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IN THE
COURT OF APPEALS OF INDIANA

Albanese Confectionery Group, Inc.,
Appellant-Defendant,

v.

Bernadette Cwik,
Appellee-Plaintiff.

March 4, 2021

Court of Appeals Case No. 20A-CT-1436

Appeal from the Lake Superior Court

The Honorable Gina Jones, Judge

Trial Court Cause No. 45D10-1705-CT-97

Tavitas, Judge.

Case Summary

[1] Bernadette Cwik's employment with Albanese Confectionery Group Inc. ("Albanese") was terminated, and Albanese remotely reset Cwik's smartphone,

which Cwik had authorized when she connected her personal phone to her company email account via an end user agreement ("the Agreement"). The Agreement authorized Albanese to perform a "factory reset," restoring the phone to its default state.

[2] Cwik filed a complaint against Albanese based on allegations of lost files stored on her smartphone, and Albanese filed a counterclaim seeking attorney's fees. Albanese then filed a motion for summary judgment. Finding that the Agreement did not survive Cwik's termination, the trial court denied Albanese's motion for summary judgment. Because we find that Cwik entered into a valid, enforceable agreement permitting Albanese to reset her phone, we reverse in part and remand with instructions to enter summary judgment for Albanese on all of Cwik's claims. We affirm the trial court's denial of summary judgment with respect to Albanese's counterclaim for attorney's fees because there are genuine issues of material fact. Accordingly, we affirm in part, reverse in part, and remand.

Issues

[3] Albanese raises a series of issues related to Cwik's six claims.[1] We, however, find one claim dispositive and address the following issues:

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[1] Albanese also argues that: (1) Cwik's spoliation of evidence entitles Albanese to summary judgment on all claims; (2) Cwik has not established that Albanese owed her a duty to protect Cwik's personal files; (3) Cwik does not have a cognizable claim under the Crime Victim's Relief

I. Whether Albanese is entitled to summary judgment based upon Cwik's acceptance of the Agreement, which allowed the factory reset of her smartphone.

II. Whether Albanese is entitled to summary judgment on its attorney's fees claim pursuant to Indiana Code Section 34-52-1-1.

Facts

[4] Cwik began working for Albanese in 2013. While working for Albanese, Cwik voluntarily connected her smartphone to Albanese's email server. Albanese employee, Sashon Karimi, set up Cwik's iPhone in early 2017.

[5] Karimi, in accordance with Albanese's standard policy, utilized an apparently built-in feature of the Apple iPhone: the Microsoft Exchange Server. In order to connect Cwik's iPhone to the server, Karimi first "pointed" the phone to the server, meaning that he inputted specific information identifying the server into the phone. Appellant's App. Vol. III p. 64. Then, Cwik was required to enter her Albanese email credentials. Upon keying her credentials, Cwik would have been presented with the Agreement.[2] The Agreement always presents on-screen prior to successful implementation of Albanese email access on a device. The Agreement must be accepted for Albanese to grant email access on the device.

Act; (4) Cwik cannot establish a bailment claim; and (5) Cwik cannot establish an invasion of privacy claim.

[2] Though Cwik treats the Agreement in both her briefing and argument below as an employment agreement, it is actually closer in kind to so-called "click-wrap" agreements, wherein an individual must agree to terms and conditions by digitally checking a box in order to avail themselves of a particular website or services offered by a website or an application.

[6] The record reflects that the Agreement reads, in relevant part:

> Server rem.albaneseconfectionery.co must be able to control some security features on your device.
>
> Activating administrator will allow Email to perform the following operations:
>
> - **Erase all data**
>   Erase phone's data without warning, by performing factory data reset.

Appellant's App. Vol. III p. 77.

