NO. COA10-1276
NORTH CAROLINA COURT OF APPEALS

Filed: 16 August 2011

SCOTT SIGMON,
Plaintiff

v. New Hanover County
No. 08 CVS 2619

PERRY JOHNSTON and
PROFESSIONAL VENDING
SERVICES, INC.,
Defendants

Appeal by defendants from orders entered 12 April 2010 by Judge Phyllis M. Gorham and orders entered 16 June and 10 July 2010 by Judge John E. Nobles, Jr., in New Hanover County Superior Court. Heard in the Court of Appeals 23 March 2011.

Samuel A. Forehand, P.A., by Samuel A. Forehand, for plaintiff-appellee.

David E. Shives, PLLC, by David E. Shives, for defendant-appellants.

CALABRIA, Judge.

Professional Vending Services, Inc. ("PVSI") and Perry Johnston ("Johnston"), the president of PVSI (collectively, "defendants"), appeal the trial court's orders denying their motions for summary judgment, for a continuance, and for

reconsideration. Defendants also appeal the trial court's orders granting their counsel's motion to withdraw; striking their answer; and ordering them to pay compensatory and treble damages to Scott Sigmon ("plaintiff"). We affirm in part and vacate and remand in part.

I. BACKGROUND

PVSI is a business engaged in establishing and servicing coin-operated vending machines in retail locations in North Carolina. In September 2006, defendants offered to sell plaintiff an existing vending machine route ("the route"). The total purchase price for the route was $44,000.00 ("the contract price"), with an initial $8,800.00 down payment and a final payment of $35,200.00 due after a "satisfactory inspection of the route by [plaintiff]."

The contract stated that "upon servicing and inspection of the route, all locks will be changed on the equipment and the purchaser will be given the new keys. This will finalize the transaction." The contract also stated that "[t]he purchaser understands that the seller makes absolutely no guarantee, express or implied, as to profits the purchaser will or will not receive from the machines." Furthermore, the contract included a merger clause, which stated in bold print:

> **This agreement contains the entire understanding of the parties, and there are no representations, warranties, covenants or undertakings other than those expressly set forth within this contract. It is expressly agreed and understood that no oral representation or agreement has been relied upon or made prior to or contemporaneous with the execution of this contract. This written contract is the sole and entire agreement between the parties herein.**

On 16 October 2006, plaintiff signed the contract and tendered the $8,000.00 down payment. On 20 October 2006, after plaintiff's "satisfactory inspection of the route," plaintiff tendered the balance of the contract price, defendants changed the locks on the equipment, and gave plaintiff new keys. In November 2007, plaintiff expressed dissatisfaction with the amount of income he had earned from servicing the route. Plaintiff claimed he relied on representations allegedly made by defendants regarding the route's prior revenues when he signed the contract.

Plaintiff filed a complaint in New Hanover County Superior Court that was amended on 28 August 2008, alleging claims of fraud, unfair or deceptive practices ("UDP"), and violations of the Business Opportunity Sales Act, Article 19 of Chapter 66 of the North Carolina General Statutes ("the Business Opportunity Sales Act"). Following defendants' answer, plaintiff initiated

discovery on 28 May 2009 by serving defendants with interrogatories, requests for production, and requests for admission. Defendants failed to respond. On 27 August 2009, plaintiff filed a motion to compel both responses to interrogatories and the production of documents. Defendants responded to some, but not all, of plaintiff's outstanding discovery requests on 4 September 2009.

After a hearing, on 17 December 2009, the trial court ordered defendants to respond to all outstanding interrogatories and to produce all outstanding documents by 8 January 2010, and deemed plaintiff's requests for admission to be admitted. After defendants failed to comply with the trial court's order, plaintiff filed three additional motions to compel which were granted by the trial court.

On 24 February 2010, plaintiff filed a motion to strike defendants' answer and render judgment by default because defendants had failed to comply with the 17 December 2009 order to compel. Subsequently, the parties each moved for summary judgment, and the trial court denied these motions on 12 April 2010. On 27 May 2010, defendants' counsel filed a motion to withdraw. The next day, plaintiff filed a motion for discovery sanctions, alleging that defendants failed to comply with the

trial court's orders to compel and orders requiring defendants to submit to depositions.

