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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-713

Filed: 18 December 2018

Polk County, No. 15 CVS 122

K. SCOTT FISCHER; VERONIKA M. FISCHER; BRIAN E. CARROLL; BRUCE W. BREITWEISER; BYANA, LLC; BOWDER, LLC, Plaintiffs,

v.

TINA FAGAN and MICHAEL FAGAN, Defendants.

Appeal by Plaintiffs from order entered 19 February 2018 by Judge Alan Z. Thornburg in Polk County Superior Court. Heard in the Court of Appeals 14 November 2018.

Bass, Dunklin, McCullough & Smith, PLLC, by Megan Sadler, for plaintiff-appellants.

Copeland Richards, PLLC, by Shawn A. Copeland, for defendants-appellees.

HUNTER, JR., ROBERT N., Judge.

K. Scott Fischer, Brian E. Carroll, Byana, LLC, and Bowder, LLC (collectively “Plaintiffs”) appeal an order entered in Polk County Superior Court denying their claims for relief against Tina Fagan and Michael Fagan (“Defendants”). We affirm in part and dismiss in part.

I. Factual and Procedural History

On 19 June 2015, Plaintiffs filed a complaint against Defendants alleging several claims for relief, including (1) abuse of process, (2) slander of title, (3) interference with contract, and (4) unfair and deceptive trade practices. In addition to their complaint, Plaintiffs filed a motion for a temporary restraining order and preliminary injunction to remove Defendants' *lis pendens* to prevent irreparable harm to Plaintiffs' business interests. Plaintiffs alleged Defendants maliciously filed and attached a *lis pendens* on 1 June 2015 on a particular piece of Plaintiffs' property in Polk County, North Carolina "for the purpose of harassment and intentional disruption of property sales, resulting in the loss of substantial sums of money[.]" On 17 July 2015, Defendants filed an answer admitting to the *lis pendens* filing from separate litigation arising in New Jersey against Plaintiffs ("New Jersey Litigation"), attached the New Jersey filing and subsequent opinion as exhibits, and contended the filing was made in good faith in an effort to secure the recovery of damages, not to harass Plaintiffs. Defendants further denied generally any malicious intent in the filing.

On 23 September 2015, Plaintiffs filed a motion for partial summary judgment on the issue of quieting title by removing the *lis pendens* and to expand the scope of the preliminary injunction. Plaintiffs contended there was no genuine issue of material fact the *lis pendens* filing was improperly filed, and sought to remove the

cloud from Plaintiffs' title. On 10 November 2018, the trial court granted partial summary judgment and a permanent injunction, rendering the *lis pendens* filing legally unenforceable and without effect. Immediately thereafter, Veronika M. Fischer and Bruce W. Breitweiser voluntarily dismissed their claims against Defendants.

The parties proceeded to discovery, and on 20 February 2017, the trial court held a bench trial between the remaining litigants. After opening statements from both parties, Plaintiffs called Scott Fischer ("Fischer") as a witness.

Fischer has a degree in quantitative economics and an MBA in finance, and worked in a variety of industries as Chief Financial Officer, before starting Fischer Investment Capital in the mid-1990s. In 2006, Fischer, through Byana, LLC ("Byana"), purchased 180 acres in Polk County, North Carolina, in addition to other acreage nearby, to develop into lots and improve the undeveloped land. Defendants met Fischer socially, and became investors in Byana in October of 2006. Fischer formed Bowder, LLC ("Bowder") in 2007 with two other partners, Dan Taylor and Brian E. Carroll ("Carroll"), to purchase additional properties to help Byana manage more property at once. Through Byana, Fischer formed "Derbyshire," a gated community serving equestrian interests in the nearby communities.

In 2006 and 2007, Mrs. Fagan invested in Byana with certain agreements controlling the investments and the business relationship with Fischer. In addition

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to an initial \$1,000,000 investment, Mrs. Fagan loaned another \$500,000 to Byana. In 2009, Byana restructured and modified the loan agreements under adverse economic conditions. During this time, Byana and associated parties continued to develop and invest in the Derbyshire development in Polk County. In 2010, under the possibility of foreclosure, the development was sold to outside investors and third parties.

