NO. COA09-1494

NORTH CAROLINA COURT OF APPEALS

Filed: 7 September 2010

GRAYDON [L.] STEPHENSON,
LAURA [Y.] STEPHENSON, and
ACCESS ENTERPRISES, INC.,
Plaintiffs,

v. Johnston County
No. 08 CVS 2451

TIMOTHY [R.] LANGDON,
RENEE K. LANGDON, and
TRL ENTERPRISES, INC.,
Defendants.

Appeal by Plaintiffs from order entered 22 September 2009 by Judge Thomas H. Lock in Johnston County Superior Court. Heard in the Court of Appeals 14 April 2010.

McDaniel & Anderson, L.L.P., by L. Bruce McDaniel, for Plaintiffs-Appellants.

Schulz Stephenson Law, by Bradley N. Schulz, for Defendants-Appellees.

STEPHENS, Judge.

I. Procedural History

On 2 July 2008, Graydon L. Stephenson, Laura Y. Stephenson, and Access Enterprises, Inc., a North Carolina corporation owned by Graydon and Laura Stephenson (collectively, "the Stephensons"), filed a complaint in Johnston County Superior Court against Timothy R. Langdon, Renee K. Langdon, and TRL Enterprises, Inc., a corporation formed by Timothy Langdon that has been inactive for

approximately 10 years (collectively, "the Langdons"). In the complaint, the Stephensons alleged misappropriation of trade secrets, conversion, breach of contract, fraud, constructive fraud, and unfair and deceptive trade practices in connection with a partnership, formed allegedly between the Stephensons and the Langdons, to run summer camps under the name "Camp Flintlock."

Before the Stephensons filed their complaint, Camp Flintlock, Inc., a North Carolina corporation owned by Timothy Langdon, filed a complaint in Johnston County Superior Court against the Stephensons (case number 08 CVS 916) ("the Camp Flintlock lawsuit"), alleging misappropriation of a business name, misappropriation of trade secrets, conversion, fraud, constructive fraud, and unfair and deceptive trade practices in connection with a partnership formed allegedly between Camp Flintlock, Inc. and the Stephensons to run summer camps under the name "Camp Flintlock." On 12 March 2008, the trial court entered a temporary restraining order prohibiting the Stephensons from, *inter alia*, conducting any business activity under the name "Camp Flintlock," using customer lists and databases owned by Camp Flintlock, Inc., and operating a website under the "campfintlock.com"[1] domain name. On 7 April 2008, the trial court granted Camp Flintlock, Inc. a preliminary injunction. Judge Kenneth C. Titus "specifically" found that the name "Camp Flintlock" belongs to Camp Flintlock, Inc., and that the Stephensons' "use of the Camp Flintlock domain or the use of the

[1] The web address "www.campfintlock.com" used by the Stephensons is a "knock-off" of the web address "www.campflintlock.com" used by Camp Flintlock, Inc.

words 'Camp Flintlock' in any way, form or fashion shall continue to cause irreparable harm" to Camp Flintlock, Inc. Judge Titus thus restrained and enjoined the Stephensons from, *inter alia*,

> any further business activity utilizing the Camp Flintlock name or the campflintlock.com domain, from contacting anyone at all using the Camp Flintlock name, from utilizing the Camp Flintlock name in any way relating to marketing, advertising, etc., [and] from using the Camp Flintlock (campfintlock.com or campflintlock.com) name on their on-line reservation system . . . .

The Stephensons moved for leave to file a third-party complaint in the Camp Flintlock lawsuit against Timothy and Renee Langdon in their individual capacities and against TRL Enterprises, Inc. The Langdons filed a response opposing the Stephensons' motion because the trial court "has determined that [] Camp Flintlock, Inc., is the owner of the Camp Flintlock name, and [the Stephensons] have been prohibited from continuing to use this name." Furthermore, the Langdons asserted that they were not necessary parties to the action since the real party in interest was Camp Flintlock, Inc., and that the Stephensons had asserted claims against Camp Flintlock, Inc. by way of counterclaim. On 29 August 2008, the Stephensons' motion to file a third-party complaint was denied by Judge E. Lynn Johnson, who

> specifically note[d] that in the Preliminary Injunction Order, Judge Kenneth Titus specifically found that the use of the Camp Flintlock name belonged to Camp Flintlock, Inc.; the present assertion by the [Stephensons] that Mr. and Mrs. Langdon and TRL Enterprises, Inc. [are] the real parties in interest in this action is contrary to the findings of Judge Titus.