The case was called for trial on 14 June 2010 and the trial court addressed the pending pretrial motions. Defendants were not present at the calendar call, but they were represented by counsel. The trial court granted defendants' counsel's motion to withdraw and denied defendants' motion to continue. The trial court also granted plaintiff's motion for sanctions by striking defendants' answer, and entered default judgment against defendants for compensatory damages of $122,154.00 and punitive damages of $244,308.00. This judgment was formally entered on 16 June 2010.

On 24 June 2010, defendants, through new counsel, filed a motion to reconsider and/or set aside the default judgment, amend or relieve defendants from the judgment, and have a new trial. The trial court denied the motions. Defendants appeal.

II. SUMMARY JUDGMENT

Defendants argue that the trial court erred by denying their motion for summary judgment. More specifically, defendants argue that there is no genuine issue of material fact regarding plaintiff's reasonable reliance upon defendants'

alleged misrepresentations regarding the route's previous revenues when he entered into the contract. We disagree.

"Summary judgment is appropriate when '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.'" *One Beacon Ins. Co. v. United Mechanical Corp.*, ___ N.C. App. ___, ___, 700 S.E.2d 121, 122 (2010) (quoting N.C. Gen. Stat. § 1A-1, Rule 56(c) (2009)). "When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party." *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001) (citation omitted). "We review a trial court's order granting or denying summary judgment *de novo*." *Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009) (internal quotations and citation omitted).

In the instant case, plaintiff's complaint alleged that defendants represented the route's average monthly gross receipts were approximately $6,000.00. Plaintiff also alleged that "the Route's actual monthly gross receipts average [were] between $500 and $750." Plaintiff further alleged that he

relied on defendants' false representations when he entered into the contract. In their answer, defendants denied plaintiff's allegations.

The parties also submitted dueling affidavits supporting their own versions of the material facts. Defendants filed the Affidavit of John K. Davis ("Davis"). Plaintiff, in addition to his own verified amended complaint, submitted the affidavits of David W. Ellegood ("the Ellegood affidavit") and a Second Affidavit of John K. Davis ("the Second Davis affidavit"). The Ellegood affidavit averred facts material to whether the Business Opportunity Sales Act applied to the contract. The Second Davis affidavit contradicted portions of his affidavit for defendants.

Moreover, on 17 December 2009, the trial court deemed the following relevant admissions conclusively established:

> 24. Admit that you represented to Plaintiff that the Route provides earning potential of $6,000.00 per month.
>
> 25. Admit that the content under the heading "Business Opportunities" in the document attached to the Complaint as Exhibit A accurately reflects an advertisement you ran for the Route in the Wilmington Star-News in September 2006.[1]

[1] The advertisement in Exhibit A stated, in pertinent part, "This route grossed over $6,000 last time serviced."

> . . .
>
> 29. Admit that during the course of the September 2006 telephone conversation referenced in Paragraphs 9-10 of the Complaint, you represented to Plaintiff that the average monthly gross receipts of each of the Route's 29 machines were $214.00.
>
> 30. Admit that during the course of the September 2006 telephone conversation referenced in Paragraphs 9-10 of the Complaint, you represented to Plaintiff that the Route's average monthly gross receipts were approximately $6,000.00.
>
> 31. Admit that during the course of the September 2006 telephone conversation referenced in Paragraphs 9-10 of the Complaint, you represented to Plaintiff that the Route's average monthly profits were approximately $3,000.00.

After reviewing the Ellegood Affidavit, the Second Davis affidavit, and the admissions, the trial court correctly determined that there was a genuine issue of material fact regarding plaintiff's reasonable reliance on defendants' alleged misrepresentations before entering into the contract. Therefore, the trial court properly denied defendants' motion for summary judgment. This argument is overruled.

III. MOTIONS TO WITHDRAW AND TO CONTINUE

A. Motion to Withdraw

Defendants argue that the trial court erred by granting their counsel's motion to withdraw. We disagree.

> Withdrawal of appearance by an attorney is governed by Superior Court Rule 16 which states in pertinent part:
>
> > No attorney who has entered an appearance in any civil action shall withdraw his appearance, or have it stricken from the record, except on order of the court. Once a client has employed an attorney who has entered a formal appearance, the attorney may not withdraw or abandon the case without (1) justifiable cause, (2) reasonable notice to the client, and (3) the permission of the court.