In June 2012, Defendants indicated to Fischer they wanted to be paid back based on the original loans. The due dates for two separate \$250,000 loans were 31 July and 31 October 2009. After a disagreement with Defendants regarding repayment of the loans, Fischer had a falling out with Defendants resulting from a telephone conversation. Fischer felt threatened by the language used in a phone call with Mr. Fagan. Following the argument, Fischer learned of the potential for a criminal inquiry by the Federal Bureau of Investigation (“FBI”) and the U.S. Attorney’s Office in 2013. In December 2014, Fischer first became aware of Defendants’ New Jersey Litigation against him and his associated companies.

In mid-2015, Fischer was in the process of procuring a land sale contract between Byana and Bowder and the Tom Tisbo and Eugenia M. Tisbo Trusts (the “Tisbo Sale”). The Tisbo Sale included forty total acres in Polk County, dated 20 April 2015; however, it did not close. On 1 June 2015, Defendants filed the *lis pendens* on land included in the Tisbo Sale. After a series of hearings, a \$1.25 million bond was

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placed on the land, which was later reduced to \$50,000, neither of which were paid by Plaintiffs. Before the trial court voided the *lis pendens*, Fischer and Defendants offered varying settlements to lift the *lis pendens*. Fischer offered \$45,000 to Defendants, and Defendants offered \$122,000, both of which were rejected by each party. Fischer believed Defendants maliciously filed the *lis pendens* because they did not accept Fischer's settlement offers of land in lieu of repayment, and instead, wanted to cause severe embarrassment and harm his reputation as retaliation. Fischer admitted he did not know or have any evidence of what Defendants were thinking at the time of the *lis pendens* filing or have any indication of why the filing was made. Fischer had no reason or evidence showing Defendants knew the Tisbo Sale existed or that it impacted the land subject to the *lis pendens* filing. Since the *lis pendens* filing, Byana and Bowder have sold parcels of land in Polk County.

Plaintiffs called Carroll to testify. Carroll is a financial advisor and manager for Byana and facilitated sales for Byana's land holdings and the Derbyshire development. Carroll lives in the area and is the "boots-on-the-ground guy" for the development. Carroll advises potential buyers and current residents of the covenants and restrictions on the land within Derbyshire. In August 2007, Carroll and Byana hired several consultants and other specialists to make improvements to the development and properties, including road access and water availability. By 2014, Byana had sold several lots in the community, including private stables and private

farms. Carroll also oversees the maintenance of the unsold and undeveloped lots remaining in Derbyshire.

In 2006, Carroll met Defendants after Mrs. Fagan had made her initial investments, and had a business relationship with Defendants and Fischer until August 2012. In the Summer of 2012, Fischer contacted Carroll regarding the investments, and relayed the argumentative phone call between Fischer and Mr. Fagan. In November 2014, Carroll was served and joined as a party in Defendants' New Jersey Litigation.

On 14 April 2015, Carroll helped facilitate and broker the Tisbo Sale and associated contract, with the help of a local real estate agent. Mr. and Mrs. Tisbo made an offer of \$1.22 million for forty acres of land owned by Byana and Bowder in the Derbyshire development and adjacent thereto. The land included an eighteen-acre pasture and lake frontage. The Offer to Purchase included a provision requiring a general warranty deed, free of encumbrances and clean title. By 1 June 2015, the due diligence period was underway, and the *lis pendens* filing was placed on portions of the same property. At the time of the *lis pendens* filing, specialists were completing a general survey, and other extensions were employed for the contract to close and the property be approved for sale. During the due diligence period, attorneys for all parties met at least twice to discuss issues regarding the Tisbo Sale, including the following items in the Offer to Purchase:

- a. Rights of access from public road[.]
- b. Private Road maintenance cost arrangements[.]
- c. Access to public utilities[.]
- d. Restrictive covenants, rights of subdivision, architectural control, association membership and assessments.
- e. To include a portion TBD of the open space between lots 77 and 78, that portion not to be less than 70% of the said greenspace shown on Derbyshire Phase IC final plat.