The Stephensons filed the present action on 2 July 2008. On or about 16 February 2009, the Stephensons moved to consolidate case number 08 CVS 916 and the present action.[2] On or about 24 July 2009, the Langdons moved for summary judgment in the present action. On 22 September 2009, the trial court entered an order granting summary judgment in favor of the Langdons in the present action. From the order granting the Langdons' summary judgment motion, the Stephensons appeal.

II. Factual Background

In the summer of 2002, Timothy and Renee Langdon, through Camp Flintlock, Inc., were operating a summer camp in Four Oaks, North Carolina under the name "Camp Flintlock." Plaintiff Graydon Stephenson ("Mr. Stephenson") approached Defendant Timothy Langdon ("Mr. Langdon") to discuss the possibility of the Stephensons operating camps in Maryland and Virginia similar to those being run by Camp Flintlock, Inc. Mr. Stephenson and Mr. Langdon entered into an oral agreement ("agreement") whereby the Stephensons would operate camps in Maryland and Virginia using the name "Camp Flintlock" and, in return, Camp Flintlock, Inc. would receive a commission on each camp registrant. The agreement was memorialized in Camp Flintlock, Inc.'s corporate minutes from 2 December 2002. According to the minutes, Camp Flintlock, Inc. would receive a commission of $15 per camper per week for the years 2003 through

[2] The record is silent as to whether that motion has been heard by the trial court.

2005, and $10 per camper per week for the years 2006 through 2008.[3] These corporate minutes further reflected that the camps "may utilize the Camp Flintlock name," while the Stephensons would be responsible for the leasing, advertising, promoting, and recruiting responsibilities for the camps in Maryland and Virginia.

The business relationship between the parties began to sour in late 2006 when Camp Flintlock, Inc. became aware that the Stephensons had failed to meet their federal and state tax obligations, had presented Camp Flintlock, Inc.'s liability insurance policy[4] without authorization to parties the Stephensons did business with in Maryland, and had diverted to their personal address on-line payments due Camp Flintlock, Inc. As a result of these actions, Mr. Langdon met with Mr. Stephenson in May of 2007 and orally terminated the agreement. Camp Flintlock, Inc. sent the Stephensons written notice of the termination on 9 August 2007.

After sending the written termination notice, Camp Flintlock, Inc. discovered that the Stephensons were continuing to send literature and other correspondence bearing the Camp Flintlock name and signed, "Your humble and Obedient Servant, Graydon L. Stephenson, Director[.]" Although the Stephensons changed the name of their camps to "Colonial Camp" in August 2007, the Stephensons indicated that their "[t]oll free number remains 866.Flintlock

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[3] The Stephensons were operating these camps in Maryland and Virginia through Access Enterprises, Inc. However, there were no corporate minutes or other documentation of Access Enterprises, Inc. evidencing this agreement.

[4] The insurance policy was valid only in North Carolina and listed Camp Flintlock, Inc. as the insured.

(354-6856)." This phone number rang at the Stephensons' home address in Dunn, North Carolina.

On 3 October 2007, Camp Flintlock, Inc. demanded that the Stephensons "cease and desist" using the name "Camp Flintlock." Despite this request, the Stephensons continued to represent themselves to individuals and organizations as Camp Flintlock, or as being affiliated with Camp Flintlock. The Stephensons' website also continued to display the 866.Flintlock phone number and contained downloadable forms which displayed the Camp Flintlock name. Additionally, the Stephensons issued a press release bearing the 866.Flintlock phone number. As a result of these actions, Camp Flintlock, Inc. filed the initial action in case number 08 CVS 916 which is currently pending in Johnston County.

III. Discussion

On appeal, the Stephensons argue that the trial court erred in granting summary judgment in favor of the Langdons. For the reasons stated below, we disagree with the Stephensons and affirm the trial court's order.

Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2007). "The trial court may not resolve issues of fact and must deny the motion if there is a genuine issue as to any material fact." *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385

(2007). Moreover, "all inferences of fact . . . must be drawn against the movant and in favor of the party opposing the motion." *Caldwell v. Deese*, 288 N.C. 375, 378, 218 S.E.2d 379, 381 (1975) (citation and quotation marks omitted).