Benton v. Mintz, 97 N.C. App. 583, 586, 389 S.E.2d 410, 412 (1990). "The determination of counsel's motion to withdraw is within the discretion of the trial court, and thus we can reverse the trial court's decision only for abuse of discretion." *Id.* at 587, 389 S.E.2d at 412. "[D]issolution of the attorney/client relationship . . . constitute[s] justifiable cause for [counsel's] withdrawal." *Id.* at 587, 389 S.E.2d at 413.

Defendants do not dispute that the trial court granted their counsel permission to withdraw. Instead, defendants argue that their counsel failed to present to the court any evidence of a justifiable cause for his withdrawal. In his motion to

withdraw, filed 27 May 2010, defendants' counsel stated, in pertinent part:

> 2) That the Defendants and the undersigned are unable to continue in the attorney-client relationship.
>
> . . .
>
> 4) That the Defendants have received notice of this motion.

In addition, when defendants' counsel presented his motion to the trial court, he explained the relevant background of the case along with the reasons he sought to withdraw and have the case continued:

> [Defendants' Counsel]: Yes, sir. You've read the email that Jay Short sent out. He's met with the defendants in this case; he's willing to take the case.
>
> Just a brief background on the case. It is almost two years old. When we were first noticed for trial last June was when the plaintiff initiated discovery. So the first year none was done by the plaintiff, and the last year we've been working through discovery issues that should have been resolved probably during the first year of the litigation.
>
> The defendants have never made a motion to continue. This is their first. We were ready to go to trial months ago, just never was reached. And there were discovery issues again.
>
> *So I have made a motion, I notified my client back in April that I intended to*

> *withdraw*. He sought new counsel. Counsel, as you read in his e-mail, has been notified that [plaintiff's counsel] subpoenaed additional witnesses for trial today that have never been disclosed to the defendants, and Mr. Short has told me and indicated in his e-mail that he intends to depose them, and my client would like to depose those new individuals that have never been disclosed. I have received no pretrial order from the plaintiff, and we have not mediated the case.
>
> Again, I'm asking to withdraw. I have copied my file to Mr. Short, who again has indicated he's ready to go, he just needs a little bit of time to prepare.

(Emphasis added). After hearing from plaintiff's counsel, the trial court denied the motion to continue and allowed the motion to withdraw.

The inability of defendants and their counsel to continue the attorney-client relationship constituted a justifiable cause for defendants' attorney to withdraw. Moreover, defendants' counsel provided reasonable notice to defendants when he orally notified them in April of his intention to withdraw and additionally provided defendants with notice of his motion to withdraw, which was filed nearly three weeks before the trial court heard the motion. Accordingly, the trial court properly exercised its discretion by granting defendants' counsel's motion to withdraw. This argument is overruled.

B. Motion to Continue

Defendants argue that the trial court erred by failing to grant their motion to continue after permitting their counsel to withdraw. We disagree.

"Continuances are not favored and the party seeking a continuance has the burden of showing sufficient grounds for it." *Shankle v. Shankle*, 289 N.C. 473, 482, 223 S.E.2d 380, 386 (1976). "No continuance shall be granted except upon application to the court. A continuance may be granted only for good cause shown and upon such terms and conditions as justice may require." N.C. Gen. Stat. § 1A-1, Rule 40(b) (2010). "[A]n attorney's withdrawal on the eve of the trial of a civil case is not *ipso facto* grounds for a continuance." *Shankle*, 289 N.C. at 484, 223 S.E.2d at 387. "[T]he decision whether to grant a continuance because the moving party's attorney has withdrawn from the case on the day of trial rests in the trial judge's discretion[.]" *Id.* at 485, 223 S.E.2d at 387.

In the instant case, defendants' counsel filed his motion to withdraw on 27 May 2010. When this motion was heard on 14 June 2010, defendants' counsel informed the trial court that defendants met with another attorney, Jay Short ("Short"), who was "willing to take the case," and that the case was "almost

two years old." Plaintiff's counsel informed the trial court of defendants' repeated refusals to respond to discovery requests and to the trial court's orders:

> [T]his is one more delay in the prosecution of this case. We filed the case in June of 2008. Yes, we only sent out discovery in May . . . of 2009. The discovery issues and things to work out that the Court has heard this morning were four motions to compel that we filed, each of which the Court granted, two of which the Defendants have yet to comply with, including those corporate sales tax returns that Judge Henry told them to turn over in December. We still ain't got them. We haven't had any communications about where they might be, what efforts they've made to go get them or when the Department of Revenue might be able to turn them over.

