IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA14-861

Filed: 21 April 2015

Carteret County, No. 12 CVS 201

GRUB, INC., t/a ICE HOUSE RESTAURANT, and JOHN VANHORN,[1] Individually, Plaintiffs,

v.

SAMMY'S SEAFOOD HOUSE & OYSTER BAR, LLC, and SAMUEL G. BOYD, Individually, Defendants.

Appeal by Defendants and cross-appeal by Plaintiffs from judgment and order entered 7 January 2014 by Judge John E. Nobles, Jr., in Carteret County Superior Court. Heard in the Court of Appeals 8 January 2015.

Chesnutt, Clemmons & Peacock, P.A., by Gary H. Clemmons, for Plaintiffs.

Harvell and Collins, P.A., by Wesley A. Collins and Russell C. Alexander, for Defendants.

STEPHENS, Judge.

Factual and Procedural History

[1] Per the custom of this Court, we list the parties' names exactly as they appear in the caption of the judgment from which this appeal is taken. However, some orders and documents in the record on appeal, including the individual plaintiff's will, spell his surname as "Van Horn." The trial transcript spells his surname "Vanhorn."

In spite of the voluminous record on appeal and numerous arguments made by the parties, this case involves a fairly simple, straightforward question: In their admitted discussions about joining forces in the restaurant business, did Plaintiff John VanHorn and Defendant Samuel G. Boyd enter into a valid oral partnership agreement to operate a seafood restaurant at the North Carolina coast? The parties generally agree on the following facts: From approximately 1990 until the fall of 2009, VanHorn and Plaintiff Grub, Inc., a North Carolina corporation in which VanHorn is the sole shareholder, operated a restaurant known as "The Ice House Restaurant" ("the Ice House") in a leased space at 109 South Sixth Street in Morehead City. In September 1990, the State issued alcohol license permits for the sale of wine, beer, fortified wine, and mixed drinks to Grub, Inc. In three rounds of remodeling between 1990 and 1993, Plaintiffs spent more than $200,000 to first create and provision the Ice House and then to expand its size. During its operation, because of the seasonal nature of the tourist trade in the area, the Ice House would periodically fall behind in its lease payments and then "catch up" on past due amounts during the busy summer months.

Between 1990 and 2009, VanHorn was heavily involved in the day-to-day operations of the Ice House, including cooking, waiting tables, organizing meals for two local summer camp programs, and delivering tax, profit, and other financial information to the restaurant's bookkeeper and accountant. During the fall of 2009, VanHorn decided to seek a business partner to manage the Ice House and allow

VanHorn to retire from day-to-day operations while still receiving a percentage of the restaurant's income. VanHorn also hoped a partner would contribute new ideas to revitalize the Ice House. VanHorn spoke to several possible partners, including Boyd, who had previously sold and filleted fish for preparation at the Ice House. In 2009, however, Boyd was working in construction. In November 2009, Plaintiffs closed the Ice House for remodeling. At this point, Plaintiffs were approximately $12,500.00 in arrears on the lease, but the property owner did not attempt to evict or remove Plaintiffs from the space.

What occurred next was hotly disputed at trial. According to VanHorn, in January or February 2010, he and Boyd had dinner at Texas Steakhouse in Morehead City. At this dinner, the friends reached an oral agreement ("the Agreement") to become partners in a new restaurant business which would operate out of the former Ice House location. They agreed that each man would have a 50% interest in the partnership, with Boyd acting as general manager and VanHorn contributing the space and equipment of the Ice House, and his skill and experience, as well as providing assistance as needed. The Agreement also provided that VanHorn would continue to work with the summer camp programs as he had been doing since 1990. Under the Agreement, VanHorn would receive 5% of the gross sales of the new restaurant, beginning one year after the "doors were open." VanHorn and Boyd also agreed that, during the first year of operations, in lieu of the 5% payment, Boyd would pay the past-due rent and other debts of Plaintiffs. VanHorn and Boyd also

committed to forming, at some point in the next two years, a new business entity to own and manage the restaurant in which each would hold a 50% interest.

Boyd, in contrast, claimed that he and VanHorn had a few conversations about going into business together, but never entered into any partnership agreement. In response to VanHorn's suggestion that the men become 50-50 partners, Boyd suggested that he simply buy the entire business from VanHorn:

> I said, "John, I'll give you $25,000 for what you have in there. But this is how I'll do it: I'll give you $5,000 down, then I'll give you $5,000 a year, or, if I get the $25,000 before the five-year period, then I'll pay you at that time."
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> And he said, "Well, I have got 25 or $30,000 in back-bills."
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> And that's when I said, "Well, John, you know what?" I said, "I'll also — I'll pay the back-bills too." I said, "I'll pay the back-bills and on top of it I'll give you $25,000."
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> And that was our conversation. That was the only conversation we ever had.
>
> So when I left [the restaurant] and he left, when we had talked, I said, "You know, I'll get in there, I'll start tearing out tomorrow," I said, "That's fine with me. I'll — I'll — I'll start tomorrow morning."
>
> So that was the conversation. I left — I think I went out the day — it was the next morning or it was shortly after I started tearing the place out.

Boyd further testified that, in February 2010 following the above conversation with VanHorn, he began to renovate the space that had been the Ice House, doing much of the work himself and receiving assistance from various friends and business

acquaintances. On direct examination, Boyd was adamant that, although VanHorn "was around" the restaurant space during this process, he contributed neither money nor direct physical help with the renovation. However, on cross-examination, Boyd agreed that a new epoxy floor put down in the restaurant prior to June 2010 was installed for no charge by a company in which VanHorn was a half-owner.