Mr. and Mrs. Tisbo wanted to close on 15 July 2015, and Carroll believed Byana and Bowder were unable to close because of the *lis pendens* filing clouding title of the Tisbo Sale property. The second closing date was 3 August 2015. The parties extended the due diligence period again until 1 September 2015, and a proposed closing date of 15 September 2015. Carroll and Mr. Tisbo exchanged the following communications on 14 August 2015:

Tom & Jeannie,

...

I understand your concerns with the 40 acre farm and firmly believe we can address those issues to both your and [your attorney] Andy Haynes' satisfaction in short order. . . .

The last time we met it was my understanding that we were down to three basic issues:

1. Restrictions on the farm – Our last survey had the property divided into a 10 acre tract along the lake for the houses which would be subject to the Derbyshire CCR's and the remaining 30+ acre tract being very lightly restricted so as to allow you freedom to do all the things you wanted on your farm. If you have any further concerns with any of

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the restrictions, please let me know and we can work through them.

2. Secondary access to the property from Pittman Drive – Linda and I spent over 2 hours with Andy Haynes and Phil Feagan the week before last walking through the options to obtain the road width you want down Pittman Drive. There are only four properties from Highway 9 into the farm and we only need two of those properties (in either an easement, permission to widen the current easement, or an outright purchase of a small sliver of land) to gain the entrance you want off of Highway 9. We received a very positive response from one of the owners (closer to the farm) regarding the widening of Pittman Road. I believe that we can get one of the two property owners on Highway 9 to work with us on this. In any case, Linda and I can definitively resolve the Pittman Drive issue in a matter of days.

3. Lis Pendens – The Lis Pendens on all of the property you have under contract has been legally removed. There was a procedural issue with the bond amount (as required by the judge) which was successfully resolved last Friday. I am not sure Andy Haynes knows about this yet but the Lis Pendens is no longer an issue to close.

I feel like we are very, very close to resolving the issues you outlined previously. I can understand your frustration with this process and how long it has taken. However, I believe we can get these last few items wrapped up for you very soon. . . .

Regards,
Brian Carroll

Brian,

Thanks for the detailed update below and the conversation from yesterday evening.

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I discussed this with Jeannie at length last night and we have concluded that we have just lost too much time trying to get this site to work out. On June 20th we had sent a list of items that needed to be addressed and still do not have anything in writing that would allow us to move forward. Your discussion points below are just more of the same, not resolutions but expectations. We don't need another meeting to talk about the same issues that we have repeatedly brought up.

We have just lost confidence that this can be resolved. We are moving on.

We wish you the best and will always speak highly of you and Derbyshire.

Tom

Carroll believed the Tisbo Sale did not close between the initial 15 July and last 15 September 2015 closing date because the *lis pendens* filing clouded title on the land parcels subject to the Offer to Purchase. Carroll had worked to satisfy the conditions Mr. and Mrs. Tisbo asked for during the due diligence and closing periods. Carroll believed the *lis pendens* filing was the most important issue remaining unresolved. Carroll believed Defendants maliciously filed the *lis pendens* because it was unnecessary.

After the Tisbo Sale failed to close, Plaintiffs listed the same parcels of land for sale for \$1.225 million in 2016, reduced it to \$995,000 in January 2017, and have yet to field any interest from bonafide purchasers.

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Plaintiffs called Philip Feagan (“Feagan”) to testify. Feagan practiced as an attorney locally in Polk County for thirty-six years and represented Byana and Bowder in real estate closings. Feagan’s responsibilities include making sure the real estate companies and sellers deliver clear title and guide contracts through due diligence and closing. Feagan believed the *lis pendens* created a clouded title that hindered the Tisbo Sale closing. Feagan conducted the settlement negotiations with Defendants to remove the *lis pendens* from the properties, but was ultimately unsuccessful.