In light of these circumstances, the trial court properly exercised its discretion by denying the motion to continue and proceeding to trial. This argument is overruled.

IV. SANCTIONS

Defendants argue that the trial court erred and abused its discretion by striking their answer. We disagree.

Although interlocutory, a party may appeal from an order imposing sanctions by striking his defense and entering judgment as to liability. *Vick v. Davis*, 77 N.C. App. 359, 335 S.E.2d 197 (1985). Rule 37 of the North Carolina Rules of Civil Procedure states, in pertinent part:

(b) *Failure to comply with order.* –

. . .

> (2) Sanctions by Court in Which Action is Pending. -- If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under section (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f) a judge of the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
>
> . . .
>
> > c. An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party[.]

. . .

(d) *Failure of party to attend at own deposition or serve answers to interrogatories or respond to request for inspection.* -- If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or

> 31(a) to testify on behalf of a party fails (i) to appear before the person who is to take his deposition, after being served with a proper notice, or (ii) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (iii) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under subdivisions a, b, and c of subsection (b)(2) of this rule.

N.C. Gen. Stat. § 1A-1, Rule 37 (2010) ("Rule 37").

"Rule 37 sanctions are powers granted to the trial courts of our state to prevent or eliminate dilatory tactics on the part of unscrupulous attorneys or litigants." *Essex Grp., Inc. v. Express Wire Servs., Inc.*, 157 N.C. App. 360, 363, 578 S.E.2d 705, 707 (2003). The choice of sanctions imposed that are authorized under Rule 37 are within the sound discretion of the trial court and may not be overturned on appeal absent a showing of abuse of that discretion; that is, that the sanctions are manifestly unsupported by reason. *Clark v. Penland*, 146 N.C. App. 288, 552 S.E.2d 243 (2001). "When findings of fact are not challenged by exceptions in the record, they are presumed to be supported by competent evidence and are binding on appeal."

Tinkham v. Hall, 47 N.C. App. 651, 652-53, 267 S.E.2d 588, 590 (1980).

Sanctions such as striking answers are well within the court's discretion in cases involving a refusal to respond to discovery requests and a refusal to obey an order to compel discovery. *Kewaunee Scientific Corp. v. Eastern Scientific Prods., Inc.*, 122 N.C. App. 734, 471 S.E.2d 451 (1996); *see Baker v. Rosner*, 197 N.C. App. 604, 677 S.E.2d 887 (2009), *disc. rev. denied*, 363 N.C. 744, 688 S.E.2d 452 (2009) (trial court did not abuse its discretion by striking answers of a husband, wife, and real estate agent and because there was ample evidence of improper action and violation of a consent order directing the production of financial documents). "[B]efore dismissing a party's claim with prejudice pursuant to Rule 37, the trial court must consider less severe sanctions." *Hursey v. Homes by Design, Inc.*, 121 N.C. App. 175, 179, 464 S.E.2d 504, 507 (1995). Either the transcript of the hearing on the motion for sanctions or the court's order must indicate that the trial court considered a less severe sanction before dismissing a party's action. *Id.*

In *Hursey*, the plaintiffs filed a claim against the defendants for fraud, conversion, breach of contract, breach of

fiduciary duty, and an unlawful conspiracy to conceal and misappropriate sums owed by the defendants to the plaintiffs. *Id.* at 176, 464 S.E.2d at 505. The defendants answered and counterclaimed. *Id.* On 26 January 1994, the plaintiffs served the defendants with the First Interrogatories and Request for Production of Documents. *Id.* When the defendants did not respond within the allotted time, the plaintiffs filed a Motion to Compel Discovery on 31 March 1994. *Id.* On 11 April 1994, at the hearing on the plaintiffs' motion, the defendants responded to the interrogatories, and the parties agreed to remove the motion from the calendar. *Id.* However, after the plaintiffs reviewed the responses and documents provided by the defendants, the plaintiffs requested the defendants' counsel to provide voluntary supplementation to the responses. *Id.* When the defendants ignored this request, the plaintiffs filed a second Motion to Compel Discovery on 9 May 1994. *Id.*