Clyde Case III, owner of a business called ACES in Havelock, testified that VanHorn contacted him in the spring of 2010. VanHorn arranged for Case to install five flat-screen televisions in the restaurant, with Case receiving payment for the several thousand dollars' worth of equipment in the form of food and catering services rather than cash. At a meeting to discuss the deal, Boyd and VanHorn explained their new partnership and business plans to Case. Before Easter 2010, VanHorn and Boyd also met with Jody Ballou about getting a special sink for the new restaurant. Ballou testified that, after the men discussed their partnership agreement with her, she commented that VanHorn should have arranged to receive 10% of gross profits. On cross-examination, Boyd admitted that VanHorn had arranged to get the televisions from Case in exchange for food and that Ballou had loaned the Ice House a sink without payment.

The bar area of the remodeled restaurant reopened in May 2010 under the name "Ice House Restaurant." In the same month, Boyd opened a bank account under his name, "Samuel G. Boyd (DBA SAMMYS)," at a local bank. All money from the

reopened restaurant, which became very profitable,[2] flowed through this account. Boyd testified that he maintained complete control of the account, and that neither VanHorn nor Grub, Inc., ever received any money from the reopened restaurant. However, Boyd acknowledged that he paid the past-due rent on the restaurant space as well as approximately $2,800 of VanHorn's personal credit card debt.

Once the full restaurant reopened in June 2010, Boyd acknowledged that VanHorn "was there from time to time." VanHorn sometimes helped out in the kitchen. According to Boyd, this resulted in customer complaints and friction with other kitchen staff. During the summers of 2010 and 2011, VanHorn also worked at the restaurant organizing meals and cooking for several camp programs, as he had done for many years.

Additional evidence revealed that, during 2010 and the first half of 2011, the reopened restaurant used Grub, Inc.'s federal tax identification number. Further, through August 2011, the restaurant continued to use Grub's three licenses for the sale of alcohol, filed unemployment tax returns under the name Grub, Inc., continued to use food vendors who invoiced Grub, Inc., and paid all utility bills through accounts in the name of either Grub, Inc. or VanHorn.

Under the Agreement, VanHorn was to begin receiving 5% of the restaurant's gross monthly sales in June 2011. In July 2011, Boyd created Defendant Sammy's

[2] Sammy's reported gross revenue of $1,156,361.72 in 2011, while the Ice House had reported only $230,068.31 in gross revenue for 2009.

Seafood House & Oyster Bar, LLC, ("SSH") to operate the restaurant. VanHorn was not made aware of the LLC nor was he listed as a 50% owner, officer, member/manager, or director of SSH. During this same time period, SSH entered into a new written lease for the space at 109 South Sixth Street, and Boyd signed as the personal guarantor. Plaintiffs were not parties to the new lease. SSH also applied for new alcohol sales permits and a new tax identification number. Later that fall, Defendants changed the locks at the restaurant, now known as "Sammy's," and did not provide a key to VanHorn.

On 27 February 2012, Plaintiffs filed a complaint in Carteret County Superior Court alleging claims for breach of partnership agreement, conversion, trespass to chattels, implied contract/*quantum meruit*, and unfair and deceptive trade practices ("UDTP"). Defendants counterclaimed seeking damages under a theory of unjust enrichment. On 15 November 2013, Defendants filed a motion *in limine* seeking to exclude, *inter alia*, any testimony from Plaintiffs' business valuation expert, Asa Crawford, regarding the value of SSH. The matter came on for a bench trial at the 18 November 2013 civil session of Superior Court in Carteret County. After hearing argument of Defendants' counsel on its motion *in limine*, the trial court denied the motion in open court.[3]

[3] The trial court entered a written order denying Defendants' motion on 9 December 2013.

At the close of Plaintiffs' case-in-chief, Defendants moved to dismiss pursuant to Rule of Civil Procedure 41(b) ("After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant . . . may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief."). N.C. Gen. Stat. § 1A-1, Rule 41(b) (2013). The court took the motion under advisement, and the trial proceeded. At the close of Defendants' case-in-chief, Plaintiffs moved to dismiss Defendants' counterclaim. Defendants voluntarily withdrew their counterclaim, which the trial court then dismissed with prejudice. Defendants renewed their motion to dismiss Plaintiffs' claims at the close of all evidence, and the court again took the motion under advisement. On 7 January 2014, the trial court entered judgment in the amount of $415,018.55 plus interest in favor of Plaintiffs on their claim for breach of partnership agreement, but dismissed Plaintiffs' conversion, trespass to chattels, *quantum meruit*, and UDTP claims. On the same date, the court entered an order awarding statutory costs to Plaintiffs. On 31 January 2014, Defendants gave written notice of appeal from the judgment and the costs order. On 6 February 2014, Plaintiffs cross-appealed from the dismissal of their UDTP claim only.

Defendants' Appeal

On appeal, Defendants argue that the trial court erred in (1) concluding that VanHorn and Boyd entered into a partnership agreement, (2) concluding that Sammy's was liable for breach of that agreement, (3) allowing irrelevant testimony

by an expert witness, and (4) calculating damages. We affirm in part and vacate and remand in part.

