture and that Caulfield took the listed actions maliciously and without cause. The trial court dismissed all of the counterclaims either under section 2-615 of the Code of Civil Procedure (Code) on the ground that they failed to state a claim or under section 2-619 of the Code because the counterclaims were defeated by some affirmative matter. See 735 ILCS 5/2-615, 2-619 (West 2012). The defendants argue that the dismissal was error. We review dismissals under sections 2-615 and 2-619 *de novo*. *Wallace v. Smyth*, 203 Ill. 2d 441, 447 (2002).

¶ 83 1. Breach of Fiduciary Duty

¶ 84 Caulfield argues that the trial court correctly dismissed the counterclaim for breach of fiduciary duty under section 2-615 for three reasons: Packer lacked standing to bring the claim, Packer's allegations failed to adequately plead any breach of Caulfield's fiduciary duty, and Packer did not adequately plead individual damages. We find the second argument persuasive and hence do not address the others.

A motion to dismiss brought under section 2-615 of the Code attacks the sufficiency of the complaint on the basis that, even assuming the allegations of the complaint to be true, the complaint does not state a cause of action that would entitle the plaintiff to relief. 735 ILCS 5/2-615 (West 2014); *Kanerva v. Weems*, 2014 IL 115811, ¶ 33. The defendants argue that Packer pled facts that would, if proven, show that Caulfield breached his fiduciary duty. For the purposes of our analysis here, we accept the defendants' assertion that Caulfield, as a shareholder in a closely-held corporation, owed a fiduciary duty encompassing duties of loyalty, care, good faith and honest dealing toward the other shareholders, including Packer.

¶ 85 The second amended countercomplaint alleged that Caulfield: filed the Shareholder Suit "for the purposes of takeover, self-enrichment and personal gain"; falsely testified in court cases in which he was called as an expert witness (specifically, regarding his own qualifications); falsely asserted in the March 16, 2010, letter to the board about New Vermillion that he (Caulfield) was protected by the Whistleblower Act; failed to expand the business and instead incurred business losses; and in unspecified ways "did not follow the predicates of" PEI and its governing bodies, and "acted in his own personal interests" to Packer's personal detriment. None of these allegations, if taken as true, would show that Caulfield violated any fiduciary duty. Filing a derivative action against a corporation's management on behalf of all shareholders is not a breach of the fiduciary duty owed to those same shareholders, even when the derivative action is alleged to have been filed "maliciously" or for "personal gain." Nor have the defendants shown how Caulfield's other purported deficiencies and misdeeds—inflation of his own qualifications as an expert witness, incorrect assertion of whistleblower status, poor business performance, or failure to follow corporate "predicates"—would, if proven, amount to a breach of Caulfield's fiduciary duty. None of the legal authority cited by the defendants involves

similar allegations being deemed sufficient to state a claim for breach of fiduciary duty. Accordingly, the defendants have failed to show that this claim was wrongly dismissed.

¶ 86 2. Civil Conspiracy

¶ 87 We next consider the viability of Packer's counterclaim for civil conspiracy. Caulfield's motion to dismiss this counterclaim argued that (1) it failed to state a cause of action under section 2-615, and (2) under section 2-619 the claim was barred by a ruling in the Shareholder Suit. The defendants respond that Packer's allegations were sufficient and that the ruling cited by Caulfield pertained only to whether items sought in discovery were protected by attorney-client privilege. We review both of these issues *de novo*. *Wallace*, 203 Ill. 2d at 447. As we agree with Caulfield's first argument, we do not reach the second.

¶ 88 "The elements of a civil conspiracy are: (1) a combination of two or more persons, (2) for the purpose of accomplishing by some concerted action either an unlawful purpose or a lawful purpose by unlawful means, (3) in the furtherance of which one of the conspirators committed an overt tortious or unlawful act." *Fritz v. Johnston*, 209 Ill. 2d 302, 317 (2004). Packer's second amended counterclaim alleged that Caulfield conspired with his attorney and with Koehler to breach their fiduciary duties by "engaging in a scheme utilizing confidential and proprietary [PEI] information for improper purposes, scheming to change the management of [PEI and TPG] to promote their own self-interests, and making false representations" to the court and to other employees. Assuming these allegations to be true (see *Kanerva*, 2014 IL 115811, ¶ 33), they adequately support the first two elements of a civil conspiracy claim.

¶ 89 However, the countercomplaint does not sufficiently plead the existence of the third element: that Caulfield (or one of his co-conspirators) "committed an overt tortious or unlawful act" in furtherance of the alleged conspiracy. The counterclaim alleges only that Caulfield,

Koehler, and their agents intentionally committed the overt acts alleged in other paragraphs of the countercomplaint, specifically: sending the March 16, 2010, letter to the board accusing Packer of diverting corporate assets to New Vermillion without proper authorization and demanding an investigation; threatening Packer's attorneys with inclusion in a derivative lawsuit, thereby causing the attorneys to cease representing Packer; causing regulatory agencies to begin investigations of PEI and TPG and an affiliated foundation; and filing the Shareholder Suit. None of these actions are inherently tortious or unlawful. Further, the defendants cite no legal authority for why the alleged acts should be viewed as tortious or unlawful in the circumstances of this case. As we have noted elsewhere, the failure to cite pertinent legal authority to support an argument results in the forfeiture of that argument. *E.R.H. Enterprises*, 2013 IL 115106, ¶ 56. Accordingly, we affirm the dismissal of this counterclaim for failure to state a claim.