On 19 May 1994, the plaintiffs served the defendants with a Second Request for Production of Documents. *Id.* When the defendants failed to respond, the plaintiffs filed a third Motion to Compel Discovery on 7 July 1994. *Id.* On 15 August 1994, the trial court issued an order compelling the defendants to produce certain designated documents by 18 August 1994. *Id.*

The defendants failed to comply with the trial court's order, and the plaintiffs moved for sanctions pursuant to Rule 37. *Id.* Following a hearing on the Motion for Sanctions, the trial court entered an order striking the defendants' counterclaims and dismissing them with prejudice. *Id.* Our Court affirmed, holding that "it may be inferred from the record that the trial court considered all available sanctions . . . in arriving at its decision," and that "the sanctions imposed were appropriate in light of [the] defendants' actions in this case." *Id.* at 179, 464 S.E.2d at 507.

In *Chateau Merisier, Inc. v. Le Mueble Artisanal GEKA, S.A.*, the plaintiff filed a complaint against the defendant for breach of contract, *quantum meruit*, unfair and deceptive practices and an accounting. 142 N.C. App. 684, 685, 544 S.E.2d 815, 816 (2001). The defendant failed to respond to the plaintiff's repeated requests for production of documents. *Id.* at 685, 544 S.E.2d at 816-17. Since the defendant failed to comply with discovery, the plaintiff filed three motions for sanctions. *Id.* The trial court granted the plaintiff's third motion for sanctions, ordered that the defendant's answer be stricken, and that a default judgment be entered in favor of the plaintiff as to the issues of breach of contract and *quantum*

meruit. *Id*. at 685, 544 S.E.2d at 817. Our Court affirmed, holding that "it is apparent [from the record] that the trial court considered all available sanctions before entering its order" and that "the trial court did not abuse its discretion in imposing sanctions in light of [the defendant's] actions in this case." *Id*. at 687, 544 S.E.2d at 818. We also noted that "the transcript of the hearing reveals that [the] plaintiff requested more severe sanctions while [the defendant] argued that it should not be sanctioned." *Id*.

In the instant case, the trial court made the following uncontested findings of fact in the 16 June 2010 order granting plaintiff's motion for sanctions:

> 2. Over the past 11 months, Defendants have failed to comply with the Rules of Civil Procedure and this Court's orders enforcing them on six separate occasions:
>
> a. On 27 July 2009, Defendants failed "to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories," in that Defendants did not respond to the interrogatories Plaintiff served on them on 28 May 2009 until 4 September 2009, which failure is sanctionable under Rule 37(d)(ii);
>
> b. On 27 July 2009, Defendants failed "to serve a written response to a request for

inspection submitted under Rule 34, after proper service of the request," in that Defendants did not respond to the requests for production of documents that Plaintiff served on them on 28 May 2009 until 4 September 2009, which failure is sanctionable under Rule 37(d)(iii);

c. On 10 September 2010, Defendant Perry Johnston failed "to appear before the person who [wa]s to take his deposition, after being served with a proper notice," which failure is sanctionable under Rule 37(d)(i);

d. On 21 September 2010, Defendant Professional Vending Services, Inc., failed "to appear before the person who [wa]s to take [its] deposition, after being served with a proper notice," which failure is sanctionable under Rule 37(d)(i);

e. On 8 January 2010, Defendants failed to comply with the Court's 17 December 2009 order that they produce certain sales tax returns by that date, in that at the time of this morning's hearing, Defendants had not produced a single sales tax return, which failure is sanctionable under Rule 37(b)(2); and

f. On 30 April 2010, Defendants failed to comply with the Court's 12 April 2010 order that they testify at a second deposition in that Defendants failed "to appear before the person who [wa]s to

> take [their] deposition, after being served with a proper notice," which failure is sanctionable under both Rule 37(b)(2) and Rule 37(d)(i);

3. In their 19 October 2009 deposition, Defendants testified that they:

> a. Have no records of or in any way relating to the revenues or profits of the vending-machine route that they sold to Plaintiff in 2006;
>
> b. Filed sales tax returns; and
>
> c. Would not comply with any subsequently-obtained court order compelling their testimony regarding prior sales of vending machines and vending-machine routes over their objection: "There will be no discussions of other cases, period. Now move on with your case or this is over and I don't have a problem telling the judge the same thing, so if you want to try me, we'll go see him, but it will be on another day and another trip for you from Raleigh. I hope you've got family down here."