I. Existence of a partnership agreement

Defendants argue that the trial court erred in determining that Boyd and VanHorn entered into a partnership agreement. Specifically, Defendants contend that VanHorn's own testimony reveals that (1) there was no meeting of the minds between VanHorn and Boyd as to material terms of the alleged partnership agreement and (2) the evidence establishes that there was never a partnership between VanHorn and Boyd because there was no sharing of the restaurant's profits. We disagree.

"The standard of review on appeal from a judgment entered after a non-jury trial is whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment." *Cartin v. Harrison*, 151 N.C. App. 697, 699, 567 S.E.2d 174, 176 (citation and internal quotation marks omitted), *disc. review denied*, 356 N.C. 434, 572 S.E.2d 428 (2002). "The trial court is required to find specific ultimate facts to support the judgment, and the facts found must be sufficient for the appellate court to determine that the judgment is adequately supported by competent evidence." *Montgomery v. Montgomery*, 32 N.C. App. 154, 156-57, 231 S.E.2d 26, 28 (1977) (citations omitted). "Conclusions of law drawn by the trial court from its findings of fact are reviewable

de novo on appeal." *Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 517, 597 S.E.2d 717, 721 (2004) (citation omitted).

As a preliminary matter, Defendants assert that various "findings of fact" in the judgment are actually conclusions of law, including, *inter alia*, denominated finding of fact 39: "The verbal terms and agreements reached by John [VanHorn] and Sammy Boyd during their January-February 2010 meeting at the Texas Steakhouse constituted a valid partnership agreement, including a valid offer, acceptance[,] and consideration."[4] We are not persuaded by Defendant's argument.

"[A]ny determination requiring the exercise of judgment or the application of legal principles is more properly classified a conclusion of law. Any determination reached through logical reasoning from the evidentiary facts is more properly classified a finding of fact." *In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997) (citations and internal quotation marks omitted); *see also Moore v. Moore*, 160 N.C. App. 569, 571-72, 587 S.E.2d 74, 75 (2003) (noting that findings of fact "reflect a conscious choice between the conflicting versions of the incident in question which emerged from all the evidence presented") (citation and internal quotation marks omitted). Further, while "[p]artnership is a legal concept[,] the determination of the existence or not of a partnership . . . involves inferences drawn from an analysis of all

[4] We note that conclusion of law 22 includes a similar determination, namely, that Boyd and VanHorn entered into a valid partnership agreement as demonstrated both explicitly by their verbal agreement at the dinner and implicitly by their subsequent conduct in working together to make the new restaurant a success and in their representations to other people.

the circumstances attendant on its creation and operation." *Davis v. Davis*, 58 N.C. App. 25, 30, 293 S.E.2d 268, 271 (citations and internal quotation marks omitted), *disc. review denied*, 307 N.C. 127, 297 S.E.2d 399 (1982). Thus, the trial court properly characterized finding of fact 39.

Likewise, we reject Defendants' characterization of findings of fact 37 and 38 as conclusions of law. While those determinations do include the word "agreed," they simply recount the details of the terms of the Agreement discussed and reached by Boyd and VanHorn. Such determinations are reached through "logical reasoning from the evidentiary facts" rather than by "the exercise of judgment or the application of legal principles" and are thus factual findings. *See In re Helms*, 127 N.C. App. at 510, 491 S.E.2d at 675.[5]

In their substantive argument that the trial court erred in finding that a valid partnership agreement existed, Defendants first contend that VanHorn's own testimony indicates that there was never a "meeting of the minds" as to material terms of the Agreement. We disagree.

Our General Statutes define a partnership as "an association of two or more persons to carry on as co-owners a business for profit." N.C. Gen. Stat. § 59-36(a) (2013).

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[5] Defendants also argue that certain other denominated findings of fact are actually conclusions of law, but do not bring forward any challenges to them as being unsupported or otherwise erroneous. Accordingly, we fail to perceive how their labeling by the trial court is pertinent and do not address Defendants' contentions regarding them.

> A contract, express or implied, is essential to the formation of a partnership. A partnership may be formed by an oral agreement. Even without proof of an express agreement to form a partnership, a voluntary association of partners may be shown by their conduct. A finding that a partnership exists may be based upon a rational consideration of the acts and declarations of the parties, warranting the inference that the parties understood that they were partners and acted as such.
>
> A course of dealing between the parties of sufficient significance and duration along with other proof of the fact may be admitted as evidence tending to establish the fact of partnership, provided it has sufficient substance and definiteness to evince the essentials of the legal concept, including, of course, the necessary intent.

Potter v. Homestead Preservation Ass'n, 330 N.C. 569, 576-77, 412 S.E.2d 1, 5-6 (1992) (citations, internal quotation marks, brackets, and ellipsis omitted).

"It is essential to the formation of any contract that there be mutual assent of both parties to the terms of the agreement so as to establish a meeting of the minds." *Creech v. Melnik*, 347 N.C. 520, 527, 495 S.E.2d 907, 911-12 (1998) (citation and internal quotation marks omitted). In contrast,

> a contract . . . leaving material portions open for future agreement is nugatory and void for indefiniteness. The reason for this rule is that there would be no way by which the court could determine what sort of a contract the negotiations would result in; no rule by which the court could ascertain what damages, if any, might follow a refusal to enter into such future contract on the arrival of the time specified.