[7] On March 13, 2017, Cwik was informed that "Albanese management had lost their confidence in [her] and were terminating [the] employment relationship." Appellant's App. Vol. II pp. 153-54. An Albanese employee escorted Cwik to her former desk to collect her personal belongings and then accompanied Cwik to the front door. Once Cwik was in her vehicle, she took out her phone and noticed that it was rebooting. She immediately proceeded to a cell phone retail store where she was informed that her phone had been restored to factory default settings. As a result, any data that had been stored on Cwik's phone was erased from that phone. Cwik emailed Albanese to request that her data be restored and was informed that the only way to regain access to the data was

via a cloud backup. Cwik apparently believed that she did not utilize Apple's iCloud backup services, though they are generally automatic.[3]

[8] In May 2017,[4] Cwik filed a complaint against Albanese alleging claims of: (1) negligence; (2) criminal mischief; (3) trespass; (4) theft[5]; (5) breach of bailment; and (6) invasion of privacy. Albanese subsequently filed a counterclaim alleging that Cwik "has brought and pursued frivolous, unreasonable, and groundless claims in this action, and [Albanese] is entitled to an award of attorney's fees incurred in defending these claims." Appellant's App. Vol. II p. 57.

[9] In June 2017, the phone at issue was destroyed after Cwik left it on the tailgate of her truck and drove away. The phone fell from the tailgate and was run over by another vehicle. The incident rendered the phone "damaged beyond the point of being able to be powered on or imaged using standard forensic procedures." Appellant's App. Vol. III p. 87.

[10] During her deposition on February 13, 2019, Cwik testified that she did have an iCloud account, and accessed the account in October 2018; she discovered that

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[3] iCloud is "a generic name for all the cloud-based services Apple provides to its users that allows data created on Apple devices to be backed up to the cloud as well as shared between multiple devices." Appellant's App. Vol. III p. 87.

[4] A second amended complaint was filed on October 26, 2018.

[5] Cwik argued below that she could recover for the criminal mischief, trespass, and theft under the Crime Victim's Relief Act, though she appears to concede that she did not suffer the requisite *pecuniary* loss. *See* Ind. Code § 34-24-3-1.

"pictures had been backed up to the cloud." *Id*. at 20-21. Cwik apparently attempted to download some of the files, failed to do so, and then intentionally deleted the files. Cwik testified, however, that she believed that there were no files on the iCloud account from December of 2016 until the date of her termination.

[11] Cwik further testified that many of the files she believed to have been lost were in fact accessible to her on the iCloud account; however, approximately three months of photographs and videos could not be located on her iCloud account. Cwik declined to give an estimate of how many files were still missing. Cwik did not explain her motive for erasing the files that formed the basis for her claims of loss,[6] though she concedes that she "is not the most technologically proficient person." Appellant's Br. p. 27. Cwik also conceded that the allegedly missing files have no monetary value, and no value of any kind to anyone other than to her.

[12] Cwik then claimed that, even though she had permanently deleted the files, a representative from Apple was able to recover the deleted files. Consequently, the only files that remained missing were an unknown number of photographs and videos from December 2016 until Cwik's termination in March 2017.

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[6] Cwik testified that there were "thousands" of picture and video files in her iCloud account. Appellant's App. Vol. III pp. 35-36. It is not clear from the record how many of the files she deleted.

[13] Albanese moved for summary judgment with respect to each of Cwik's six claims. Albanese argued that: (1) summary judgment was appropriate as a sanction because of Cwik's negligent and/or intentional spoliation of key evidence; (2) Cwik consented to the factory reset of her phone when she entered into the Agreement; (3) Albanese did not owe a duty of care; (4) Cwik was not entitled to recovery under the Crime Victim's Relief Act because she had admittedly suffered no pecuniary loss; (5) Cwik had failed to establish a bailment; and (6) no physical contact or intrusion of Cwik's physical space, and, thus, no invasion of privacy. Albanese further sought summary judgment on its counterclaim for attorney's fees on the grounds that Cwik's claims were frivolous, unreasonable, and groundless under Indiana Code Section 34-52-1-1.

[14] The trial court denied the motion for summary judgment as to all counts, but, in its order, addressed only one issue: whether the Agreement remained enforceable after Cwik had been terminated. Relying on a series of federal cases, the trial court concluded that the Agreement ended when Cwik's employment was terminated. Albanese now appeals.

Analysis

[15] Summary judgment is appropriate only when the moving party shows there are no genuine issues of material fact for trial and the moving party is entitled to judgment as a matter of law. *Erie Indem. Co. for Subscribers at Erie Ins. Exch. v. Estate of Harris by Harris*, 99 N.E.3d 625, 629 (Ind. 2018); *see also* Ind. Trial Rule 56(C). Once that showing is made, the burden shifts to the nonmoving party to designate appropriate evidence to demonstrate the actual existence of a genuine

issue of material fact. *See, e.g., Schoettmer v. Wright*, 992 N.E.2d 702, 705-06 (Ind. 2013).

