An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA01-272

NORTH CAROLINA COURT OF APPEALS

Filed: 05 February 2002

LIBERTY OIL COMPANY
OF LIBERTY, INC.

v. Randolph County
No. 99 CVS 860

RICHARD F. HILDRETH, and wife,
JOY B. HILDRETH; and RICHARD
L. HILDRETH

Appeal by defendant Richard F. Hildreth from judgment entered 1 December 2000 by Judge A. Moses Massey in Randolph County Superior Court. Heard in the Court of Appeals 9 January 2002.

William H. Flowe, Jr. for plaintiff-appellee.

Gavin, Cox, Pugh, Etheridge & Wilhoit, LLP, by Alan V. Pugh and Robert E. Wilhoit, for defendant-appellants.

THOMAS, Judge.

Defendant, Richard F. Hildreth, appeals from the denial of motions for directed verdict and new trial, setting forth two assignments of error in this breach of contract case. For the reasons discussed herein, we affirm the trial court.

The facts are as follows: Defendant leased four convenience stores to plaintiff Liberty Oil Company in November 1994. The

contract was for a five-year period with plaintiff having the option to renew for an additional five years. Rent was set at a total of $4,800 per month.

In addition to other provisions, the lease called for defendant to:

> keep all tanks and lines in compliance with State and Federal EPA regulations provided, however, that if at any time a defect or problem arises such that the tank or lines do not meet EPA regulations, [defendant] has the option to not correct the problem. If [defendant] determines that it is not feasible to correct the defect or problem the rental amount paid by [plaintiff] to [defendant] shall be reduced by $1,200.00 for each such premises.

Plaintiff, meanwhile, had a duty to "pay [for] the tank tightness test [and] to pay all amounts due [to] the State of North Carolina for the registration fund for [the] tanks."

Plaintiff was primarily in the business of distributing and selling fuel and other petroleum products. After upgrading the four locations, plaintiff subleased the premises to various convenience store operators who, in turn, purchased petroleum products from plaintiff.

In 1996, one of the stores experienced a leak in an underground storage tank. Defendant decided not to repair or replace the tank. The store was returned to defendant by agreement and the total rent was reduced to $3,600 per month for the remaining three stores.

Eventually, the remaining underground tanks needed upgrading, but defendant refused to perform the work. Plaintiff notified the operators of the convenience stores that after 22 December 1998, fuel could no longer be dispensed from the tanks. The operators, nonetheless, agreed to keep the stores open and plaintiff elected to continue with the leases.

Because the tanks were in violation of government standards, however, plaintiff in turn did not have the tank tightness tests performed as required. Defendant wrote plaintiff that it was in violation of the agreement and therefore, the lease was being terminated. Plaintiff responded by denying any violation and refusing to vacate the property.

In December 1998, defendant padlocked the fuel tanks and took possession of the three stores. Consequently, plaintiff filed a complaint against defendant, as well as his wife and son, Joy B. Hildreth and Richard L. Hildreth, alleging breach of contract and conversion. He requested preliminary and permanent injunctions, lost profits, and other compensatory damages in excess of $10,000.

Defendants answered that they terminated the lease because plaintiff had breached it by failing to keep current, perform, and pay for tank tightness tests. Defendant Richard L. Hildreth was released from the action prior to trial. A directed verdict was entered for defendant Joy Hildreth at the close of all the evidence.

In December 2000, a jury found that defendant breached the agreement and awarded damages to plaintiff in the amount of $140,809.99. Costs of the action were also taxed to defendant. He gave timely notice of appeal.

For our purposes, we combine defendant's first and second assignments of error, by which he argues: (1) the trial court erred in denying his directed verdict as to special damages at the close of plaintiff's evidence because plaintiff failed to produce evidence as to the profitability of the stores prior to his re-possession; and (2) the trial court erred in failing to set the verdict aside and order a new trial on the same basis. We disagree.