Boyce v. McMahan, 285 N.C. 730, 734, 208 S.E.2d 692, 695 (1974) (citations and internal quotation marks omitted). However, contract terms are reasonably certain

"if they provide a basis for determining the existence of a breach and for giving an appropriate remedy." *Restatement* (*Second*) *of Contracts* § 33(2) (2012). In addition, "the law . . . does not favor the destruction of contracts on account of uncertainty, and the courts will, if possible, so construe [a] contract as to carry into effect the reasonable intent of the parties, if it can be ascertained." *Welsh v. N. Telecom*, 85 N.C. App. 281, 290, 354 S.E.2d 746, 751 (citation and internal quotation marks omitted), *disc. review denied*, 320 N.C. 638, 360 S.E.2d 107 (1987). "In the usual case, the question whether an agreement is complete or partial is left to inference or further proof. The subsequent conduct and interpretation of the parties themselves may be decisive of the question as to whether a contract has been made . . . ." *Cnty of Jackson v. Nichols*, 175 N.C. App. 196, 199, 623 S.E.2d 277, 279-80 (2005) (citations and internal quotation marks omitted).

Defendants contend that exactly how and when the alleged "50-50" partnership would be legally constructed was a material term of the Agreement left to be determined later. Specifically, Defendants note that, while the complaint alleged that each partner would receive a 50% interest in a new limited liability company to be established in early 2012, in his deposition, VanHorn first stated that he planned to give Boyd 50% of VanHorn's existing LLC, Grub, Inc., and then contended that he and Boyd had not "figured that out" yet. Similarly, VanHorn's will, dated 17 May 2011, notes that, "[o]n January 1, 2012, at his option, I will convey 50% of my shares

of Grubb [sic], Inc.[,] to Sammy Boyd." We do not believe that these "inconsistencies" suggest an undetermined material term of the Agreement.

VanHorn was entirely consistent in asserting the partnership would be run as an LLC, with each partner holding a 50% share. Evidence before the trial court, in the form of testimony from VanHorn and two other witnesses, as well as various exhibits and the admitted conduct of Boyd as well as VanHorn, strongly support an inference that Boyd and VanHorn entered into the Agreement, a valid oral partnership agreement, with definite material and essential terms. As noted *supra*, Plaintiffs presented evidence in the form of testimony from VanHorn, Case, and Ballou that (1) VanHorn and Boyd had agreed to become partners in running a new restaurant in the former Ice House space, (2) each man would have a 50% share in the business, (3) VanHorn would receive 5% of the gross monthly sales from the new restaurant beginning one year after it began operation, and (4) Boyd would pay off various debts of Plaintiffs in lieu of making 5% payments to VanHorn during the first year of operation. In addition, VanHorn's description of the Agreement's terms is corroborated by copious documentary evidence before the trial court indicating that, while Boyd played a leading role in "energizing" and managing the new restaurant, VanHorn used his community goodwill and experience to obtain needed equipment, continued to provide meals to the summer camps as planned, and allowed the new restaurant to use Grub, Inc.'s alcohol licenses, tax identification number, and corporate name to operate. The evidence before the trial court indicates that, up until

July 2011 when Boyd formed SSH, both Boyd's and VanHorn's statements and conduct were completely in accordance with the terms of the Agreement as alleged by VanHorn.[6]

This evidence supports the trial court's determination that VanHorn and Boyd intended to enter into the Agreement and form a partnership. *See Welsh*, 85 N.C. App. at 290, 354 S.E.2d at 751. Whether their partnership later took the form of a new LLC to be formed in early 2012 or whether VanHorn was to give Boyd a share of Grub, Inc., at some point appears to have been a detail VanHorn and Boyd were willing to determine later, and thus, not a material term of the Agreement. Indeed, the lack of detail about how VanHorn's and Boyd's "50-50" partnership would eventually be structured as an LLC did not impair the trial court's ability to "determin[e] the existence of a breach and . . . giv[e] an appropriate remedy." *See Restatement* (*Second*) *of Contracts* § 33(2).

Defendants also point to VanHorn's testimony that the Agreement specified that he was to receive 5% of the restaurant's "gross monthly sales" or "gross income" rather than a portion of the restaurant's profits, contending that an agreement to

[6] In a related argument, Defendants contend that Plaintiffs' introduction of evidence regarding Boyd's conduct somehow transformed their allegation in the complaint that the Agreement was an express contract into an improper attempt to recover under a theory of implied contract. *See, e.g.*, *Vetco Concrete Co. v. Troy Lumber Co.*, 256 N.C. 709, 713, 124 S.E.2d 905, 908 (1962) (holding that "an express contract precludes an implied contract with reference to the same matter"). However, Plaintiffs never asserted that the Agreement was an implied contract; they were simply forced to rely in part on evidence of Boyd's and VanHorn's conduct because the Agreement was an oral contract and Boyd denied its existence. Plaintiffs' implied contract/*quantum meruit* claim concerned only Defendants' use of certain restaurant equipment.

share profits, rather than gross income, is an essential element of any partnership. Defendants cite *Harrell Oil Co. of Mount Airy v. Case* and numerous other cases for the proposition that "co-ownership and sharing of any actual profits are indispensable requisites of any partnership . . . ." 142 N.C. App. 485, 488, 543 S.E.2d 522, 525 (2001) (citation and internal quotation marks omitted). However, Defendants do not discuss the facts of most of those cases which is unsurprising since they are factually dissimilar and shed little, if any, light on the circumstances presented in this matter.