A defendant can prove entitlement to summary judgment by "(1) proving that an essential element of the plaintiff's case is non-existent, or (2) showing through discovery that the plaintiff cannot produce evidence to support an essential element of his or her claim, or (3) showing that the plaintiff cannot surmount an affirmative defense." *Wilkins v. Safran,* 185 N.C. App. 668, 672, 649 S.E.2d 658, 661 (2007) (citation and quotation marks omitted). Once established, the burden then shifts to the nonmovant "to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a *prima facie* case at trial." *Id.* (citation and quotation marks omitted). The standard of review for summary judgment is *de novo*. *Builders Mut. Ins. Co. v. North Main Constr., Ltd.*, 361 N.C. 85, 88, 637 S.E.2d 528, 530 (2006).

A. Breach of Contract

The Stephensons first argue that the trial court erred in granting summary judgment in favor of the Langdons on the Stephensons' breach of contract claim. We disagree.

To establish a breach of contract, a plaintiff must prove the existence of a valid contract and that the defendant breached the terms of that contract. *Lake Mary Ltd. P'ship v. Johnston*, 145

N.C. App. 525, 536, 551 S.E.2d 546, 554 (2001). In order to prove the existence of a valid contract, the plaintiff must show that there was a meeting of the minds of the parties as to all essential terms of the agreement. *Chaisson v. Simpson,* 195 N.C. App. 463, 470, 673 S.E.2d 149, 156 (2009). Moreover, in order "[t]o assert a claim for breach of contract, [a] defendant must be either a party to the contract or a third-party beneficiary." *State ex rel. Long v. Interstate Casualty Ins. Co.*, 120 N.C. App. 743, 747, 464 S.E.2d 73, 75 (1995) (citation and quotation marks omitted).

The Stephensons argue that "[i]t was error to grant summary judgment against [them] when their overwhelming facts . . . showed a strong *prima facie* case of breach of contract and resulting damages." In support of this contention, the Stephensons cite to the ninth page of Mr. Stephenson's 15-page affidavit. This page contains no facts pertaining to the Stephensons' breach of contract claim. Moreover, the Stephensons fail to specifically set forth any of the "overwhelming facts" in their argument.

To the contrary, the record reveals that the Langdons were not parties to the agreement with the Stephensons and, thus, there was no meeting of the minds between the Stephensons and the Langdons. Evidence of a contract allegedly made between the Stephensons and the Langdons to conduct activities under the Camp Flintlock name consisted of the Annual Minutes of the Directors of Camp Flintlock, Inc. from the corporation's 2 December 2002 meeting of its board of directors. Details of the business arrangement between the Stephensons and Camp Flintlock, Inc., entitled "Business

Arrangement with Mr. & Mrs. Stephenson & Access Enterprises[,]" were added to the minutes book.[5] These documents are signed by Timothy R. Langdon as "Director, President" and Renee K. Langdon as "Secretary" of Camp Flintlock, Inc. The agreement states, *inter alia*, that the commissions for the use of the Camp Flintlock name are to be paid by the Stephensons and Access Enterprises to Camp Flintlock, Inc., not to Timothy or Renee Langdon personally or TRL Enterprises, Inc.

Furthermore, in his deposition, when Mr. Stephenson described the terms of the oral agreement he and Mr. Langdon entered into, he admitted that the agreement "was actually between Camp Flintlock -- between Mr. Langdon and his corporation and Access Enterprises, which I'm the owner of." Although Mr. Stephenson then stated that he "did not know at the time what corporate entity lied [sic] behind" the Langdons, his deposition testimony reveals that he knew his oral agreement was not with Mr. or Mrs. Langdon in their individual capacities. Morever, a letter sent on 9 August 2007 "To Graydon Stephenson/Access Enterprises" which terminated the agreement between the parties was signed "Timothy R. Langdon[,] President of Camp Flintlock."

Accordingly, the Stephensons have failed to establish that a valid contract existed between the Stephensons and the Langdons

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[5] Mr. Stephenson concedes in his affidavit that "the agreement was memorialized in annual directors minutes of the corporation named Camp Flintlock, Inc. dated December 2, 200[2] and December 1, 200[2], and specifically the 'Business Arrangement' paper attached to the former . . . ."

and, thus, the Stephensons have failed to show a *prima facie* case of breach of contract. We conclude the trial court did not err in granting summary judgment in favor of the Langdons on the Stephensons' breach of contract claim.

B. Misappropriation of Trade Secrets

The Stephensons next argue that the trial court erred in granting summary judgment in favor of the Langdons on the Stephensons' misappropriation of trade secrets claim. We again disagree.