Plaintiffs called Tina Fagan (“Mrs. Fagan”) to testify. Mrs. Fagan corroborated earlier testimony she had invested and loaned Byana \$1.5 million in total, and in return, received a 10% interest in Byana and repayment of the two separate \$250,000 loans. Mrs. Fagan signed a Confidential Investment Offering and Questionnaire before investing, acknowledging she understood the agreements and contractual obligations. Mrs. Fagan was surprised to learn about a debt to a third-party bank on the Byana interests in Derbyshire, and thought Derbyshire was “debt-free.” Mrs. Fagan was generally uninvolved in the legal requirements associated with her investments, did not understand the documentation or agreements, and had her husband handle most of the details of the investment options and elections. Mrs. Fagan was not aware at the time of her investment period and attempted recovery of funds other investors had accepted land in lieu of cash repayments. Mrs. Fagan

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thought because she had not seen any returns on her 2006 investment, Fischer and Byana had defrauded her of her returns, leading to the New Jersey Litigation. Mrs. Fagan wanted to “be whole again” and recover her 10% interest, instead of a particular remedy. Mrs. Fagan believed the investment payments went to Fischer’s personal expenses instead of Byana improvements. Mrs. Fagan also believed Byana owned 100% of Derbyshire, and was operating debt-free without the involvement of third parties or others.

Mrs. Fagan had noticed an article advertising sales from Derbyshire and the surrounding area and realized she had not seen any profits from those sales. As of 2015, she understood Byana’s purpose was to buy and sell real estate in Polk County. Based on those concerns, Defendants filed the *lis pendens* to retrieve her investments in Derbyshire and Byana. Mrs. Fagan did not investigate further before filing the *lis pendens*. Before the filing, Mrs. Fagan was not aware of the Tisbo Sale, or that the filing inhibited the contract from moving forward. Mrs. Fagan believed she filed the *lis pendens* in good faith, and had a legal basis from which to do so. Mrs. Fagan testified to the following:

Q. Why – why, from your perspective, was the *lis pendens* filed?

A. To protect our 10% in Derbyshire. We didn’t know – I mean, we didn’t know if he signed land – we didn’t know if all of the land was sold. We didn’t know anything.

Q. At the time the *lis pendens* was filed did you believe you

had an ownership interest in the land covered by that document?

A. Yes.

Plaintiffs called Michael Fagan (“Mr. Fagan”) to testify. Mr. Fagan has been employed by the Secret Service since May 1997, specializing in protective detail and investigative services. In 2006 after meeting at a wedding, Mr. Fagan contacted Fischer about investment opportunities. Eventually, Mrs. Fagan invested in Byana in or about October 2006. After the investment, Mrs. Fagan possessed two separate notes from the two \$250,000 loans to Byana. Mr. Fagan believed Mrs. Fagan was as truthful and as knowledgeable as she could be in signing the Confidential Investment Questionnaire and Offering documents.

Defendants visited the Derbyshire properties three times since investing: November 2006, June 2007, and for a family event in 2008. In early 2007, Plaintiffs sent Defendants a Conceptual Master Plan of Derbyshire. After visiting and making the investment, Mr. Fagan did not take concrete steps to determine what type of ownership his wife’s investment entitled her to in the Derbyshire properties or Byana itself. Mr. Fagan was unaware of any third-party debts Plaintiffs owed while modifying the loan agreements in 2009. Mr. Fagan learned about a debt to Macon Bank in mid-2011.

Mr. Fagan recalled “vividly” the phone call he had with Fischer regarding the investment returns, and took notes of the conversation. From his notes, the phone

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call took place on 28 June 2012 between Defendants and Fischer. As of June 2012, Byana was no longer paying on the notes, and Fischer discussed land as compensation for nonpayment. Based on the phone call and subsequent conversations, Mr. Fagan believed he and Mrs. Fagan were being defrauded and referred the allegations to the FBI for investigation. Mr. Fagan agreed with Mrs. Fagan that he thought Fischer was using their investment capital for his own personal expenses, and defrauding his investors. The FBI investigation closed in December 2015, and took no action against Plaintiffs.