For example, in *Harrell Oil Co. of Mount Airy*, a partnership was found to exist despite the "absence of an express agreement to share profits or losses, and despite the apparent absence of actual profits during the operation of the business" because "the evidence indicated that [the] defendants received the profits from the sale of the business." *Id.* at 489, 543 S.E.2d at 526. As for the other cases cited by Defendants, *Peirson v. American Hardware Mut. Ins. Co.* concerned the effect of an allegedly erroneous statement in an insurance contract that the entity which was covered by a policy was a partnership. 248 N.C. 215, 220-21, 102 S.E.2d 800, 804-05 (1958). In *Johnson v. Gill*, our Supreme Court held that the lease or sale of a tractor for use in a landscaping business did not the seller/lessor a partner of the buyer/lessee in the landscaping business. 235 N.C. 40, 45, 68 S.E.2d 788, 792 (1952). In *Rothrock v. Naylor*, no partnership was found between an owner of lots and a realty company hired to build and sell homes on the lots because the contracts between the parties provided only for each party to receive fixed sums of money upon completion of

various aspects of the construction and sale of the homes. 223 N.C. 782, 787, 28 S.E.2d 572, 575 (1944). These cases are not analogous to the matter before us, and we find them inapposite.

Likewise, Defendants correctly recite case law holding that, "[w]hile an agreement to share profits as such is one of the tests of partnership, an agreement to receive part of the profits for services rendered, as a means only of ascertaining the compensation, does not create a partnership." *Wilkinson v. Coppersmith*, 218 N.C. 173, 174, 10 S.E.2d 670, 671 (1940) (citations omitted); *see also Gurganus v. Mfg. Co.*, 189 N.C. 202, 204, 126 S.E. 423, 423 (1925) (finding that a trial court erred in instructing a jury that an independent contractor who received as payment a portion of the profits earned by the company which hired him was a partner of the company for purposes of liability); *Williams v. Biscuitville, Inc.*, 40 N.C. App. 405, 407-08, 253 S.E.2d 18, 19-20 (holding that profit sharing does not create a partnership when those funds are paid as part of an employee's compensation scheme), *disc. review denied*, 297 N.C. 457, 256 S.E.2d 810 (1979). We fail to see the relevance of these assertions here where there is no allegation or evidence that VanHorn was to receive part of the profits from Sammy's for services rendered as an employee or an independent contractor.

Indeed, this Court's decision in *Williams* supports Plaintiffs' position. In that case, "the plaintiff was to have received a share of the profits in the form of keeping whatever part of the seventy percent of *gross receipts* that he was able to retain[,]"

which this Court noted would be "*prima facie* evidence that he is a partner in the business [but for the fact that] he received this share of the profits as wages of an employee." *Id.* at 407, 253 S.E.2d at 19 (internal quotation marks omitted; italics and emphasis added). Here, the Agreement was that Boyd would retain 95% of gross monthly income from which he would cover the restaurant's expenses, and no evidence suggests that VanHorn was an employee of Sammy's.

Defendants further note that "[t]he sharing of gross returns does not *of itself* establish a partnership, whether or not the persons sharing them have a joint or common right or interest in any property from which the returns are derived." N.C. Gen. Stat. § 59-37(3) (2013) (emphasis added). Here, however, the trial court did not rely on the sharing of gross returns alone in determining that a partnership existed between Boyd and VanHorn. To the contrary, as noted *supra*, additional evidence in the form of witness testimony, documentary evidence, and the actions and representations of Boyd and VanHorn all supported the trial court's findings regarding both the existence of a partnership as well as the specific terms included in the Agreement. We reject Defendants' argument on this point.

In sum, the trial court's findings of fact regarding the existence and terms of an oral partnership agreement between VanHorn and Boyd are supported by competent evidence. Accordingly, this argument is overruled.

II. Breach of the partnership agreement

Defendants next argue that the trial court erred in concluding that they breached the Agreement because the evidence revealed that any partnership between VanHorn and Boyd was "at will." While we agree that the Agreement here was at will, we conclude that the trial court was correct in concluding that Defendants breached the Agreement prior to the termination of the parties' partnership.

Defendants cite *Campbell v. Miller*, 274 N.C. 143, 161 S.E.2d 546 (1968), for the proposition that "termination [of a partnership agreement] by the election of a partner is not a breach of contract." While Defendants' statement of the law is correct, *Campbell* is simply inapposite to the present matter.

> A partnership is a partnership at will unless some agreement to the contrary can be proved.
>
> The significance of the partnership being one at will, *i.e.*, without any definite term or undertaking to be accomplished, is that the termination by the election of a partner is not a breach of contract. Having the legal right to terminate, it would seem that there is no liability for its exercise whatever the motive, and whatever may be the injurious consequences to co-partners, who have neglected to protect themselves by an agreement to continue for a definite term. . . . The Uniform Partnership Act provides that dissolution of the partnership is brought about without violation of the agreement between the partners by the express will of any partner when no definite term or particular undertaking is specified.

Id. at 150, 161 S.E.2d at 551 (citations, internal quotation marks, and certain ellipses omitted). Here, as Defendants note, Plaintiffs' complaint alleges that the Agreement was to continue "for so long as the two remained in business together." The

undisputed evidence was that any partnership was "without any definite term or undertaking to be accomplished[,]" and, thus, like the partnership agreement in *Campbell*, the Agreement between Boyd and VanHorn was a partnership at will. *See id.*

However, *Campbell* does not hold that an at-will partnership agreement cannot be breached. Rather, that case, like the rest of our State's pertinent case law, only removes the nature, timing, and/or basis for termination from the list of actions that can constitute a breach by a partner. *See id.* Again, we agree fully with Defendants on this point.