[16] When ruling on the motion, the trial court construes all evidence and resolves all doubts in favor of the non-moving party. *Id.* at 706. We review the trial court's ruling on a motion for summary judgment de novo, and we take "care to ensure that no party is denied his day in court." *Id.* "We limit our review to the materials designated at the trial level." *Gunderson v. State, Indiana Dep't of Nat. Res.*, 90 N.E.3d 1171, 1175 (Ind. 2018), *cert. denied*. We are constrained by neither the claims and arguments presented at trial nor the rationale of the trial court ruling. *See, e.g., Woodruff v. Ind. Family & Soc. Servs. Admin.*, 964 N.E.2d 784, 790 (Ind. 2012) ("We will reverse if the law has been incorrectly applied to the facts. Otherwise, we will affirm a grant of summary judgment upon any theory supported by evidence in the record."); *Wagner v. Yates*, 912 N.E.2d 805, 811 (Ind. 2009) ("[W]e are not limited to reviewing the trial court's reasons for granting or denying summary judgment but rather we may affirm a grant of summary judgment upon any theory supported by the evidence.").

I. The Agreement

[17] Each of Cwik's claims shares a common basis—that Albanese improperly reset Cwik's phone, thereby permanently erasing some of Cwik's personal files. Albanese, however, argues that Cwik entered into the Agreement, and thereby authorized Albanese to reset Cwik's phone. "Under Indiana law, a party to a contract 'is presumed to understand and assent to the terms of the contracts he or she signs.'" *John M. Abbott, LLC v. Lake City Bank*, 14 N.E.3d 53, 58 (Ind. Ct.

App. 2014) (quoting *Sanford v. Castleton Health Care Ctr., LLC*, 813 N.E.2d 411, 418 (Ind. Ct. App. 2004), *trans. dismissed* (2006)).

[18] We find that Cwik consented to the terms of the Agreement, including permitting Albanese to perform a factory reset, and we find this issue to be dispositive of Cwik's claims. The designated evidence demonstrates that an agreement existed between the parties. Karimi testified that it is not possible for an employee to gain access to her Albanese email account on a device without first pressing a button to indicate assent to the terms of the Agreement. Cwik readily admits that she had Albanese email access on her phone for several years. Although Cwik testified that she could not *recall* pressing the button and that she *would* never have pressed it, the designated evidence demonstrates that Cwik must have accepted the terms of the Agreement to gain the email access on her smartphone. The Agreement allowed Albanese to "[e]rase phone's data without warning, by performing factory data reset." Appellant's App. Vol. III p. 77.

[19] Cwik argued, and the trial court ruled, that the Agreement ceased to have effect at the moment of Cwik's termination. We disagree. First, there is no term in the Agreement that defines the duration of Albanese's control over the phone, or asserts that it shall not survive Cwik's termination, and we will not supply terms to a contract that lacks such terms. *See, e.g., Zukerman v. Montgomery*, 945 N.E.2d 813, 819 (Ind. Ct. App. 2011) ("This court cannot make a contract for the parties, nor are we at liberty to revise a contract, or supply omitted terms while professing to construe it.").

[20] More importantly, the Agreement was not contingent upon the nature of Cwik's employment relationship with Albanese. It was not an employment agreement. Rather, the Agreement purported to protect Albanese's proprietary data on Cwik's smartphone.[7] The trial court cited a variety of non-binding federal cases for the proposition that an employer is no longer allowed to access the computer or phone of an employee once that employee has been terminated. *See, e.g., LVRC Holdings LLC v. Brekka,* 581 F.3d 1127, 1133 (9th Cir. 2009) (holding that Brekka had authorization to access a computer under the federal Computer Fraud and Abuse Act); *International Airport Centers, L.L.C. V. Citrin*, 440 F.3d 418 (7th Cir. 2006) (holding that Citrin accessed a laptop without authorization under the federal Computer Fraud and Abuse Act after his employment terminated). We note that the cases cited by the trial court seem to primarily deal with unauthorized access in the context of the federal Computer Fraud and Abuse Act, which is inapposite here. Even if those cases were applicable here, however, we see no reason that the parties could not freely contract to reach an arrangement whereby Alabanese's access to Cwik's smartphone would survive her termination. Accordingly, we find that Cwik and Albanese entered into an unambiguous agreement.

