

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA06-827

NORTH CAROLINA COURT OF APPEALS

Filed: 1 May 2007

TERRY D. McNEIL,  
Plaintiff,

v.

Forsyth County  
No. 03 CVS 1199

STEVEN HILL and STEVEN HILL  
MOTOR COMPANY,  
Defendants.

Appeal by Defendant Steven Hill from order entered 29 August 2005 by Judge Lindsay R. Davis, Jr., in Forsyth County Superior Court. Heard in the Court of Appeals 8 February 2007.

*Guy B. Oldaker III for Plaintiff-Appellee.*

*David E. Shives, PLLC, by David E. Shives, for Defendant-Appellant Steven Hill.*

STEPHENS, Judge.

After a jury verdict in favor of Plaintiff, Defendant Steven Hill ("Defendant") appeals from the trial court's order denying Defendant's motion for judgment notwithstanding the verdict or, in the alternative, for new trial.<sup>1</sup> We affirm.

Plaintiff and Defendant entered into a joint venture to purchase, renovate, and re-sell houses. Defendant was to finance

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<sup>1</sup> The trial court directed a verdict in favor of Defendant Steven Hill Motor Company on all issues. No appeal was taken from that ruling.

purchases and cover the expenses of remodeling, Plaintiff was to oversee renovations, and the parties were to split all profits evenly. After earning and splitting profits on their first two properties, a dispute arose over the existence and amount of profits resulting from the re-sale of the venture's next two houses (the "houses"). Though the parties agreed on the purchase and sale prices of the houses, they disagreed on the amount of expenses incurred in renovations.

At trial, during which only Plaintiff presented evidence, Plaintiff testified that, based on his estimates, the joint venture made a profit of approximately \$52,000.00 on the houses. Plaintiff testified that the joint venture spent approximately \$34,000.00 on labor and materials, \$1,000.00 to "clean up" the houses, and \$700.00 on utility expenses for the houses. On cross-examination, Plaintiff was shown what Defendant contended were "profit and loss statement[s]" for the houses. Plaintiff testified that he disputed the accuracy of several of the figures listed on Defendant's statements. In addition to disputing the expenses listed for "additional credits," Plaintiff questioned the expenses listed for utilities, allowances for heating and air conditioning, materials and supplies, and truck and auto expenses.

Called as an adverse witness by Plaintiff, Defendant testified that the joint venture suffered a loss of approximately \$11,500.00 on the houses. Defendant based his testimony regarding the loss on the affidavit of his accountant, Mr. Nick Spoloric, and the affidavit's two exhibits, prepared by Mr. Spoloric, each of which

purported to be "Statement[s] of Income" for the houses (the "Spoloric statements," or "statements"). Defendant testified that Mr. Spoloric generated the statements after litigation began and approximately three years after the houses were re-sold. According to the affidavit, Exhibit A represented "a preliminary statement of [i]ncome" prepared after an "initial review of the records and checks associated with" the houses, and showed a cumulative loss of \$13,368.26 on the houses. Exhibit B, on the other hand, represented "a more detailed profit/loss statement" assembled after "a thorough review" of the records and receipts, and showed a cumulative loss of \$11,263.31 on the houses. After testifying that he maintained all of the joint venture's records and receipts, Defendant testified that Exhibit B was, in fact, prepared after Defendant's house was "ransacked." Defendant testified that, as a result of his house being "ransacked," he "found" more receipts that allowed Mr. Spoloric to do a "second accounting." The Spoloric affidavit was introduced into evidence during Defendant's testimony.

Plaintiff presented an accountant, accepted by the court as an expert witness, who testified that the Spoloric statements did not follow generally accepted accounting principles and contained a "mathematical error." He also testified that, from all the records he reviewed, he could not do an accounting that supported the information presented in the statements. He could not account for \$22,000.00 of "additional credit." Though he saw a check written for the combined amounts of an "allowance for heating/air," he

"[did not] know what [the check] was for." The expert's accounting of the labor charges differed by over \$6,000.00 from the figures presented in the Spoloric statements. Finally, the expert testified that he could not duplicate the statements' "interest" expense, as the expert did not see evidence of an average loan balance or an applicable interest rate from which interest payments could be calculated.

The trial court denied Defendant's motion for directed verdict made at the close of Plaintiff's evidence. After electing not to present evidence, Defendant moved for directed verdict at the close of all the evidence. The trial court again denied the motion. The issue presented to the jury by the trial court's instructions was whether the joint venture made a profit on the houses and, if so, what amount was due Plaintiff. The jury returned a verdict in favor of Plaintiff in the amount of \$6,192.00, and judgment on the verdict was entered on 12 July 2005.

Defendant filed his motion for judgment notwithstanding the verdict or, in the alternative, for new trial on 21 July 2005. The trial court denied the motion by order entered 29 August 2005. In denying the motion for judgment notwithstanding the verdict, the trial court stated that Defendant "failed to carry the burden" and that the "evidence was sufficient to permit the jury to consider [Plaintiff's] claim." As for the motion for new trial, the court stated that the "award is supported by the evidence . . . and the Court will not disturb the jury's resolution of contested factual

issues." From the order, Defendant appeals. For the reasons which follow, we affirm.

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By his sole assignment of error, Defendant contends that the trial court's denials of his motions for directed verdict made at the close of Plaintiff's evidence and at the close of all the evidence, and the trial court's denial of his motion for judgment notwithstanding the verdict or, in the alternative, for new trial were erroneous as a matter of law because the evidence at trial of the existence, and if any, the amount of damages was insufficient and necessarily speculative. We disagree.