Defendants go astray, however, in attempting to apply the holding of *Campbell* to the facts of this case. First, and most critically, in *Campbell*, the plaintiff contended "that the agreement was broken by Miller's [the defendant's] termination of the association . . . ." *Id.* at 151, 161 S.E.2d at 551. Here, in contrast, Plaintiffs have *not* alleged that Boyd wrongfully terminated the partnership with VanHorn. What Plaintiffs *have* alleged is that Defendants, in refusing to pay VanHorn 5% of gross monthly sales and to list VanHorn as owning 50% of the LLC Boyd set up to run the new restaurant, failed to perform under the Agreement, and, thus, breached its terms. Plaintiffs' action for breach of partnership agreement was therefore a proper recourse. *See Potter*, 330 N.C. at 578, 412 S.E.2d at 6 (holding that, in the event of breach of an oral partnership, a plaintiff's "remedies may include an action for breach of contract or dissolution, winding up, and distribution of partnership

assets under North Carolina's Uniform Partnership Act") (citations omitted; emphasis added).

Further, the defendant in *Campbell* raised the at-will nature of the parties' partnership agreement as a defense to his alleged breach by termination at trial, and evidence supported a finding that the parties' association was actually terminated:

> The only evidence of termination of the association is that there was a disagreement between the plaintiff and Miller on 25 August 1964, resulting from the plaintiff's refusal to remain at the plant for work that evening. As a result, according to the plaintiff's testimony, Miller said, "The thing for you to do is to get your stuff and get out of here." Thereupon, the plaintiff, without comment, gathered up some of his tools and left, never to return. This is slender evidence upon which to rest a finding that Miller dissolved the partnership. It strongly suggests that the plaintiff, who had that day received an advancement of $200 against his drawing account, had tired of the association and took the first opportunity to dissolve it. Be that as it may, the partnership was a partnership at will and, if Miller dissolved it, he did not break the agreement thereby.

Id. at 151, 161 S.E.2d at 551-52. The essential point made by our Supreme Court, of course, was not whether the plaintiff or the defendant terminated the agreement, since both were free to do so. *See id.* at 151, 161 S.E.2d at 552. Rather, the holding was that dissolution had occurred, and that, even if the defendant's action, rather than the plaintiff's action, had effected the dissolution, the defendant's act could not constitute a breach. *Id.*

However, we find instructive the Court's *dicta* in characterizing the strength of the evidence, to wit, that an explicit statement to "get out" or the act of leaving the

location of a partnership's business never to return or contact the other partner can support the finding of an intent to dissolve. In a partnership at will, "dissolution occurs automatically by operation of law upon any partner's unequivocal expression of an intent and desire to dissolve the partnership." *Sturm v. Goss*, 90 N.C. App. 326, 332, 368 S.E.2d 399, 402 (1988) (citations omitted); *see also* N.C. Gen. Stat. § 59-61(1)(b) (2013) ("Dissolution is caused . . . [w]ithout violation of the agreement between the partners . . . [b]y the express will of any partner when no definite term or particular undertaking is specified[.]"). For example, in *Sturm*, one partner's filing of a lawsuit for damages against the other partner based upon claims of fraud, unfair competition, and breach of contractual and fiduciary obligations to a partnership was held to be an unequivocal action sufficient to automatically dissolve the partnership. 90 N.C. App. at 332, 368 S.E.2d at 402; *see also Simmons v. Quick-Stop Food Mart, Inc.*, 307 N.C. 33, 296 S.E.2d 275 (1982) (finding dissolution where both parties explicitly agreed to dissolve); *Langdon v. Hurdle*, 17 N.C. App. 530, 195 S.E.2d 72 (finding dissolution where one doctor left his partner's urology practice and set up his own competing medical practice), *cert. denied*, 283 N.C. 585, 196 S.E.2d 810 (1973). *See also* 59A Am Jur 2d *Partnership* § 82 (2013) ("[A partnership at will] is subject to dissolution by mutual agreement of the parties or by the express will of any one partner. All that a partner needs to do to dissolve a partnership at will is give notice to the copartners of the intent to dissolve the partnership.").

Unlike the defendant in *Campbell*, Boyd did not tell VanHorn "to get [his] stuff and get out of here." *See Campbell*, 274 N.C. at 151, 161 S.E.2d at 551. Nor did VanHorn, in response, depart the scene "without comment, gather[] up some of his [belonging]s and le[ave], never to return." *See id.* To the contrary, VanHorn testified that, once Boyd's failures to perform under the Agreement came to his attention in the summer of 2011, VanHorn made repeated attempts to discuss the problems with Boyd and correct them. Although Boyd was "evasive" according to VanHorn, no evidence suggests that Boyd ever explicitly told VanHorn that their partnership had ended. VanHorn did testify on cross-examination that he knew by the fall of 2011 that the partnership was troubled:

> Q[:] Did Mr. Boyd make it clear to you that he did not want you involved any further in the restaurant business in the fall of 2011 when he changed the locks, got a new lease, started a new LLC?
>
> A[:] You mean, did he tell me to stay out of there? Is that what you're saying? I don't know what you're saying about that.
>
> Q[:] Well, did he?
>
> A[:] No, it was just a — a — it was obvious he didn't want me there.

In addition, VanHorn answered "I think so" when asked whether "the business relationship came to an end" by the end of 2011. This testimony could support a factual finding that the parties' at-will partnership had ended.