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[7] Cwik contends that "[t]he wiping of Ms. Cwik's phone wasn't even required to get the email off her phone." Appellee's Br. p. 17. She fails, however, to distinguish between remote email *access* and the storage of files on the phone itself. It is clear that her access to the exchange email server was terminated prior to the phone being restored to its factory settings. But it is equally clear from the terms of the Agreement that Albanese's intent was to exercise control over more than just the phone's access to the email server. Rather, Albanese sought, and was granted, permission to control a variety of ways in which the phone could be used to access *or store* proprietary data.

II. Cwik's Claims

[21] Cwik's complaint raised multiple claims, and Albanese requested summary judgment on each of her claims. Cwik raised claims of: (1) negligence; (2) criminal mischief; (3) trespass; (4) theft; (5) breach of bailment; and (6) invasion of privacy. The trial court did not reach any of these claims in its summary judgment ruling. The basis of each of Cwik's claims is that Albanese improperly reset Cwik's phone, which resulted in the loss of some of Cwik's data. The designated evidence establishes, however, that Cwik authorized Albanese to do so; thus, Cwik's claims are either precluded or are no longer cognizable. Accordingly, Cwik's claims must fail.

a. Negligence

[22] Cwik's first claim was for negligence. We note that "[n]egligence claims have three elements: (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty and (3) injury to the plaintiff proximately caused by the defendant's breach." *Hayden v. Franciscan All., Inc.*, 131 N.E.3d 685, 693 (Ind. Ct. App. 2019) (citing *Scott v. Retz*, 916 N.E.2d 252, 257 (Ind. Ct. App. 2009)), *trans. denied*. Cwik argued that Albanese was negligent because "Albanese breached their duty to Cwik when they, through subterfuge, accessed her phone and destroyed her captured memories, contacts and other data." Appellant's App. Vol. II p. 26. There can be no duty, however, to refrain from doing what one has expressly been authorized to do. Where there is a contract, that contract defines the duty of care, if any, rather than tort law. *See, e.g., JPMCC 2006-CIBC14 Eads Parkway, LLC v. DBL Axel, LLC*, 977 N.E.2d 354, 364 (Ind. Ct.

App. 2012) ("Where the source of a party's duty to another arises from a contract, 'tort law should not interfere.'") (quoting *Greg Allen Const. Co. v. Estelle*, 798 N.E.2d 171, 175 (Ind. 2003)). Accordingly, Albanese demonstrated that it was entitled to summary judgment on Cwik's negligence claim.

b. Criminal Mischief, Trespass, and Theft

[23] The next three of Cwik's claims—criminal mischief, trespass, and theft—alleged that Albanese acted criminally, thereby inflicting pecuniary injury. Indiana Code Section 32-24-3-1 provides, in part:

> If a person . . . suffers a pecuniary loss as a result of a violation of IC 35-43, IC 35-42-3-3, IC 35-42-3-4, IC 35-45-9, or IC 35-46-10, the person may bring a civil action against the person who caused the loss for the following:
>
> (1) An amount not to exceed three (3) times:
>
> > (A) the actual damages of the person suffering the loss, in the case of a liability that is not covered by IC 24-4.6-5; or
> >
> > (B) the total pump price of the motor fuel received, in the case of a liability that is covered by IC 24-4.6-5.
>
> (2) The costs of the action.
>
> (3) A reasonable attorney's fee.

* * * * *

[24] We first note that claims under Indiana Code Section 34-24-3-1 require the establishment of a "pecuniary loss." Cwik conceded that the allegedly missing files have no monetary value, and no value of any kind to anyone other than to her. Accordingly, Cwik failed to establish the existence of a genuine issue of material fact regarding pecuniary loss, and Albanese was entitled to summary judgment on the claims for criminal mischief, trespass, and theft.