. . .

6. Defendants have never produced to the Court or Plaintiff any communication from the Department of Revenue on the status of the records request that Defendants claim to have made in February 2010, nor any follow-up communication from Defendants to the Department regarding same;

> 7. In any event, during his 1 December 2009 telephone hearing with counsel for Plaintiff and defense counsel, Judge Henry ordered Defendants to have requested by 15 December 2009 any tax returns not then in their possession[.]

These unchallenged findings are binding on appeal and support the trial court's conclusions that defendants "willfully refused" to comply with the court's orders and the North Carolina Rules of Civil Procedure, and that further court orders compelling defendants' compliance "would have little use beyond rhetorical value for Plaintiff's inevitable subsequent motions for sanctions for Defendants' failure to comply with such orders." Therefore, the trial court properly exercised its discretion by granting plaintiff's motion for sanctions in light of defendants' actions in this case.

Defendants also contend that when the trial court struck their answer and entered a default judgment, the trial court did not consider imposing less severe sanctions.

After two motions for sanctions had been denied, plaintiff filed a third motion for sanctions, asking the court to strike defendants' answer and render judgment by default. At the 14 June 2010 hearing on plaintiff's third motion for sanctions pursuant to Rule 37, the trial court heard arguments from plaintiff's counsel, as follows:

Mr. Johnston has blown off three depositions. He's failed to comply with the Court's order, with Judge Gorham's order that he sit for a second deposition to testify about the subject matter of the Davis transaction, which he would not testify about in October. He has not done that. And he ain't going to do it.

We need that testimony. And the sanction -- we -- in all of our motions I have brought to compel I have not once asked for money sanctions. The only time I've mentioned the cost was we were in front of you, we were responding to the defense's motion to compel, and it was so far off, wanting the list of everybody I called in this case without ever citing any authority before coming to court or filing that motion, why they're entitled to that, I did ask for costs for that.

But in my motions, we've never asked for costs. We've asked for litigation sanctions. The Court has [a] better remedy for a real party who refuses to comply, not only by the rules of discovery and civil procedure, but with court orders after hearings, court orders enforcing those rules demanding specific compliance. And that remedy is litigation sanctions.

We're not asking to put him in jail, we're not asking for any of the contempt remedies. We're saying strike his answer. Don't let him walk into this courtroom and defend himself and say that documents say certain things, which we can't see what they say because he hasn't turned them over. Don't let him come up here and testify for the first time about what a particular [] is in front of twelve people who don't know the two-year procedural history of this case, and talk about all these things he wouldn't

> tell us in a deposition because he wouldn't show up for it. And that's - that's the crux of the case.

After hearing these arguments from plaintiff's counsel, the trial court recessed for a period of fifty-seven minutes to consider plaintiff's motion. When the trial court returned from recess, the court stated, "All right, sir, I'm going to allow your motion to strike the answer and enter default."

The record and the unchallenged findings show that plaintiff only requested that the trial court strike defendants' answer and enter default judgment. The transcript and the order show that plaintiff did not ask the court to grant more severe sanctions. Furthermore, the trial court considered the arguments of counsel, recessed for nearly one hour to consider plaintiff's motion for sanctions, and concluded, "Defendants' cumulative willful refusals to comply with the N.C. Rules of Civil Procedure and this Court's orders compelling their compliance with those rules make plain that no sanction short of striking their answer and entering judgment by default suffices[.]" These actions and conclusions show that the trial court considered lesser sanctions before entering its order. This argument is overruled.

V. DUE PROCESS

Defendants argue that the trial court erred by violating their due process rights by failing to provide notice and an opportunity to be heard at the hearing regarding the amount of damages. We disagree.

"A fundamental element of due process is adequate and reasonable notice appropriate to the nature of the hearing. Such notice involves a reasonable time for preparation." *Benton*, 97 N.C. App. at 589, 389 S.E.2d at 414 (internal quotations and citation omitted). In *Benton*, the defendant argued that the trial court erred by failing to grant his motion for continuance after allowing his counsel's motion to withdraw. *Id*. at 587, 389 S.E.2d at 413. We agreed with the defendant because his withdrawing counsel misled him as to the nature of the trial court's proceedings, did not inform him of trial dates, and as a result, the defendant had only a few hours to prepare for a trial involving "complicated legal issues." *Id*. at 588-89, 389 S.E.2d at 413-14. This Court granted the defendant a new trial because nothing in the record indicated the defendant sought to delay or evade trial, and because the defendant did not know the trial was scheduled. *Id*. at 589, 389 S.E.2d at 414. Therefore, the defendant's ability to produce witnesses and prove its case was prejudiced. *Id*.