North Carolina's Trade Secrets Protection Act ("TPSA") provides that the owner of a trade secret "shall have remedy by civil action for misappropriation" of the secret. N.C. Gen. Stat. § 66-153 (2007). Under the TPSA, a "trade secret" is

> business or technical information, including but not limited to a formula, pattern, program, device, compilation of information, method, technique, or process that:
>
> a. Derives independent actual or potential commercial value from not being generally known or readily ascertainable through independent development or reverse engineering by persons who can obtain economic value from its disclosure or use; and
>
> b. Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

N.C. Gen. Stat. § 66-152(3) (2007). In order to survive a motion for summary judgment, the nonmovant must allege sufficient facts to allow a reasonable fact finder to conclude that the information at

issue meets the two above-stated requirements of a trade secret under N.C. Gen. Stat. § 66-152(3). *Wilmington Star-News, Inc. v. New Hanover Reg'l Med. Ctr., Inc.*, 125 N.C. App. 174, 180, 480 S.E.2d 53, 56 (1997).

A *prima facie* case of misappropriation of trade secrets is established by the introduction of substantial evidence that the person against whom relief is sought both:

> (1) Knows or should have known of the trade secret; and
>
> (2) Has had a specific opportunity to acquire it for disclosure or use or has acquired, disclosed, or used it without the express or implied consent or authority of the owner.

N.C. Gen. Stat. § 66-155 (2007).

To maintain an action for misappropriation of a trade secret, "a plaintiff must identify a trade secret with sufficient particularity so as to enable a defendant to delineate that which he is accused of misappropriating and a court to determine whether misappropriation has or is threatened to occur." *Analog Devices, Inc. v. Michalski*, 157 N.C. App. 462, 468, 579 S.E.2d 449, 453 (2003). Thus, "a complaint that makes general allegations in sweeping and conclusory statements, without specifically identifying the trade secrets allegedly misappropriated, is 'insufficient to state a claim for misappropriation of trade secrets.'" *Washburn v. Yadkin Valley Bank & Trust,* 190 N.C. App. 315, 327, 660 S.E.2d 577, 585-86 (2008) (quoting *VisionAIR, Inc. v. James*, 167 N.C. App. 504, 511, 606 S.E.2d 359, 364 (2004)).

Moreover, "[s]ummary judgment should be granted upon the nonmovant's failure to identify that information which it claims to be a trade secret that was misappropriated." *Panos v. Timco Engine Ctr., Inc.*, __ N.C. App. __, __, 677 S.E.2d 868, 875 (2009).

The Stephensons' argument in support of their contentions on this issue is that they "under oath have shown a strong *prima facie* case of expropriation of trade secrets by [the Langdons]." The Stephensons again fail, however, to set forth any of the facts supporting their argument. Instead, the Stephensons cite Mr. Stephenson's affidavit to prove their *prima facie* case for misappropriation. The applicable section of the affidavit states:

> In connection with the operation of the camp business, I developed proprietary customer lists, data, and contract information, as well as client data and client contact computer programs. This proprietary information and phone numbers constitute "trade secrets" which were expropriated by Langdon and the Langdon Parties.

However, nowhere in the record do the Stephensons articulate what specific information is encompassed in these broadly defined categories. Thus, the identification of the trade secret or secrets allegedly misappropriated is "broad and vague,"[6] and the Stephensons have failed to identify the trade secret "with

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[6] *See Washburn*, 190 N.C. App. at 327, 660 S.E.2d at 586 (Defendant's identification of the trade secrets allegedly misappropriated by plaintiffs as defendant's "'business methods; clients, their specific requirements and needs; and other confidential information pertaining to [the defendant's] business'" was "broad and vague" and did not support a claim for misappropriation of trade secrets.).

sufficient particularity" so as to enable Defendants "to delineate that which [they are] accused of misappropriating and a court to determine whether misappropriation has or is threatened to occur." *Analog Devices,* 157 N.C. App. at 468, 579 S.E.2d at 453; *see Edgewater Servs., Inc. v. Epic Logistics, Inc.*, 2009 NCBC 20, *21 (2009) (Plaintiff's complaint alleging that defendants unlawfully acted together to misappropriate plaintiff's trade secrets, "in the form of 'formulae, patterns, programs, devices, compilations of information, methods, techniques and processes,'" failed to identify with sufficient particularity what trade secrets have been misappropriated in violation of the Act.). Furthermore, the Stephensons' allegation that "[D]efendants have misappropriated these trade secrets . . . and have utilized the same" is general and conclusory. *See Washburn*, 190 N.C. App. at 327, 660 S.E.2d at 586 ("[Defendant's] allegation that it 'believes [Plaintiffs] used its trade secrets' is general and conclusory.")