[25] Moreover, each of these claims fail as a result of the Agreement's provisions. Cwik asserts that Albanese's action of "wip[ing] Cwik's phone" amounted to criminal mischief. Appellant's App. Vol. II p. 30; *see* Ind. Code § 35-43-1-2 ("A person who recklessly, knowingly, or intentionally damages or defaces property of another person *without the other person's consent* commits criminal mischief . . . .") (emphasis added). With respect to trespass, Cwik alleged that Albanese committed trespass by accessing her property without a legal right. *See* Ind. Code § 35-43-2-2(b) ("A person who . . . (4) knowingly or intentionally interferes with the possession or use of the property of another person *without the person's consent* . . . commits criminal trespass . . . .") (emphasis added). For her theft claim, Cwik alleged that Albanese's action of "wip[ing] Cwik's phone" amounted to theft. Appellant's App. Vol. II p. 31; *see* Ind. Code § 35-43-4-2(a) ("A person who knowingly or intentionally exerts *unauthorized control* over property of another person, with intent to deprive the other person of any part of its value or use, commits theft . . . .") (emphasis added).

[26] All three of Cwik's tort-analogue criminal claims are governed by language that clearly demonstrates that those claims can only succeed in the absence of

permission or authorization. The designated materials establish that Cwik authorized and consented to the Agreement, including the factory reset of her phone. As such, the Agreement requires that, as a matter of law, these claims must necessarily fail. We conclude that Albanese is entitled to summary judgment on Cwik's claims for criminal mischief, trespass, and theft.

c. Bailment

[27] Cwik further claimed that Albanese's ability to exert control over her phone constituted a bailment. "A bailment arises when: (1) personal property belonging to a bailor is delivered into the *exclusive possession* of the bailee and (2) the property is accepted by the bailee." *Cox v. Stoughton Trailers, Inc.*, 837 N.E.2d 1075, 1082 (Ind. Ct. App. 2005) (emphasis added).[8] Here, the Agreement makes clear that both Cwik, and Albanese, to a lesser extent, would be able to exert control over the contents of the smartphone. Cwik failed to demonstrate a genuine issue of material fact regarding whether Albanese ever had *exclusive* possession of the phone or its contents. Accordingly, Albanese was entitled to summary judgment on Cwik's bailment claim. *See, e.g., Stubbs v. Hook*, 467 N.E.2d 29, 30 (Ind. Ct. App. 1984) (finding that there was no bailment where multiple parties had keys to the same aircraft).

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[8] "To constitute delivery, there generally must be a full transfer, either actual or constructive, of the property to the bailee as to exclude the possession of the owner and all other persons and give to the bailee, for the time being, the sole custody and control of the property." *Cox*, 837 N.E.2d at 1083. It is unclear how Cwik can reasonably contend that Albanese had *exclusive* possession of the data on her personal phone. Presumably she was able to freely manipulate the data herself, notwithstanding the fact that she had granted Albanese permission to do the same in a limited capacity.

d. Invasion of Privacy

[28] Finally, Cwik asserted a claim of invasion of privacy via intrusion for Albanese's act of accessing her phone. "Intrusion occurs when there has been an 'intrusion upon the plaintiff's physical solitude or seclusion as by invading his home or conducting an illegal search.'" *F.B.C. v. MDwise, Inc.*, 122 N.E.3d 834, 837 (Ind. Ct. App. 2019) (quoting *Cullison v. Medley*, 570 N.E.2d 27, 31 (Ind. 1991)), *trans. denied*. We further note that:

> [W]e have specifically chosen not to recognize claims of Intrusion where the intrusion only invades plaintiff's emotional solace. *See Westminster Presbyterian Church of Muncie v. Yonghong Cheng*, 992 N.E.2d 859, 868-69 (Ind. Ct. App. 2013) (concluding that the tort of Intrusion has only been found where there was an intrusion by physical contact or an invasion of plaintiff's physical space, and refusing to extend it to cases where the only intrusion is upon plaintiff's emotional solace), *trans. denied*.

F.B.C., 122 N.E.3d at 837. Cwik authorized the remote factory reset of her phone through the Agreement. It is not clear what physical intrusion Cwik is alleging, and we find none in the record. Cwik has failed to establish a genuine issue of material fact regarding an essential element of a claim of invasion of privacy via intrusion, and her claim fails. Accordingly, Albanese was entitled to summary judgment on Cwik's intrusion claim.