¶ 90 3. Intentional Infliction of Emotional Distress

¶ 91 Packer's final counterclaim was for intentional infliction of emotional distress. Caulfield asserts that the trial court correctly dismissed this counterclaim both because it failed to state a claim and because it was barred by affirmative matter. We begin by considering whether the allegations adequately stated a cause of action.

¶ 92 Intentional infliction of emotional distress has three elements: (1) "truly extreme and outrageous conduct" (2) committed either with the intent or the knowledge that it was likely to cause severe emotional distress (3) that in fact did cause severe emotional distress. *McGrath v. Fahey*, 126 Ill 2d 78, 86 (1988). Here, Packer failed to allege actions by Caulfield that meet the standard of "truly extreme and outrageous conduct."

¶ 93 Packer's counterclaim itself does not specifically identify the conduct alleged to be outrageous. Instead, it simply alludes to all of the preceding allegations of the countercomplaint.

(In addition, one allegation charges that Caulfield filed "multiple frivolous lawsuits in multiple venues" against Packer and made false and misleading statements about the Shareholder Suit to corporate clients and employees.) On appeal, the defendants identify the following conduct by Caulfield as extreme and outrageous: attempting to remove Packer from the board of the company that bore his name by filing the Shareholder Suit in Cook County despite the fact that corporate headquarters were in Du Page County. The defendants also allege that Caulfield knew that the allegations in that suit were false.

¶ 94 To meet the standard of extreme and outrageous conduct, a plaintiff must allege conduct that is "so extreme as to go beyond all possible bounds of decency, and to be regarded as intolerable in a civilized community." *Kolegas v. Heftel Broadcasting Corp.*, 154 Ill. 2d 1, 21 (1992). The conduct alleged here, assessed objectively (see *Bianchi v. McQueen*, 2016 IL App (2d) 150646, ¶ 83), does not meet this standard.

¶ 95 Caulfield argues that the filing of a lawsuit is merely the exercise of a legal right possessed by all citizens, and thus it can *never* be considered extreme and outrageous. He relies on *Schiller v. Mitchell*, 357 Ill. App. 3d 435, 450 (2005) (defendants' actions of making reports about neighbors to the police and other officials, and complaining to the homeowners' association, did not constitute extreme and outrageous conduct; "[a] person will not be liable where he has done nothing more than demand legal rights in a permissible way"). We would not go quite this far. We note that, in *Schiller* (unlike here), there was no allegation that the defendants' complaints were false or baseless. *Id.* at 449. And this court has held that deliberately initiating a false legal proceeding that amounts to malicious prosecution may support a claim of intentional infliction of emotional distress. See *Bianchi v. McQueen*, 2016 IL App (2d) 150646, ¶ 84 (allegations "that defendants fabricated and manufactured evidence and

concealed exculpatory evidence for the purpose of falsely and maliciously detaining, arresting, and charging plaintiffs, knowing that such charges lacked probable cause *** sufficiently pleaded the first element of intentional infliction of emotional distress").

¶ 96 Here, however, Packer did not assert the tort of malicious prosecution, and he has not pled the elements of such a claim. See *Beaman v. Freesmeyer*, 2019 IL 122654, ¶ 26. In fact, the defendants cite only a single legal authority to support their contention that the initiation of the allegedly frivolous Shareholder Suit was, in itself, extreme and outrageous conduct that went "beyond all possible bounds of decency": *Barthelmes v. Martineau*, 1999 WL 1319194, an unreported decision from a Massachusetts lower court, the holding of which was subsequently reversed. See *Barthelmes v. Martineau*, 2000 WL 1269666 at *6 (Mass. Super. May 22, 2000) ("as a matter of law[,] the conduct alleged [the making of a false claim of sexual harassment] does not rise to the level *** of outrageousness").

¶ 97 The defendants also argue that conduct that is not extreme and outrageous in itself may rise to that level if it is undertaken in retaliation for legitimate whistleblowing activity. See *Johnson v. Federal Reserve Bank of Chicago*, 299 Ill. App. 3d 427, 430 (1990). But the allegations of Packer's claim do not even mention the concept of retaliation by Caulfield against Packer. Moreover, *Johnson* is distinguishable because it involved an employer's actions against an employee, and Illinois courts have held that the abuse of power is a relevant factor in assessing whether conduct is extreme and outrageous. See *McGrath*, 126 Ill. 2d at 86-87 (the extreme and outrageous nature of the conduct may arise from the defendant's abuse of a position of actual or apparent authority over the plaintiff or the power to affect the plaintiff's interests); *Kolegas*, 154 Ill. 2d at 21 (same). "In circumstances involving the abuse of a position of power, the extreme and outrageous nature of conduct may arise not so much from what is done as from

the defendant's actual or apparent ability to damage the plaintiff's interests by his exercise of power or authority." *Welsh v. Commonwealth Edison Co.*, 306 Ill. App. 3d 148, 154 (1999). Here, that factor is not present—a crucial difference. (Our own research has disclosed that an employment relationship was present in the vast majority of cases citing *Johnson* for the proposition that the allegation of a retaliatory motive transformed non-actionable conduct into extreme and outrageous conduct. Packer was not employed by Caulfield.) Thus, Packer did not adequately plead the element of extreme and outrageous conduct, and the counterclaim for intentional infliction of emotional distress was properly dismissed for failure to state a claim.

¶ 98 III. CONCLUSION

¶ 99 For the reasons stated, the judgment of the circuit court of Du Page County is affirmed.

¶ 100 Affirmed.