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NO. COA01-981

NORTH CAROLINA COURT OF APPEALS

Filed: 18 June 2002

OLD WELL WATER, INC. and
WILLIAM I. BELK,
Plaintiffs,

v.

COLLEGIATE DISTRIBUTING, INC. and SAYERS F. HARMAN, II,
Defendants and Third-Party Plaintiffs,

Mecklenburg County
No. 98 CVS 17238

v.

WILLIAM REED RAYNOR, II,
Third-Party Defendant.

Appeal by defendant and third-party plaintiff Collegiate Distributing, Inc. from judgment filed 11 December 2000 and from order dated 5 February 2001 by Judge Forrest D. Bridges in Mecklenburg County Superior Court. Heard in the Court of Appeals 14 May 2002.

Hamilton, Gaskins, Fay & Moon, PLLC, by Jackson N. Steele and Mark R. Kutny, for plaintiff-appellees.

Maupin, Taylor & Ellis, P.A., by M. Keith Kapp, Camden R. Webb, and Kevin W. Benedict, for defendant and third-party plaintiff-appellant Collegiate Distributing, Inc.

Lewis & Anderson, P.C., by Susan H. Lewis and Susan M. Brown, for third-party defendant-appellee.

GREENE, Judge.

Collegiate Distributing, Inc. (Collegiate) appeals a judgment filed 11 December 2000 entered consistent with a jury verdict in favor of Collegiate and Sayers F. Harman, II (Harman) (collectively, Defendants) in the amount of $1.00 and trebled to $3.00. Collegiate also appeals an order dated 5 February 2001 denying its motion for a new trial.

In 1996, William Reed Raynor, II (Raynor), Larry Phillips (Phillips), Kimberly Kiser, and William I. Belk (Belk) formed Old Well Water, Incorporated (Old Well), a company designed to produce and distribute bottled water products affiliated with various colleges and universities.[1] During 1997, Old Well was not permitted to sell its product at UNC-Chapel Hill's (UNC) Kenan Stadium, but the company was able to distribute its product to book stores on UNC's campus and also to the Educational Foundation, a booster club on campus. In November 1997, Raynor, Belk, and Phillips discussed with Harman, who at the time was dating Raynor's daughter, the possibility of him distributing Old Well's water. In 1998, Harman moved to Raleigh and incorporated Collegiate, a distribution company. Old Well agreed that Collegiate would be the sole distributor of Old Well's water.

After various occurrences between the parties concerning the production and distribution of Old Well's water, Old Well and Belk (collectively, Plaintiffs) filed a complaint against Defendants on 18 December 1998 alleging Defendants had breached their contract

[1]Kimberly Kiser subsequently sold her shares in Old Well to Raynor, Phillips, and Belk.

with Old Well and sought a declaratory judgment that Belk was not the alter ego of Old Well and Plaintiffs had not breached any contract or agreement with Defendants. Defendants answered, denying the allegations in Plaintiffs' complaint and counterclaiming for damages arising out of breach of an oral contract, breach of an oral distributorship contract, breach of an implied contract, unfair and deceptive trade practices, fraud, negligent misrepresentation, and constructive termination of an oral distribution agreement. On 1 July 1999, Defendants filed a third-party complaint against Raynor alleging the same claims they had alleged in their counterclaim against Plaintiffs.

At trial on the matter, Raynor testified he and Harman never discussed Harman's business plan with respect to particular locations or estimated sale volumes. After making a delivery with Collegiate's employees, Raynor noticed Collegiate was not efficiently delivering or inventorying its product. Sometime in 1998, Harman began requesting a 1.5 liter bottle of water to distribute to various customers. Raynor informed Harman that Old Well's bottling company did not have the capacity to produce a 1.5 liter bottle. In the Fall of 1998, Raynor began receiving telephone calls and complaints from businesses in Chapel Hill regarding Collegiate's failure to distribute Old Well's water to their businesses.