Moreover, neither the portion of Mr. Stephenson's affidavit referenced by the Stephensons nor any other evidence tends to show that the Stephensons made reasonable efforts under the circumstances to maintain the secrecy of any information which they alleged to be a trade secret. N.C. Gen. Stat. § 66-152(3). Mr. Stephenson's statement in his affidavit that "'trade secrets' . . . were expropriated by Langdon and the Langdon Parties" is an insufficient forecast of the evidence necessary to survive summary judgment on this cause of action.

Accordingly, as the Stephensons cannot identify the specific

information they argue constituted trade secrets and did not forecast any evidence tending to show that the Stephensons made reasonable efforts to maintain the secrecy of the allegedly misappropriated information, the trial court did not err in granting summary judgment for the Langdons on the Stephensons' misappropriation of trade secrets claim. The Stephensons' argument is overruled.

C. Partnership

The Stephensons next argue that the trial court erred in granting the Langdons' motion for summary judgment "relating to [the Stephensons'] partnership claims."

In their complaint, the Stephensons allege misappropriation of trade secrets, conversion, breach of contract, fraud, constructive fraud, and unfair and deceptive trade practices. The Stephensons fail to identify which claims constitute their "partnership claims." In their brief to this Court, the Stephensons argue,

> [w]ith a strong *prima facie* showing of facts by [the Stephensons], it was therefore error for the trial court to grant summary judgment for [the Langdons] depriving [the Stephensons] of their partnership rights to partnership properties, including especially the partnership name involved in this case.

Presumably, by this argument the Stephensons contend they made a "strong *prima facie* showing" that a partnership existed. We thus interpret the Stephensons' argument to be that because the Stephensons made a *prima facie* showing that a partnership existed between the Stephensons and the Langdons, the trial court erred in

granting summary judgment for the Langdons on the Stephensons' conversion, fraud, and constructive fraud claims.[7] We are not persuaded by the Stephensons' argument.

A partnership is defined as "an association of two or more persons to carry on as co-owners a business for profit." N.C. Gen. Stat. § 59-36 (2007). The tort of conversion is defined as the "unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of an owner's rights." *State ex rel. Pilard v. Berninger*, 154 N.C. App. 45, 57, 571 S.E.2d 836, 844 (2002) (citation and quotation marks omitted), *disc. review denied*, 356 N.C. 694, 579 S.E.2d 100 (2003).

We need not determine whether the Stephensons' forecast of evidence is sufficient to show that a partnership existed between the Stephensons and the Langdons because the existence of a partnership, in and of itself, is not sufficient to show that the Langdons wrongfully converted any property belonging to the Stephensons, including partnership proceeds. The Stephensons have failed to address in their brief what forecast of evidence

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[7] In their brief on appeal, the Stephensons directly address their misappropriation of trade secrets and breach of contract claims. Furthermore, the Stephensons' claim for unfair and deceptive trade practices was based wholly on their claim for misappropriation of trade secrets. The Stephensons do not address their conversion, fraud, and constructive fraud claims, which leads us to the presumption that the alleged "partnership claims" are subsumed within their conversion, fraud, and constructive fraud claims, particularly since, in their complaint and their brief on appeal, the Stephensons assert entitlement to "their share of partnership properties" allegedly converted and expropriated by the Langdons.

supported the essential elements necessary to show conversion: (1) ownership of the property in the Stephensons and (2) a wrongful conversion of the property by the Langdons. *Id.*

The tort of fraud is defined as "(1) [a] [f]alse representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party." *Ragsdale v. Kennedy*, 286 N.C. 130, 138, 209 S.E.2d 494, 500 (1974). Constructive fraud requires evidence of "a relation of trust and confidence . . . [which] led up to and surrounded the consummation of the transaction in which defendant is alleged to have taken advantage of his position of trust to the hurt of plaintiff." *Barger v. McCoy Hillard & Parks*, 346 N.C. 650, 666, 488 S.E.2d 215, 224 (1997) (citation and quotation marks omitted).