[29] As Albanese was entitled to summary judgment on each of Cwik's claims raised in her complaint, we reverse the trial court's denial of summary judgment and remand with instructions to enter summary judgment in favor of Albanese on all claims raised by Cwik.

II. Counterclaim for Attorney's Fees

[30] Finally, we address Albanese's motion for summary judgment on its counterclaim seeking attorney's fees pursuant to Indiana Code Section 34-52-1-1(b), which provides:

> In any civil action, the court may award attorney's fees as part of the cost to the prevailing party, if the court finds that either party:
>
> (1) brought the action or defense on a claim or defense that is frivolous, unreasonable, or groundless;
>
> (2) continued to litigate the action or defense after the party's claim or defense clearly became frivolous, unreasonable, or groundless; or
>
> (3) litigated the action in bad faith.

[31] Indiana Code Section 34-52-1-1(b) "places an obligation on litigants to investigate the legal and factual basis of the claim when filing and to continuously evaluate the merits of claims and defenses asserted throughout litigation." *BioConvergence, LLC v. Menefee*, 103 N.E.3d 1141, 1161 (Ind. Ct. App. 2018)*, trans. denied*.

> "A claim is 'frivolous' if it is made primarily to harass or maliciously injure another; if counsel is unable to make a good faith and rational argument on the merits of the action; or if counsel is unable to support the action by a good faith and rational argument for extension, modification, or reversal of existing law." *Kitchell v. Franklin*, 26 N.E.3d 1050, 1057 (Ind. Ct. App. 2015) (citing *Wagler v. W. Boggs Sewer Dist.*, Inc., 980

> N.E.2d 363, 383 (Ind. Ct. App. 2012), *reh'g denied*, *trans. denied*, *cert. denied*, 571 U.S. 1131, 134 S. Ct. 952, 187 L.Ed.2d 786 (2014)), *trans. denied*. "A claim is 'unreasonable' if, based on the totality of the circumstances, including the law and facts known at the time, no reasonable attorney would consider the claim justified or worthy of litigation." *Id*. "A claim is groundless if no facts exist which support the legal claim relied on and presented by the losing party." *Purcell v. Old Nat. Bank*, 972 N.E.2d 835, 843 (Ind. 2012). "However, the law is settled that a claim is neither groundless nor frivolous merely because a party loses on the merits." *Kitchell*, 26 N.E.3d at 1057. "Bad faith is demonstrated where the party presenting the claim is affirmatively operating with furtive design or ill will." *Id*.

Id. at 1161-62.

[32] In its motion for summary judgment, Albanese argued that it was entitled to summary judgment on its counterclaim because: (1) the complaint was brought by Cwik as retaliation for her firing; (2) each of the claims was groundless; and (3) Cwik improperly deleted files drom her iCloud account and destroyed the iPhone in question during the litigation. Cwik's trial counsel conceded that Cwik's complaint intentionally took a "scattershot" approach because no available theory under Indiana law provided a "clean fit" for Cwik's alleged loss. Tr. Vol. II pp. 45, 52. It is well-settled, however, "that a claim is neither groundless nor frivolous merely because a party loses on the merits." *Staff Source, LLC v. Wallace*, 143 N.E.3d 996, 1009 (Ind. Ct. App. 2020).

[33] Although certain aspects of Cwik's claims are concerning, we cannot say no genuine issues of material fact exist, and that Albanese was entitled to judgment

as a matter of law on its counterclaim for attorney's fees. We, therefore, affirm the trial court's denial of Albanese's motion for summary judgment with respect to its counterclaim and remand for further proceedings consistent with this opinion.

Conclusion

[34] Cwik expressly permitted Albanese to perform a factory reset of Cwik's phone. As a result, Albanese is entitled to summary judgment as a matter of law on all of Cwik's claims. We find, however, that genuine issues of material fact exist with respect to Albanese's counterclaim for attorney's fees. We reverse the trial court's order denying summary judgment on Cwik's claims and instruct the trial court to enter an order for summary judgment in favor of Albanese on those claims. We affirm the trial court's order denying summary judgment with respect to Albanese's counterclaim and remand for further proceedings.

[35] Affirmed in part, reversed in part, and remanded.

Bailey, J., and Robb, J., concur.