The record in the instant case indicates that although defendants' counsel properly informed defendants as to the nature of the trial proceedings and trial dates, defendants often refused to attend court proceedings and were noticeably absent at the hearing where the trial court struck defendants' answer and granted a default judgment. In contrast to *Benton*, the default hearing did not involve complicated legal issues and the record indicates that defendants constantly sought to delay or evade trial throughout the course of the litigation. Thus, the trial court properly granted defendants' counsel's motion to withdraw and properly denied defendants' motion for continuance. This argument is overruled.

VI. DAMAGES

Defendants argue that the trial court erred when it determined the amount of compensatory and punitive damages awarded to plaintiff. We agree.

> When the trial court sits without a jury, as it did in this case, "the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts." *Shear v. Stevens Bldg. Co.*, 107 N.C. App. 154, 160, 418 S.E.2d 841, 845 (1992) (citation omitted). The trial court's conclusions of law are reviewed *de novo*. *Humphries v. City of Jacksonville*, 300 N.C. 186, 265 S.E.2d 189 (1980).

Shepard v. Bonita Vista Prop., L.P., 191 N.C. App. 614, 616, 664 S.E.2d 388, 390 (2008).

> In *Norwood v. Carter*, 242 N.C. 152, 87 S.E.2d 2, [our Supreme] Court said: "'Where actual pecuniary damages are sought, there must be evidence of their existence and extent, and some data from which they may be computed. No substantial recovery may be based on mere guesswork or inference; without evidence of facts, circumstances, and data justifying an inference that the damages awarded are just and reasonable compensation for the injury suffered.' 25 C.J.S. 496." The continuation of the last above sentence quoted from C.J.S. reads: "and when compensatory damages are susceptible of proof with approximate accuracy and may be measured with some degree of certainty, they must be so proved even in actions of tort."

Lieb v. Mayer, 244 N.C. 613, 616, 94 S.E.2d 658, 660 (1956).

In *Blankenship v. Town & Country Ford, Inc.*, the plaintiffs filed a claim against the defendant alleging, *inter alia*, unfair and deceptive practices relating to the plaintiffs' purchase of a motor vehicle from the defendant. 155 N.C. App. 161, 164, 574 S.E.2d 132, 134 (2002). When the defendant did not appear and failed to respond to the plaintiffs' complaint, the plaintiffs moved for an entry of default and a default judgment, and the trial court granted the motions. *Id.* Attached to the plaintiffs' motion for default judgment were affidavits from the

plaintiffs "stating that the vehicle was appraised at $4,900 when they attempted to sell it in August 2001 and that the vehicle was worth only $6,200 at the time of purchase, $8,648.50 below the original purchase price." *Id.* The trial court then entered default judgment against the defendant, "finding it had violated N.C. Gen. Stat. § 75-1.1 (2001) and . . . ordered defendant to pay $8,648.50 in compensatory damages for each of the statutory violations and then trebled these damages under [] N.C. Gen. Stat. § 75-16 (2001) . . . ." *Id.* The trial court then denied the defendant's motion to set aside the entry of default and default judgment. *Id.* at 164-65, 574 S.E.2d at 134.

On appeal, the defendant contested the award of damages. *Id.* at 167, 574 S.E.2d at 136. This Court held that, even though the plaintiff's "affidavit[s] stated the purchase price of the vehicle as $14,848.50 and established the actual value of the vehicle at the time of the purchase as $6,200," . . . "there are no findings by the trial court regarding whether defendant's conduct amounts to an unfair and deceptive [] practice under N.C. Gen. Stat. § 75-1.1[.]" *Id.* at 167-68, 574 S.E.2d at 136. "Without these findings, we are unable to determine whether defendant's conduct entitles plaintiff to damages under the applicable statute[]." *Id.* at 168, 574 S.E.2d at 136. We

remanded the case to the trial court "for a determination and findings as to whether defendant's conduct amounts to an unfair and deceptive [] practice under N.C. Gen. Stat. § 75-1.1 . . . ." *Id.*