However, other parts of VanHorn's testimony and his actions suggested that he considered the partnership on-going and did not believe that Boyd had terminated the association. For example, in January 2012, VanHorn was still attempting to set up a meeting with Boyd:

> Well, I was trying to work a deal out with [Boyd], trying to work it out to where we could be compatible in what we had established over there in that restaurant. I wanted to work it out with him. I was approaching him about this, sit down and talk some terms here, and figure out what we can do to make this the way it's supposed to be and the way our deal was, and work it out with him.

VanHorn then testified that it was not until a meeting in January or February 2012 that Boyd clearly communicated his intent or desire to dissolve their partnership:

> It was a fairly lengthy conversation. We — I was sitting, trying to work out to where he would figure out that what he had done was wrong to me, in our agreement. And so I faced him up with, "Let's try to work this out. Let's try to figure something out, and make it to where we can live with one another." I said, "We're friends here. Let's don't become enemies in this, what we're trying to do."
>
> So — and it was not real responsive on his part, and he had already — basically had made his mind up that he was going to take that over and — and he didn't want me to be a part of it.
>
> And I — that's how, when I left from that conversation, I recognized that. And that's when I said, "Well, I have got to have a lawsuit filed." That's when I started the ball rolling.

Thus, it was not until this meeting, when Boyd unequivocally expressed his intent to end the association with VanHorn, that the partnership was dissolved.[7] However, Defendants' acts and omissions prior to that date, including the creation of SSH without providing VanHorn a 50% interest therein and the failure to give Plaintiffs 5% of Sammy's gross sales, were breaches of the Agreement. Accordingly, the trial court did not err in finding and concluding that Defendants breached the Agreement.

III. Liability of SSH

Defendants also argue that the trial court erred in concluding that SSH was liable for breach of the Agreement because it did not yet exist when Boyd and VanHorn entered into the Agreement. We reject this circular argument.

As previously discussed, the Agreement provided for VanHorn and Boyd to create an LLC to own and operate the new restaurant, with each partner holding a 50% interest. The undisputed evidence at trial was that SSH is an LLC created to own and operate the new restaurant, now known as Sammy's. Thus, while SSH did not exist at the time the Agreement was made, its existence was clearly contemplated by and provided for in the Agreement. Indeed, the creation of SSH, to the exclusion of VanHorn, was one of the primary actions which constitutes breach of the partnership agreement here. Boyd cannot shield his assets from liability for his

[7] If there were any doubt about Boyd's intent following the meeting, certainly the filing of Plaintiffs' lawsuit on 27 February 2012 was an "unequivocal expression of an intent and desire to dissolve the partnership" by VanHorn, which automatically dissolved the partnership. *See Sturm*, 90 N.C. App. at 332, 368 S.E.2d at 402.

breach of the Agreement by arguing that SSH, the entity whose very creation was itself the breach, did not exist at the time the Agreement was entered into. This argument is overruled.

IV. Expert testimony on business valuation

Defendants argue that the trial court abused its discretion in allowing Crawford, Plaintiffs' expert witness on business valuation, to testify about the value of Sammy's. We disagree.

As Defendants emphasize, "the trial judge is afforded wide latitude of discretion when making a determination about the admissibility of expert testimony." *State v. Bullard*, 312 N.C. 129, 140, 322 S.E.2d 370, 376 (1984). "The trial court's decision regarding what expert testimony to admit will be reversed only for an abuse of discretion." *State v. Alderson*, 173 N.C. App. 344, 350, 618 S.E.2d 844, 848 (2005) (citation omitted). A trial court abuses its discretion only if "its actions are manifestly unsupported by reason . . . . [or] upon a showing that [the trial court's decision] was so arbitrary that it could not have been the result of a reasoned decision." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985) (citation omitted). "[I]n a bench trial, the trial judge will be presumed to know the law and will disregard irrelevant or inadmissible evidence." *Scott v. Scott*, 106 N.C. App. 606, 613, 417 S.E.2d 818, 823 (1992), *affirmed*, 336 N.C. 284, 442 S.E.2d 493 (1994).

Specifically, Defendants contend that, as a remedy for Defendants' alleged breach of the partnership agreement, Plaintiffs sought only specific performance

under the Agreement, to wit, 5% of the restaurant's gross sales and a transfer of a 50% interest in Sammy's. This is incorrect. In their complaint, the remedies Plaintiffs sought for breach of the Agreement were "damage[s] in an amount in excess of $10,000.00," as well as "specific performance of the Agreement as an additional remedy . . . including but not limited to . . . [requiring Boyd to] issu[e] to Plaintiff VanHorn a fifty percent (50%) membership-ownership interest in Defendant Sammy's."

As damages for breach of the partnership agreement, the trial court awarded Plaintiffs 5% of gross sales between June 2011 and December 2013 as well as 50% of the fair market value of Sammy's as of December 2011. We note that, although Defendants challenge the admission of Crawford's testimony and argue error in other aspects of the trial court's calculation of damages which we address below, they have not brought forward on appeal any argument that the trial court erred in awarding Plaintiffs damages in the amount of 50% of the restaurant's fair market value, rather than in awarding Plaintiffs a 50% ownership interest in Sammy's and leaving Plaintiffs to file a further action to wind up the affairs of the partnership in order to "cash out" that interest.[8] Rather, they argue only that they were prejudiced by the

[8] Defendants' counsel did make such an argument to the trial court during the pretrial motions hearing:

> There's no evidence that the agreement is — is that Mr. Van[H]orn was entitled to any value of his business at this stage. There was no allegation in the Complaint with regard to dissolution, winding up, the

trial court's admission of Crawford's testimony because they had not expected to contest the issue of Sammy's valuation at trial and therefore had not procured their own business valuation expert. However, Defendants did not make this argument in the trial court nor did they request a continuance in order to locate their own business valuation expert following the trial court's denial of their motion *in limine*.