Belk testified that in September 1997, he had dinner with Harman where he explained it would be difficult to make sales in the stadiums because Coca Cola had exclusive rights in the

stadiums. Belk testified he and Harman never discussed the capacity of the various university stadiums and how many people could be serviced with bottled water. According to Belk, Harman never discussed with him the projected sales and Belk never gave Harman any feedback on what he could possibly sell. Even though Collegiate was supposed to distribute the water to Harris Teeter and Winn Dixie grocery stores, Old Well continued to supply the grocery stores with the water because Collegiate was not properly supplying the stores.

Harman testified Belk and Raynor asked him to be a distributor for Old Well water and he agreed to do so only after Old Well agreed to: to produce a catering size product and a 1 liter or 1.5 liter product; provide Harman with access to all the outlets on the campuses including the stadiums and student stores; allow Harman to assume responsibility for all existing accounts; produce water for North Carolina State University (N.C. State) and Duke University; and produce a six-pack product. Belk and Raynor told Harman that all sizes and all schools would be available by 1998. After agreeing to distribute Old Well's water, Harman returned to Atlanta and developed a business plan. The trial court admitted the business plan for the limited purpose of establishing projections made by Harman but ordered the jury not to consider the business plan as evidence of Collegiate's lost profits and redacted information from the business plan concerning lost profits. Martin Kilpatrick (Kilpatrick), a senior level executive at Coca Cola Enterprises, advised Harman that the distribution company would be

a profitable venture based on guaranteed placements, venues, and packages. At a meeting in January 1998 with Raynor, Phillips, and Belk, Harman learned Old Well had not produced a bundled package, a 1.5 liter product, or N.C. State water.

After Harman moved to Raleigh, he encountered resistance from various campus outlets that did not want Old Well's product in their stores. Although Harman was promised he would have a product to distribute to N.C. State in early 1998, Harman did not receive an N.C. State product from Old Well until June or July 1998, which was after the semester had ended and the students were on their summer break. In March 1998, Harman was told Duke University would not approve of a bottled water affiliated with its university. Harman never received the bundled packages or bottles larger than the 20-ounce size. As a consequence, Harman lost many customers. Subsequently, Harman began developing a 5-gallon product, on which he affixed Old Well's labels and sold to various entities. In a summary of income and expenses for Collegiate, Harman gave a detailed account of each operating expense, its total value of assets, and its total profit from sales. Harman was permitted to testify Collegiate's net loss was $82,572.00.

On cross-examination, Harman admitted he received a higher salary in March 1999, even after Collegiate had closed its business. On 15 July 1999, Harman wrote himself a check from Collegiate's checking account for $5,000.00. Throughout 1998, there were various times Collegiate paid the rent for Harman's apartment, which doubled as an apartment and a business. Harman

also admitted paying various personal expenses out of Collegiate's account. In addition, many of Collegiate's operating expenses came from its distribution of a 5-gallon water product, not produced by Old Well. Harman admitted there had been various withdrawals made from Collegiate's bank account that he could not identify as relating to personal or business expenses, but he believed them to be business expenses. Harman contended he had reimbursed any personal expenses he had paid out of Collegiate's account.

Kilpatrick testified as an expert in marketing, advertising, and operations within the consumer package industry with a focus on beverages. After reviewing Harman's business plan, Kilpatrick advised him that under no circumstances should he pursue the Old Well venture without first receiving additional package sizes together with the foundation of retail outlets, stadiums, and arenas. During Kilpatrick's testimony, Plaintiffs objected to Kilpatrick testifying with respect to whether Collegiate would have been profitable and would have made $97,000.00 in its first three years of operation. On *voir dire*, Kilpatrick testified that in his opinion, Collegiate would have been profitable based on his knowledge of other water companies, the package sizes utilized in the business plan, the retail distribution in the business plan, and Harman's capability of bringing in new retail outlets. Kilpatrick admitted he had very little familiarity with respect to starting a distribution company for the sole distribution of water. In calculating Collegiate's profit projections, Kilpatrick used the projections Harman made in his business plan. In forming his