In the instant case, plaintiff filed an action against defendants for fraud, UDP and violations of the Business Opportunity Sales Act. At the 14 June 2010 hearing, plaintiff submitted an affidavit from A.E. Strange ("Strange"), a certified public accountant with an accreditation in business valuation from the American Institute of Certified Public Accountants. In his affidavit, Strange stated that plaintiff asked him for a valuation for the route, presuming monthly gross revenue of $6,000.00, as well as a valuation of the route presuming monthly revenue "in the amounts that it has actually grossed since Plaintiff acquired it." Strange further stated that the difference in these two values was $122,154.00. After the trial court entered default judgment against defendants, the court ordered them to pay plaintiff damages in the amount of $122,154.00.

However, in its order granting plaintiff's motion for default judgment and awarding compensatory and punitive damages against defendants, the trial court did not make any findings

regarding whether defendants' conduct amounted to an unfair and deceptive practice under N.C. Gen. Stat. § 75-1.1, whether defendants' conduct amounted to a violation of the Business Opportunity Sales Act, or whether defendants' conduct amounted to fraud. *See id*. "Without these findings, we are unable to determine whether defendant's conduct entitles plaintiff to damages under the applicable statutes" and causes of action. *Id*. Therefore, we vacate the portion of the trial court's order awarding damages and remand this case for a determination and findings as to whether defendants' conduct amounts to an unfair and deceptive practice under N.C. Gen. Stat. § 75-1.1, a violation of the Business Opportunity Sales Act, as well as common law fraud. "On remand, plaintiff[] and defendant[s] may present evidence on issues relating to damages under the applicable statutes" and causes of action. *Id*.

VII. RULE 60 MOTION

Defendants argue that the trial court abused its discretion by denying their motion pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(b)(1) (2010) ("Rule 60(b)(1)"). We disagree.

> The decision whether to set aside a default judgment under Rule 60(b) is left to the sound discretion of the trial judge, and will not be overturned on appeal absent a clear showing of abuse of discretion. . . . The trial judge's conclusion in this regard

> will not be disturbed on appeal if competent evidence supports the judge's findings, and those findings support the conclusion.

JMM Plumbing & Utils., Inc. v. Basnight Constr. Co., 169 N.C. App. 199, 202, 609 S.E.2d 487, 490 (2005) (internal citations omitted).

Rule 60(b)(1) permits a court to relieve a party from an order for, *inter alia*, "surprise." N.C. Gen. Stat. § 1A-1, Rule 60(b)(1) (2010). "A party moving to set aside a judgment under subdivision (b)(1) must show not only . . . surprise . . ., *but also the existence of a meritorious defense*." *Estate of Teel v. Darby*, 129 N.C. App. 604, 607, 500 S.E.2d 759, 762 (1998) (emphasis added). In the instant case, defendants argue that their counsel's withdrawal, without proper notice, constituted "surprise" pursuant to Rule 60(b)(1). However, as previously noted, defendants' counsel adequately informed defendants of his motion to withdraw.

Defendants also state in their brief that they "presented exculpatory evidence and a meritorious defense in support of" their Rule 60(b)(1) motion. However, defendants failed to include in their brief exactly what exculpatory evidence they presented, and failed to state exactly what was their meritorious defense. Furthermore, defendants failed to cite to

any authority to support their arguments. "It is not the duty of this Court to supplement an appellant's brief with legal authority or arguments not contained therein." *Goodson v. P.H. Glatfelter Co.*, 171 N.C. App. 596, 606, 615 S.E.2d 350, 358 (2005). As a result, defendants have not met the second element of the two-part test required to set aside a judgment under Rule 60(b)(1). Even assuming, *arguendo,* that defendants met both elements of the test, defendants have failed to show that the trial court abused its discretion by denying their Rule 60(b)(1) motion. Therefore, defendants' issue on appeal is overruled.

VIII. CONCLUSION

We affirm the trial court's orders granting defendants' counsel's motion to withdraw, denying defendants' motion to continue, granting plaintiff's motions for entry of default and default judgment, and denying defendants' Rule 60(b) motion. The portion of the trial court's 16 June 2010 order awarding damages is vacated and remanded.

Affirmed in part, vacated and remanded in part.

Judges STEELMAN and BEASLEY concur.

Report per Rule 30(e).