In 2013, Defendants, under an audit from the Internal Revenue Service (“IRS”), requested a K-1 tax document from 2011 concerning revenues or lack thereof from Byana regarding the investments. Mr. Fagan maintained Byana had never sent any tax documents from 2011, which had led to the audit for failure to report income. Mr. Fagan was concerned his security clearance could be revoked if he was under audit or found to have failed to report income. In 2013, Byana sent the K-1 documentation to Defendants. Based on the inconsistencies in documentation, Mr. Fagan believed and reported to the IRS he was a victim of fraudulent activity, which directly led to the New Jersey Litigation. In filing the New Jersey civil actions, Mr. Fagan wanted to be “whole again or recover [his] losses.”

Mr. Fagan learned of a new equestrian center opening in Polk County, and filed the *lis pendens* to recover from the Fagans’ perceived ownership interests in

Derbyshire. Mr. Fagan stated the *lis pendens* filing was “to recover money or assets or anything of value,” and not harassment.

Plaintiffs rested their case, and Defendants did not put on any evidence. At the close of the case, both parties made closing arguments. The trial court gave Plaintiffs and Defendants an opportunity to settle before rendering a judgment. After no settlement was reached, the trial court entered an order denying Plaintiffs’ claims for relief in the instant case. Plaintiffs timely appealed.

II. Standard of Review

“The standard of review on appeal from a judgment entered after a non-jury trial is whether there is competent evidence to support the trial court’s findings of fact and whether the findings support the conclusions of law and ensuing judgment.” *Cartin v. Harrison*, 151 N.C. App. 697, 699, 567 S.E.2d 174, 176 (2002) (citation and quotation marks omitted); *see also Sisk v. Transylvania Cmty. Hosp., Inc.*, 364 N.C. 172, 179, 695 S.E.2d 429, 434 (2010) (“[F]indings of fact made by the trial judge are conclusive on appeal if supported by competent evidence, even if . . . there is evidence to the contrary.” (citations and quotation marks omitted)). “Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal.” *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) (citations omitted).

III. Analysis

A. Order

Plaintiffs argue the trial court erred in Findings of Fact 11, 18, 22, 24(a), 24(c), 33, 40, 42, and 43. Plaintiffs contend these findings are not supported by competent evidence. Further, Plaintiffs contend Conclusions of Law 59, 64, and 67-69 are unsupported by corresponding findings of fact. The challenged findings and conclusions are as follows:

11. Plaintiff K. Scott Fischer (“Fischer”) resides in New Jersey. At times relevant to this matter, he has served as the manager of Private Capital, LLC, which, in turn, has served as manager of Plaintiffs Byana, LLC, and Bowder, LLC.

...

18. The Fagans made this investment in Byana based on representations made by Fischer to them that Byana owned 100 percent of the real property comprising Derbyshire, and that it was owned debt-free. [transcript citation omitted] Several years later, the Fagans learned that the Derbyshire property was subject to significant debt owed to a third party, Macon Bank. [transcript citation omitted]

...

22. During the phone call, Fischer told the Fagans that a portion of the funds they had advanced had been used to pay other investors. [transcript citation omitted]

...

24. Thus, by the summer of 2012:

a. The Fagans had discovered that, contrary to

Fischer's assertions at the time the Fagans were first considering investing in Byana, the Derbyshire property was subject to significant debt owed to a third party, Macon Bank.

...

c. The Fagans had been told by Fischer that a portion of the funds they had advanced had been used to pay other investors.

...

33. After receiving the IRS notice, Tina Fagan made repeated efforts to obtain information from Fischer and Byana's accountant, Bruce Breitweiser, for the purpose of responding to the audit. Fischer and Breitweiser were slow to respond and, ultimately, did not provide the Fagans with all the information Ms. Fagan had requested. [transcript citation omitted]

...

40. The Fagans' belief and assertion that they have been the victims of fraud perpetrated by Plaintiffs are based on a range of facts and circumstances as alleged in their Complaint in the New Jersey Action.

