

## State Trial Courts

**VERDICT: \$74,644.72, negligent misrepresentation by retail condo agent as to insurance coverage, 49% negligence by Plaintiffs... Judge concluded that jury computed damage amount rather than Court as instructed, allowed jury's "net" to stand... fees/costs to Defendant on claim it prevailed pursuant to condo Declarations.**

Robert & Mary McDermott bought 2 units in a retail condo in the JJC Center in Billings from J&S Development. Prior to trial J&S's real estate agent Gene Stumvoll denied making any misrepresentations as to whether the building was fully insured, but at trial testified that he told McDermotts that their units were fully insured. He explained that coverage was supposed to be provided by the condo association on the building and by the tenants on the contents and build-out. He had rented the units to third parties before McDermotts bought them, and the lease that he and J&S drafted required the tenant to fully insure the unit owner's interest. However, after the condo complex burned 9/1/01, McDermotts and others who had purchased units from J&S learned that none of the tenant policies covered their interests completely. They sued J&S, Stumvoll, and others alleging negligence, misrepresentation and 3 separate breaches of contract. All defendants except J&S settled or were dismissed before trial. The negligence claim was dismissed by Plaintiffs and one of the contract claims was dismissed on summary judgment. The remaining breach of contract claims were dismissed by directed verdict and the case went to the jury on negligent misrepresentation, with J&S alleging contributory negligence.

A 12-0 Billings jury found that Stumvoll committed negligent misrepresentation, that J&S is liable for his negligent misrepresentation, that his negligent representation caused damage to McDermotts, and that McDermotts were negligent and their own negligence caused or contributed to their damages. It apportioned negligence 49% to McDermotts and 51% to J&S, and found that McDermotts' damages were \$74,644.72. Judge Watters entered judgment for McDermotts for \$74,644.72 plus 10% interest and costs.

J&S moved to amend the judgment, contending that Watters erred in entering judgment for the full amount of \$74,644.72 instead of \$38,068.81 (51% of \$74,644.72), and that she should have entered judgment that included fees & costs to J&S. The following is from her order denying the motion to amend as it pertains to the damage amount and granting it as it pertains to fees & costs:

J&S argues that the Court made a "manifest error of law" in awarding damages without accounting for McDermotts' negligence. It cites §27-1-702 (when the negligence of the one against whom damages are sought is greater than the negligence of the one seeking damages, "any damages allowed must be diminished in the proportion to the percentage of negligence attributable to the person recovering"). It also points to Inst. 21:

If you find for the plaintiffs on the question of liability, then you must determine the amount of money which will reasonably and

fairly compensate the plaintiffs for all loss caused by the defendant, regardless of whether such loss could have been anticipated.

It then looks to Inst. 25, which instructs that upon a finding of contributory negligence,

the total amount of damages that plaintiffs would otherwise be entitled to recover will be reduced by the court in proportion to the amount of negligence you attribute to the plaintiffs.

According to J&S, the proper damage amount would therefore be \$38,068.81 (\$74,644.72 minus \$36,575.91).

McDermotts argue that the \$74,644.72 given by the jury as "the amount of the McDermotts' damages" already reflects a reduction for the 49% negligence attributed to them. They point to the fact that \$74,644.72 is precisely the amount they claimed for lost investment (\$146,362.21) decreased by 49%. That lost investment amount, along with \$108,322 for lost rents, was introduced at trial. J&S presented opposing arguments to the lost rent claim, but never disputed that McDermotts' lost investment was in fact \$146,362.21, but simply argued that it was not liable for any of the lost investment. McDermotts assert that "Defendant's position not only conflicts with the evidence, but it blindly refuses to acknowledge the statistical impossibility of a total damage determination exactly matching the finding of comparative negligence." While the Court cannot agree that it is statistically *impossible* for such a match to occur, it is statistically *very improbable*. As noted by J&S, it is generally true that courts should assume that a jury followed the instructions. However, it is the Court's opinion that the jury's intent was clear. The overwhelming improbability of a total damage award that is precisely equal to McDermotts' lost investment amount decreased by their contributory negligence is enough evidence for the Court to stray from the general assumption that the jury followed the instructions, and to instead assume that it went ahead and computed the damage amount. Accordingly, the Court finds that the jury's damage award of \$74,644.72 reflects the total lost investment amount of \$146,362.21 decreased by McDermotts' contributory negligence of 49%. It would be "manifest error" for the Court to ignore this overwhelming likelihood and decrease their award by another 49% simply because it was the jury and not the Court that computed the damage amount.

McDermotts' complaint contained 3 counts against J&S. Count IV asserted that J&S violated the Declaration of Unit Ownership. J&S moved for summary judgment on all counts. The Court summarily dismissed part of the claim in Count IV and on the 2nd day of trial directed verdict for J&S on the rest of Count IV. The Declaration provides that the prevailing party in an action relating to the Declaration, by-laws, or covenants "shall be entitled to recover their costs and attorney fees from the losing party." Courts may not use a "mathematical approach comparing the total number of issues in the case with those actually prevailed upon" for determining fee awards." *Osterman* (Mont. 2003), quoting *Hensley* (US 1933). J&S argues that since the Court dismissed Count IV, it is entitled to fees & costs incurred in defending that count.

McDermotts contend that viewing the case as a whole they should be considered prevailing party. While it is true that McDermotts "prevailed" when they were awarded money damages for the claim upon which trial was held, it is also true that J&S "prevailed" when the Court dismissed Count IV. It incurred fees & costs defending against Count IV until it was finally dismissed in its entirety on the 2nd day of trial. Count IV asserted that it violated terms of the Declaration. Therefore, pursuant to the Declaration, J&S, as "prevailing party" for the claim brought under the Declaration, "shall be entitled to recover [its] costs and attorney fees from the losing party." A hearing shall be held to determine fees & costs using the 7 *Osterman* guidelines.

No experts.

Demand, \$140,000; offer, \$12,250. Jury request, \$254,684.21; jury suggestion, 0.

Jury deliberated 4 hours 3rd day.

J&S has appealed.

***McDermott v. J&S Development, Yellowstone DV 02-661, verdict 5/25/05, judgment 5/31/05, order on motion to amend judgment 8/9/05.***

Tom Singer (TTS Civil Trial Attorneys), Billings, for McDermotts; William Gilbert & James Halverson (Herndon, Sweeney & Halverson), Billings, for J&S (EMC Ins.).