A directed verdict is proper when there is no evidence of an essential element of plaintiff's claim. *McMurray v. Surety Federal Savings & Loan Assoc.*, 82 N.C. App. 729, 348 S.E.2d 162 (1986), *cert. denied*, 318 N.C. 695, 351 S.E.2d 748 (1987). A motion to set aside the verdict is addressed to the discretion of the trial court and such ruling will not be disturbed on appeal absent an abuse of discretion. *State v. Daye*, 15 N.C. App. 233, 189 S.E.2d 584, (1972). Thus, the trial court's decision can be overturned only if it is clear from the record that the trial judge abused or failed to exercise his discretion. *See State v. Peterson*, 337 N.C. 384, 446 S.E.2d 43 (1994).

This Court has held that:

> "Damages for breach of contract may include loss of prospective profits where the loss is the natural and proximate result of the breach." *Mosley & Mosley Builders v. Landin Ltd.*, 87 N.C. App. 438, 446, 361 S.E.2d 608, 613 (1987) (citing *Perkins v. Langdon*, 237 N.C. 159, 170, 74 S.E.2d 634, 643 (1953)), *cert. dismissed*, 322 N.C. 607, 370 S.E.2d 416 (1988). To recover lost profits, the claimant must prove such losses with "reasonable certainty." *Olivetti Corp. v. Ames Business Systems, Inc.*, 319 N.C. 534, 546, 356 S.E.2d 578, 585, *reh'g denied*, 320 N.C. 639, 360 S.E.2d 92 (1987). Although absolute certainty is not required, damages for lost profits will not be awarded based on hypothetical or speculative forecasts. *Mosley*, 87 N.C. App. at 446, 361 S.E.2d at 613 (when prospective profits are conjectural, remote, or speculative, they are not recoverable); *see also Weyerhaeuser Co. v. Supply Co.*, 292 N.C. 557, 561, 234 S.E.2d 605, 607 (1977).

McNamara v. Wilmington Mall Realty Corp., 121 N.C. App. 400, 407-08, 466 S.E.2d 324, 329-30, *rev. denied*, 343 N.C. 307, 471 S.E.2d 73 (1996).

In the instant case, Jim Parker (Parker), president and part-owner of plaintiff gave specific evidence as to what he believed were the lost profits of the three stores, including provisions for market fluctuations, pursuant to *McBride v. Apache Camping Center, Inc.*, 36 N.C. App. 370, 243 S.E.2d 913, *cert. denied*, 295 N.C. 550, 248 S.E.2d 727 (1978). He testified that when plaintiff leased the stores in 1994, it made many necessary repairs to the "unbranded and kind of run down" stores, including painting the pumps, asphalt work, and inserting credit card machines at the pumps. Parker further testified that gasoline sales doubled at the stores, mainly

because of the credit card machines installed at the pumps. He stated the three stores "were profitable up to [December 1998], and [Liberty] anticipated them even being better in the future." Parker testified as to the remaining time left on the agreement and used business records to verify the volume of sales and prices charged. He further testified as to the value of the fuel left in the tanks.

Plaintiff's accountant, Joseph Gary Core, testified that plaintiff's gross profit in 1998 was $661,524 and in 1999, $519,679. He stated there was approximately a $140,000 difference between the two years. For 1998, plaintiff had a net income of $75,202. In 1999, there was a net loss of $100,859.

This was sufficient evidence for the jury to draw a reasonably accurate conclusion not based on conjecture or speculation as to the damages amount. *See Overnite Transportation Co. v. Int'l Brotherhood of Teamsters*, 257 N.C. 18, 29, 125 S.E.2d 277, 285-86, *cert. denied*, 371 U.S. 862, 9 L. Ed. 2d 100, *reh'g denied*, 371 U.S. 899, 9 L. Ed. 2d 131 (1962). We further hold there was no abuse of discretion in the judge's ruling that the verdict was not against the weight of the evidence. Accordingly, we reject defendant's arguments.

NO ERROR.

Judges WYNN and HUDSON concur.

Report per Rule 30(e).