In light of the remedies requested in the complaint and the trial court's judgment, we must reject Defendant's contention that Crawford's testimony was not relevant. The trial court's determination of the proper amount of damages was based on Crawford's opinion about the amount due to Plaintiffs for 5% of gross sales and his opinion about the monetary value of Plaintiffs' 50% ownership interest. This testimony clearly assisted the court in determining the appropriate amount of damages owed to Plaintiffs for breach of the Agreement. *See* N.C. Gen. Stat. § 8C-1, Rule 702(a) (2013) ("If scientific, technical[,] or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise . . . ."). Thus, we conclude that

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> proper procedure that would be necessary in order for Mr. Van[H]orn to get his ownership interest, if the Court eventually finds that he does have an ownership interest.
>
> So our argument to the Court would be that the value of the LLC, or the partnership, would be irrelevant for these proceedings, because there's no way that — [D]efendants can see — that we get to a point that there is an order to be entered with regard to damages in this case. Therefore, the purported value of the LLC or partnership is irrelevant.

Crawford's testimony about Sammy's fair market value was highly relevant to the award of damages in this case. The trial court did not abuse its discretion by admitting testimony from Plaintiffs' business valuation expert, and, accordingly, this argument is overruled.

V. Calculation of damages

Defendants also argue that the trial court erred in calculating the damages to which Plaintiffs were entitled. Specifically, Defendants contend that, although the Agreement provided that VanHorn would receive 5% of gross monthly sales from the new restaurant for "as long as [VanHorn and Boyd] remained in business together" and VanHorn testified that he realized the partnership was over by the end of 2011, the trial court awarded Plaintiffs 5% of gross sales through the end of 2013. We agree in part.

As discussed *supra*, the parties' at-will partnership was automatically dissolved, not in December 2011, but rather in January or February 2012 when Boyd unequivocally expressed his desire to end the partnership at the meeting with VanHorn. Accordingly, we vacate the award of damages and remand to the trial court for additional findings of fact regarding the date of that meeting and recalculation of damages based thereupon.

Plaintiffs' Cross-Appeal

On cross-appeal, Plaintiffs argue that the trial court erred in dismissing their claim for UDTP. We disagree.

Under Chapter 75 of our General Statutes, "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts and practices in or affecting commerce, are . . . unlawful." N.C. Gen. Stat. § 75-1.1 (2013). However, Chapter 75 does not address all wrongs which may occur in a business setting. *HAJMM Co. v. House of Raeford Farms, Inc.*, 328 N.C. 578, 593, 403 S.E.2d 483, 492 (1991). Rather, the UDTP statutes are intended to protect aggrieved customers and consumers from unethical behavior by businesses with whom they transact. *See Bhatti v. Buckland*, 328 N.C. 240, 245, 400 S.E.2d 440, 442 (1991). In contrast, internal disputes within a business are not properly addressed via UDTP claims. *See generally Wilson v. Blue Ridge Elec. Mbrshp. Corp.*, 157 N.C. App. 355, 578 S.E.2d 692 (2003). Thus, in determining whether a UDTP claim can be sustained, the question is not whether a contractual relationship exists between a plaintiff and a defendant, but whether the allegedly deceptive acts of the defendant affected commerce. *See J.M. Westall & Co. v. Windswept View of Asheville, Inc.*, 97 N.C. App. 71, 75, 387 S.E.2d 67, 69, *disc. review denied*, 327 N.C. 139, 394 S.E.2d 175 (1990).

Plaintiffs cite a single case, *Compton v. Kirby*, 157 N.C. App. 1, 577 S.E.2d 905 (2003), in support of their argument that the dispute between VanHorn and Boyd was "in or affecting commerce." We find that case inapposite. *Compton* involved alleged deceit and fraud in the sale of a business to a third party. *Id.* at 6-7, 577 S.E.2d at 909. Specifically, the defendant, having acknowledged that his real estate business was in fact a partnership with the plaintiffs, represented to a third party

prospective buyer of the business that he was the sole owner. *Id.* When the plaintiffs became aware that the defendant was not representing their interests in the proposed sale, they contacted the prospective buyer and the sale fell through. *Id.* Therefore, in addition to other claims, the plaintiffs successfully brought a UDTP claim against the defendant, a result affirmed by this Court. *Id.* at 20, 577 S.E.2d at 917.

Here, in contrast, there is no third party involved in or affected by the breach of the partnership agreement between Boyd and VanHorn. The record does not suggest any pending sale to a third party, deception of vendors, or fraud affecting any customer of the Ice House or Sammy's. Rather, the conflict is solely an internal matter between Boyd and VanHorn over the terms of their contractual relationship. Therefore, the conduct at the root of this matter does not affect commerce. Accordingly, the trial court did not err in dismissing the UDTP claim against Defendants. This argument is overruled.

Conclusion

The judgment and the costs order of the trial court are

AFFIRMED in part; VACATED and REMANDED in part.

Judges GEER and DILLON concur.

Report per Rule 30(e).