opinion on whether Collegiate would have been profitable, Kirkpatrick did not have: any market research data from Wake, Orange, and Durham counties; any details concerning what, if any, competitors would be in the areas; knowledge concerning local brands of water in the three counties; knowledge concerning the number of retail outlets available; or any knowledge of bottled water companies with access to university logos. The trial court sustained Plaintiffs' objection to Kilpatrick testifying about the profitability of Collegiate and concluded the proffered testimony was based entirely on Harman's business plan and the assumptions contained therein without any independent market data or track records of similarly situated businesses. Kilpatrick was allowed to testify that Old Well's 20-ounce bottled water would not be successful in a grocery store without the availability of other sizes and packages.

After all the evidence, the trial court instructed the jury that if Harman had been damaged by Plaintiffs' and Raynor's fraud or negligent misrepresentation, he was entitled to be placed, insofar as possible by payment of money, in the same position he would have occupied if those acts had not occurred. If there were no actual damages, the jury was instructed to find nominal damages. The jury returned a verdict finding, in pertinent part: Harman had been damaged by the negligent misrepresentation of Belk in the amount of $1.00; Old Well had failed to perform under an agreement with Defendants for the exclusive distributorship of its product in Wake, Durham, and Orange counties; Belk had made a negligent

misrepresentation to Collegiate; Belk had misrepresented Old Well's ability and intent to create different bottle sizes other than the 20-ounce size; Belk's conduct had proximately caused injury to Collegiate; and Collegiate had sustained $1.00 in damages. The trial court found Plaintiffs had committed unfair and deceptive trade practices in violation of N.C. Gen. Stat § 75-1.1 and awarded Defendants costs which included Kilpatrick's expert witness fee. After determining Plaintiffs had made two efforts at settling Defendants' counterclaims against them, the trial court declined to award attorney's fees. The trial court entered judgment on the jury's verdict and trebled the amount of damages to $3.00.

On 20 December 2000, Defendants moved the trial court for a new trial on the issue of damages arguing the verdict was contrary to law and the damages were inadequate. The trial court denied Defendants' motion for a new trial.

The issues are whether: (I) Defendants' evidence of lost profits is sufficient to mandate its admissibility; and (II) a jury is required to award actual damages once it finds a party's conduct proximately caused injury to another.

I

Collegiate argues the trial court erred in excluding evidence relating to its lost profits. We disagree.

While "lost future profits are difficult for a new business to calculate and prove," such businesses, like an established business, must prove lost profits with reasonable certainty.

Olivetti Corp. v. Ames Bus. Systems, Inc., 319 N.C. 534, 545-46, 356 S.E.2d 578, 585 (1987). The burden of proving lost profits is on the party seeking them and that party must show "that the amount of damages is based upon a standard that will allow the finder of fact to calculate the amount of damages with reasonable certainty." *Id.* at 547-48, 356 S.E.2d at 586. While "absolute certainty is not required, damages for lost profits will not be awarded based on hypothetical or speculative forecasts." *McNamara v. Wilmington Mall Realty Corp.*, 121 N.C. App. 400, 407-08, 466 S.E.2d 324, 329, *disc. review denied*, 343 N.C. 307, 471 S.E.2d 72 (1996). Because "an estimate of anticipated profits does not provide an adequate factual basis for a jury to ascertain the measure of damages," *Catoe v. Helms Const. & Concrete Co.*, 91 N.C. App. 492, 496, 372 S.E.2d 331, 335 (1988), the trial court is permitted to exclude evidence of lost profits if it is based on mere speculation, *see Olivetti*, 319 N.C. at 549, 356 S.E.2d at 587.

In this case, Collegiate, the party seeking lost profits, did not have an established history of profits. The only evidence of Collegiate's lost profits consisted of Kilpatrick's testimony and Harman's sales projections. Kilpatrick's testimony, as well as Defendants' business plan, was based entirely on speculative evidence, without any independent research or data to support the estimates or any comparison to similar businesses. Defendants' business plan centered entirely around speculative opportunities and venues at which to sell Old Well's product. Due to the highly speculative nature of Defendants' projections and Kilpatrick's

testimony, Collegiate did not establish its lost profits with reasonable certainty. Accordingly, the trial court did not err in excluding Defendants' evidence of lost profits.[2]

II

Collegiate, relying on *Robertson v. Stanley*, 285 N.C. 561, 206 S.E.2d 190 (1974), argues it presented uncontroverted evidence of damages, thus the jury erred in awarding only nominal damages. We disagree.