...

42. Ms. Fagan testified at trial that the filing of the *Lis Pendens* was not undertaken with the intention to harass or humiliate any of the Plaintiffs, but that it was undertaken as an effort to protect the Fagans' legal interests. [transcript citation omitted]

43. Mr. Fagan testified at trial that the *Lis Pendens* was not filed with the intention to punish the Plaintiffs [transcript citation omitted], and that he would not have allowed the *Lis Pendens* to have been filed if he had

believed there was anything inappropriate about doing so.
[transcript citation omitted]

...

59. The Plaintiffs have failed to prove by a preponderance of the evidence that the Fagans are liable under any of the claims for relief Plaintiffs assert against the Fagans.

...

64. In addition to the reasons set forth above[:]

a. Plaintiffs are not entitled to recover against the Fagans under their slander of title or abuse of process claims for the additional and independent reason that they have failed to prove, by a preponderance of the evidence, that the Fagans acted with the requisite malicious intent in connection with the filing of the *Lis Pendens*.

b. Plaintiffs are not entitled to recover against the Fagans under their UDTPA claim for the additional and independent reason that they have failed to prove, by a preponderance of the evidence, conduct on the part of the Fagans that was unfair or deceptive.

...

67. This Court, in ruling on Plaintiffs' Motion for Partial Summary Judgment, determined that the *Lis Pendens* did not satisfy the statutory prerequisites applicable to the filing of a *lis pendens* under North Carolina law. That is not, however, determinative of Plaintiffs' abuse of process and slander of title claims. *Cf. Cardon*, 120 N.C. at 461, 27 S.E.2d at 109 ("If at last, upon investigation, the defendant fails to show any title or interest in possession or in remainder, still, if his acts were done in good faith at the time he spoke, no action will lie.").

68. Thus, because Plaintiffs have failed to prove that the Fagans acted [with] the necessary malicious intent with

respect to the Tisbo Contract, they are not entitled to recover on their claims for abuse of process and slander of title.

69. With respect to Plaintiffs' UDTPA claim, the filing of the *Lis Pendens* – under the circumstances and in the manner demonstrated by the evidence at trial – does not support Plaintiffs' recovery against the Fagans. *See Kelley v. CitiFinancial Services, Inc.*, 205 N.C. App. 426, 434, 696 S.E.2d 775, 782 (2010) (holding, in the context of an unfair and deceptive trade practices claim, that a defendant acting out of a good faith belief in the legal sufficiency of an interest in real property does not engage in unscrupulous practices designed to deceive others with an interest in the same property). Similarly, the Plaintiffs failed to prove the existence of any other conduct attributable to the Fagans that would support recovery under the UDTPA claim. This includes the actions of the Fagans taken in connection with the FBI investigation and IRS notice, which the evidence at trial demonstrated were taken in good faith and without the kind of aggravating circumstances necessary to support recovery under the UDTPA.

The above challenged findings of fact and conclusions of law do not address the crux of the trial court's order, and are not determinative. Plaintiffs do not challenge Findings of Fact 44-51 finding the Fagans were not aware of the Tisbo Sale at the time of the *lis pendens* filing. Accordingly, Findings of Fact 44-51 are binding on appeal. *See Koufman*, 330 N.C. at 97, 408 S.E.2d at 731.

Plaintiffs do not challenge Conclusions of Law 60, 62, or 63, concluding Defendants' *lis pendens* filing was not the proximate cause of damages regarding the Tisbo Sale. This finding is fatal to Plaintiffs' appeal.

The unchallenged conclusions of law state the following:

60. First and foremost, Plaintiffs have failed to prove that they have suffered injuries and related damages as a result of conduct on the part of the Fagans that is the subject of Plaintiffs' claims. Plaintiffs' claims for damages at trial were based solely on the termination of the Tisbo Sale. [transcript citation omitted] As such, Plaintiffs bear the burden of proving, by a preponderance of the evidence, that the filing of the *Lis Pendens* or some other conduct undertaken by or on behalf of the Fagans was the proximate cause of the termination of the Tisbo Sale.