Our standard of review for a trial court's ruling on a motion for directed verdict is the same as that for a trial court's ruling on a motion for judgment notwithstanding the verdict: whether the evidence was sufficient to go to the jury. *Kearns v. Horsley*, 144 N.C. App. 200, 552 S.E.2d 1, cert. denied, 354 N.C. 573, 559 S.E.2d 179 (2001). "The standard is high for the moving party, as the motion should be denied if there is more than a scintilla of evidence to support the plaintiff's *prima facie* case." *Scarborough v. Dillard's, Inc.*, \_\_ N.C. App. \_\_, \_\_, 632 S.E.2d 800, 803 (2006) (citation omitted). "The evidence supporting the plaintiff's claims must be taken as true, and all contradictions, conflicts, and inconsistencies must be resolved in the plaintiff's favor, giving the plaintiff the benefit of every reasonable inference." *Newton v. New Hanover County Bd. of Educ.*, 342 N.C. 554, 563, 467 S.E.2d 58, 65 (1996) (citation omitted).

"A party must present evidence, not mere speculation, to recover lost profits." *Catoe v. Helms Constr. & Concrete Co.*, 91 N.C. App. 492, 496, 372 S.E.2d 331, 334 (1988) (citation omitted). Although "[i]t is a well-established principle of law that proof of damages must be made with reasonable certainty[.]" *Olivetti Corp. v. Ames Business Systems, Inc.*, 319 N.C. 534, 546, 356 S.E.2d 578, 585 (citation omitted), *reh'g denied*, 320 N.C. 639, 360 S.E.2d 92 (1987), lost profits need not be shown with "[a]bsolute certainty[.]" *Mosley & Mosley Builders, Inc. v. Landin Ltd.*, 87 N.C. App. 438, 446, 361 S.E.2d 608, 613 (1987), *cert. dismissed*, 322 N.C. 607, 370 S.E.2d 416 (1988).

Viewed in the light most favorable to Plaintiff, the evidence presented at trial was sufficient to go to the jury on the issue of whether the joint venture made a profit. The parties agreed on the purchase and sale prices of the houses. The issue was the amount of expenses incurred in renovation. Defendant maintained that the Spoloric statements accurately accounted for all such expenses. Plaintiff, meanwhile, repeatedly cast into doubt the general reliability of the Spoloric statements and the accuracy of several of the expenses shown thereon. In fact, the Spoloric statements contained multiple mathematical errors.

Although Plaintiff's testimony regarding the expenses consisted primarily of estimates, Plaintiff's expert witness provided specific evidence from which a jury could determine damages with reasonable certainty. While Defendant maintained that the joint venture had an expense of \$22,890.00 in "additional

credit," Plaintiff's expert witness testified that he could find support in the joint venture's records for only \$890.00 of that amount. While Defendant maintained that the joint venture had an expense of \$7,300.00 as an "allowance for heating/air," Plaintiff's expert witness testified that he could not properly attribute this expense to the houses. While Defendant maintained that the venture spent \$21,622.19 on contract labor, Plaintiff's expert witness could only account for \$14,794.87 in labor expenses. Finally, while Defendant maintained that the joint venture had an expense of \$8,281.15 in "interest," Plaintiff's expert witness could not determine the basis from which the interest figure was derived. Contradictions in the evidence and the credibility of the witnesses are for the jury to resolve. *Clark v. Bodycombe*, 289 N.C. 246, 221 S.E.2d 506 (1976). Because the evidence was sufficient to go to the jury on the issue of whether the joint venture made a profit, Defendant's argument on this issue is overruled.

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Pursuant to Rule 59 of the Rules of Civil Procedure, a trial court may grant a new trial on any one of nine grounds. Although Defendant, in the motion from which this appeal is taken, sought a new trial on three of the grounds specified in Rule 59, it is clear on appeal that Defendant now seeks a new trial only upon the ground of N.C. Gen. Stat. § 1A-1, Rule 59(7), that "the evidence at trial of the existence, and if any, the amount of damages was insufficient and necessarily speculative." We disagree.

Where a new trial was sought because of insufficient evidence, this Court reviews a trial court's order denying a new trial for an abuse of discretion. *In re Will of Buck*, 350 N.C. 621, 516 S.E.2d 858 (1999). A trial court abuses its discretion only when its ruling is "manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision." *Briley v. Farabow*, 348 N.C. 537, 547, 501 S.E.2d 649, 656 (1998) (citations omitted). "Because 'the trial court has directly observed the evidence as it was presented and the attendant circumstances, as well as the demeanor and characteristics of the witnesses,' a trial court's ruling on a motion for new trial is given great deference." *Kummer v. Lowry*, 165 N.C. App. 261, 263, 598 S.E.2d 223, 225 (quoting *Will of Buck*, 350 N.C. at 628, 516 S.E.2d at 863), *cert. denied*, 359 N.C. 189, 605 S.E.2d 153 (2004).

The trial court did not abuse its discretion in denying Defendant's motion for a new trial. The jury's finding that the joint venture made a profit and that Plaintiff was entitled to \$6,192.00 thereof was supported by the evidence. As discussed above, Plaintiff's expert witness presented specific evidence from which an amount of damages could have been determined with reasonable certainty. As such, the decision of the trial court to deny Defendant's motion for new trial was not "manifestly unsupported by reason" or "so arbitrary that it could not have been the result of a reasoned decision." Defendant's argument on this issue is without merit, and the order of the trial court is affirmed.



AFFIRMED.

Judges MCGEE and CALABRIA concur.

Report per Rule 30(e).