While the existence of a partnership may be sufficient evidence of the fiduciary relationship required to support a claim of constructive fraud, *see Marketplace Antique Mall, Inc. v. Lewis*, 163 N.C. App. 596, 600, 594 S.E.2d 121, 124-25 (evidence that plaintiff and defendant were equal partners in two antique furniture businesses was sufficient evidence that they were business partners and thus in a fiduciary relationship), *disc. review denied*, 358 N.C. 544, 599 S.E.2d 399 (2004), it is not sufficient, in and of itself, to show the remaining elements of the fraud claims. Furthermore, the Stephensons have failed to address what forecast of evidence sufficiently shows "(1) [a] [f]alse representation or concealment of a material fact, (2) reasonably

calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party[,]" *Ragsdale*, 286 N.C. at 138, 209 S.E.2d at 500, or "the transaction in which defendant is alleged to have taken advantage of his position of trust to the hurt of plaintiff." *Barger*, 346 N.C. at 666, 488 S.E.2d at 224 (citation and quotation marks omitted).

The Stephensons have failed to argue or otherwise address the forecast of evidence which supports their claims for conversion, fraud, and constructive fraud, and this Court will not construct the Stephensons' argument or comb the record to try to find support for their position any more than it has done already. *See Goodson v. P.H. Glatfelter Co.*, 171 N.C. App. 596, 606, 615 S.E.2d 350, 358 ("It is not the duty of this Court to supplement an appellant's brief with legal authority or arguments not contained therein."), *disc. review denied*, 360 N.C. 63, 623 S.E.2d 582 (2005). Accordingly, the Stephensons' argument is overruled.

D. Judicial Estoppel

Finally, the Stephensons contend that the trial court erred in granting summary judgment in favor of the Langdons because the Langdons were "judicially estopped to take inconsistent and prejudicial positions regarding a related case[.]"

Judicial estoppel forbids a party from asserting a legal position inconsistent with one taken earlier in the same or related litigation. *Medicare Rentals, Inc. v. Advanced Servs.*, 119 N.C.

App. 767, 769, 460 S.E.2d 361, 363, *disc. review denied*, 342 N.C. 415, 467 S.E.2d 700 (1995). Thus, to establish judicial estoppel, the Stephensons must show that the Langdons have maintained inconsistent positions.

The Stephensons argue in their brief as follows:

> [The Langdons] first tried to separate these two cases [case 08 CVS 916 and the present action] by taking the position in the earlier case that they were *completely separate* when they objected to [the Stephensons] bringing in the individual Langdons in the first and older case, and then subsequently when [the Stephensons] here filed motions to consolidate in both cases, [the Langdons] opposed that, *again taking the position* that they were two *completely separate* cases. Judicial estoppel clearly applies.

(Emphasis added).

This argument indicates that the Langdons have maintained the consistent, not *inconsistent*, position that case 08 CVS 916 and the present action are two "completely separate" cases. Moreover, the Langdons clarify in their brief that they have consistently maintained they should not be parties to either case because Camp Flintlock, Inc., and not the Langdons, is the real party in interest. Indeed, Camp Flintlock, Inc.'s response to the Stephensons' motion for leave to file a third-party complaint, and Camp Flintlock Inc.'s and the Langdons' response to the Stephensons' motion to consolidate case 08 CVS 916 and the present case, indicate that Camp Flintlock, Inc. and the Langdons maintained that Camp Flintlock, Inc., not the Langdons in their individual capacities, was the real party in interest. Likewise,

in the present action, the Langdons argue that Camp Flintlock, Inc., not the Langdons in their individual capacities, is the real party in interest. As these positions are entirely consistent, judicial estoppel is not applicable.

We note that Camp Flintlock, Inc.'s opposition to the Stephensons' motion to bring the Langdons into case 08 CVS 916 as additional party defendants, and Camp Flintlock Inc.'s and the Langdons' opposition to the Stephensons' motion to consolidate case 08 CVS 916 with the present case, are not included in the original record on appeal but, instead, are included in the Rule 11(c) Supplement to the record, filed by the Langdons. Although the Stephensons argue that the Langdons are trying to "confuse matters and prejudice the [Stephensons]" by filing the supplement, the above-described documents contained in the supplement are necessary to this Court's review of the Stephensons' judicial estoppel argument and, thus, should have been included in the original record on appeal. *See* N.C. R. App. P. 9 (It is the appellant's duty and responsibility to see that the record on appeal is in proper form and complete.)

For the reasons stated herein, the judgment of the trial court is

AFFIRMED.

Judges HUNTER and GEER concur.

Report per Rule 30(e).