...

62. The evidence at trial failed to establish that the filing of *Lis Pendens* – or any other conduct undertaken by or on behalf the Fagans – was the proximate cause of the Tisbos' termination of their contract with the LLC Plaintiffs, and the related damages asserted by Plaintiffs. *Cf. Whyburn v. Norwood*, 47 N.C. App. 310, 315, 267 S.E.2d 374, 377 (1980) (affirming summary judgment where, as here, “[t]here is no evidence” that party’s “alleged damages were proximately caused by the filing of the . . . lis pendens.”). To the contrary, the evidence – particularly the email exchanges between Plaintiffs and the Tisbos – demonstrated that the Tisbo Sale did not close for the simple reason that the Plaintiffs failed to satisfy contractual conditions (wholly unrelated to the *Lis Pendens* or any actions on the part of the Fagans) required for the sale to close.

63. Each of Plaintiffs' four claims for relief sought recovery for damages that Plaintiffs alleged they sustained when the Tisbo Sale was terminated. Accordingly, the Plaintiff's failure to prove that the filing of the *Lis Pendens* – or any other conduct on the part of the Fagans – was the proximate cause of the termination of the Tisbo Sale is fatal to all of Plaintiff's claims against the Fagans.

The above unchallenged conclusions of law are based upon unchallenged Findings of Fact 44-51. Accordingly, Conclusions of Law 60, 62, and 63 are supported by competent evidence, and we hold Defendants' *lis pendens* filing was not the proximate cause of Plaintiffs' damages, and thus, fatal to all Plaintiffs' claims.

“[U]nder Rule 28(b)(6) of the North Carolina Rules of Appellate Procedure, where a party fails to assert a claim in its principal brief, it abandons that issue and cannot revive the issue via reply brief.” *Larsen v. Black Diamond French Truffles, Inc.*, 241 N.C. App. 74, 79, 772 S.E.2d 93, 96 (2015) (citation omitted); see also N.C.R. App. P. 28(b)(6) (2018). Plaintiffs do not attempt to dispute the above unchallenged conclusions or address the deficiency in their reply brief. Accordingly, we deem this issue abandoned.

Most notably, the trial court concluded “the evidence – particularly the email exchanges between Plaintiffs and the Tisbos – demonstrated that the Tisbo Sale did not close for the simple reason that the Plaintiffs failed to satisfy contractual conditions [w]holly unrelated to the *Lis Pendens*,” and Plaintiffs do not challenge this conclusion on appeal. The trial court relied on this Court's previous holding in *Whyburn v. Norwood*, 47 N.C. App. 310, 315, 267 S.E.2d 374, 377 (1980) where, as here, the trial court found no evidence damages were proximately caused by a *lis pendens* filing. Plaintiffs fail to address this case in their appeal or attempt to distinguish it from the case *sub judice*. Thus, we are bound by our holding in

Whyburn, and affirm the trial court's order. See *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." (citations omitted)).

B. Statutory Costs

Plaintiffs contend the trial court erred in ordering Plaintiffs pay statutory costs associated with the action in the order on appeal. However, in their appellate brief, the Fagans have represented to this Court that they are not seeking any costs in connection with this litigation. Therefore, this portion of Plaintiffs' appeal is dismissed as moot.

IV. Conclusion

Plaintiffs failed to challenge the trial court's findings that Defendants were unaware of the Tisbo Sale when they filed the *lis pendens* action. Plaintiffs also failed to challenge the trial court's conclusions the *lis pendens* was not the proximate cause of Plaintiffs' damages. Thus, the trial court's order is binding on appeal on separate and independent grounds different from those challenged on appeal. We dismiss as moot the remainder of Plaintiffs' appeal. Accordingly, we affirm in part and dismiss in part.

AFFIRMED IN PART; DISMISSED IN PART.

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Judges DAVIS and BERGER concur.

Report per Rule 30(e).