Under *Robertson*, "uncontroverted damages cannot be arbitrarily ignored by the jury." *Warren v. Gen. Motors Corp.*, 142 N.C. App. 316, 320, 542 S.E.2d 317, 319 (2001). *Robertson*, however, does not apply if there has been no stipulation as to an element of damages. *Smith v. Beasley*, 298 N.C. 798, 801, 259 S.E.2d 907, 909 (1979). Thus, where there is no stipulation as to damages, "[i]t is the function of the jury alone to weigh the evidence, determine the credibility of the witnesses and the probative force to be given their testimony, and determine what the evidence proves or fails to prove." *Id.* The jury weighs the credibility of the testimony and "has the right to believe any part or none of it." *Id.* While an injured party is entitled "to be placed, insofar as this can be done by money, in the same position he would have occupied" had the

[2]Collegiate also argues in its brief to this Court that the trial court erred in excluding evidence concerning stadium attendance projections. Because these projections were highly speculative and there was no certainty as to how many of those attending would actually purchase Old Well water, the trial court did not err in excluding this evidence as it did not produce a reasonably certain estimate of Collegiate's lost profits. We note Harman was permitted to testify concerning projections he made in his business plan.

injury not occurred, *Perfecting Serv. Co. v. Product Dev. & Sales Co.*, 259 N.C. 400, 415, 131 S.E.2d 9, 21 (1963), "nominal damages are allowed where a legal right has been invaded but there has been no substantial loss or injury to be compensated." *Lee Cycle Center, Inc. v. Wilson Cycle Center, Inc.*, 143 N.C. App. 1, 9-10, 545 S.E.2d 745, 750, *aff'd*, 354 N.C. 565, 556 S.E.2d 293 (2001). "It is not error to limit recovery to nominal damages when evidence is insufficient for the jury to determine lost profits with reasonable certainty." *Catoe*, 91 N.C. App. at 497, 372 S.E.2d at 335.

In this case, the parties did not stipulate to the issue of damages as in *Robertson*, thus the jury was free to weigh the evidence and determine the credibility of Defendants' witnesses as to the amount of damages sustained by Collegiate. *See Smith*, 298 N.C. at 801, 259 S.E.2d at 909. In any event, Defendants' evidence relating to damages was controverted. On cross-examination of Harman, Plaintiffs disputed many of the operating costs and attributed many of Collegiate's expenses to Harman's personal expenses. At times during his testimony, Harman was unable to effectively identify personal expenses versus business expenses. Moreover, Plaintiffs put on evidence that Harman did not efficiently operate his business. In weighing the evidence and the credibility of Defendants' witnesses, the jury had the right to believe any part or none of the testimony and determine the accuracy of Collegiate's estimation of damages. Therefore, it is conceivable that the jurors could have found Collegiate only suffered nominal damages. Accordingly, the trial court did not err

in entering a judgment awarding only nominal damages.[3]

No error.[4]

Judges HUDSON and BIGGS concur.

Report per Rule 30(e).

[3]In its brief to this Court, Collegiate argues the trial court erred in denying its motion for a new trial based on inadequate damages. Because we hold it was within the jury's province to award nominal damages, we need not address Collegiate's arguments relating to a new trial on damages.

[4]Collegiate also argues in its brief to this Court that the trial court abused its discretion in denying Collegiate's request for attorney's fees pursuant to N.C. Gen. Stat. § 75-16.1, but it concedes the issue of attorney's fees should only be considered if this Court orders a new trial on the damages issue. Because we have not awarded a new trial on damages, we need not address Collegiate's argument relating to attorney's fees.