IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 24-0238

JOHN GROSVOLD, D/B/A GROSVOLD EXCAVATING,

Plaintiff/Counterclaim Defendant/ Appellee/ Cross-Appellant,

v.

J. BOWMAN NEELY and the J. BOWMAN NEELY REVOCABLE TRUST,

Defendant/Counterclaim-Plaintiff/ Appellant/ Cross-Appellee.

APPELLANT'S OPENING BRIEF

On Appeal from the Third Judicial District Court, Anaconda-Deer Lodge County
Cause No. DV-22-03
The Honorable Robert J. Whelan, Presiding

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1. Did the District Court err in granting summary judgment on Appellants', J. Bowman Neely and The J. Bowman Neely Revocable Trust's (collectively referred to as "Neely"), construction defect claim, after the jury heard evidence of multiple construction defects in Appellee John Grosvold d/b/a Grosvold Excavating's (collectively referred to as Grosvold) work?
2. Did the District Court err in granting judgment as a matter of law on Neely's negligence claim, when there was evidence of Grosvold's negligence in performing work for Neely and Grosvold did not move for judgment as a matter of law?

STATEMENT OF THE CASE

Grosvold sued J. Bowman Neely and the J. Bowman Neely Revocable Trust for an account stated, breach of contract, and quantum meruit on January 14, 2022. (*Complaint and Demand for Jury Trial*, CR 1). Neely answered and filed a counterclaim for breach of contract, negligence, trespass to chattel, and construction defect under Mont. Code Ann. § 70-19-427, on March 14, 2022. (*Answer and Counterclaim*, CR 3). Grosvold moved for summary judgment on the construction defect claim on November 7, 2022. (*Pl./Counterclaim Def.'s Mtn. for Summary Judgment Re: Def./Counterclaim Pl. J. Bowman Neely's Counterclaim*

for Liability for Construction Defect Pursuant to Mont. Code Ann. § 70-19-427 and *Pl./Counterclaim Def.'s Brf. in Supp. of Mtn. for Summary Judgment Re: Neely Trust's and Neely's Counterclaim for Liability for Construction Defect Pursuant to Mont. Code Ann. §70-19-427*, CR 25 & 26). Neely opposed summary judgment in a brief filed on December 8, 2022. (*Defs.' Resp. in Opp. to Pl./Counterclaim Def.'s Brf. in Supp. of Mtn. for Summary Judgment Re: Neely Trust's and Neely's Counterclaim for Liability for Construction Defect Pursuant to Mont. Code Ann. § 70-19-427*, CR 31).

By written order on December 28, 2023, the District Court reserved ruling on the Motion for Summary Judgment until the time of trial. (*Order Denying Pl.'s Mtn. for Summary Judgment Re: Neely Trust's and Neely's Counterclaim for Liability for Construction Defect Pursuant to Mont. Code Ann. § 70-19-427*, CR 42). A four-day jury trial was held from January 8-11. During the settling of jury instructions, the District Court stated that it would rule on the pending motion for summary judgment on the construction defect claim to determine whether the jury would be instructed on the claim. TR 749-50. On the final day of trial, the Court dismissed the construction defect claim:

> With regards to the instructions, the Court has decided with regards to Defendant's Proposed 15 and 16 the Court is not going to allow the construction defect to go to the jury. I don't believe the evidence presented before the Court substantiates that the work completed was done to a residence. And, more particularly, the work that was defective was done to a residence. And so I'm not allowing that issue to go to the jury.

TR 756.

Grosvold did not move for summary judgment or judgment as a matter of law on Neely's negligence claim. Instead, Grosvold argued negligence instructions should not be given "because this isn't a negligence case. This is a breach of contract case." TR 745-746. While Neely was willing to withdraw the negligence claims if the construction defect claims would be decided by the jury, Neely noted:

> [W]e've got a claim for negligence, that the construction work was performed negligently, that he didn't comply with the reasonable standard of care in completing the work. And he's got a duty to perform the work as a reasonably prudent contractor. He breached that duty and that caused damages to Bowman [Neely]."

Id. The Court ultimately dismissed both the construction defect claim and the negligence claim, stating: "[W]ith regards to negligence, throughout this case we have heard testimony with regards to good workman-like manner, industry standards, but at no time was there any discussion with regards to negligence." TR 756.

The special verdict form did not allow the jury to decide the construction defect or negligence claims. CR 48.1. A verdict finding Neely breached the contract with Grosvold was subsequently reached by the jury. (*Judgment on Special Verdict*, CR 61).

STATEMENT OF FACTS

Neely hired Grosvold to perform excavation and construction work on his property. TR 416. Neely's family has owned the property at issue since approximately 1910. TR 403. Neely intends to pass the property to his son. *Id.* Grosvold's work was part of a project to update and renovate the property. The construction project was detailed in architectural plans, engineering plans, and landscaping plans, all of which were provided to Grosvold. *Id.* at 406-410. The architectural, engineering, and landscaping plans, showing work to be done at the residence, were submitted to the jury. *See e.g.*, Exhibit 100-034—048, 100-126 (TR 291-292; 295).

As described below, Grosvold and his crew performed extensive demolition, excavation, foundation work, trenching and bedding for geothermal heating lines, and a bridge for the driveway to the property. His work was defective, and the relationship between Neely and Grosvold broke down. Neely sent Grosvold a letter giving notice of the construction defects. TR 193-194; Exhibit 12. The letter identified multiple construction defects, including:

1. Installing the bridge at the improper height;
2. Improperly installing water, conduit, and heat pump lines;...
3. Damaging existing septic, water, power, propane, irrigation, and fire suppression systems;

4. Damaging recently planted and irrigated areas;

5. Causing a new septic line you installed to disconnect; ...

10. An improperly installed retaining wall;...

12. Operating without reference to existing plans and directions causing unnecessary, duplicative, and avoidable damage and expense.

Id. Grosvold disputed the claims in Neely's letter. Exhibit 34 (TR 261).

At trial, evidence showed that the bridge was built to a height two feet above the height in the plans. Charlie Kees, a landscape architect, testified that he created a bridge and road schematic design that specified the elevation of the bridge. TR 484-485, 487-488. He met with Grosvold at the property and marked the exact elevations of the bridge based on the schematic design. TR 488-489. The elevation of the bridge, as constructed by Grosvold, was 18 inches too high on one end and 2 ½ feet too high on the other end. TR 491-493.

Michael McPherson testified to defects in the construction of water, conduit, and heat pump lines. TR 601-613. McPherson was hired to design a geothermal heating system for the property. TR 602-603. The system was designed for either straight-run lines (that would not include any cutting of the pipe) or fusion welding of the pipe (as opposed to a mechanical fastener). TR 604-606. McPherson testified to his opinion that fusion welds should have been performed if connections were necessary. TR 607-608. He told Grosvold to use fusion welds, if necessary, and

offered to come to the property to perform welds. TR 607-608, 613. Grosvold admitted at trial that he used clamps on the pipe, rather than fusion welds, as required by the plans. TR 228-229.

Grosvold's crew brought heat lines into the foundation wall above the frost line, where they would freeze. TR 526-527. Johnny Burford, another contractor on the project, testified that these lines should be six-foot minimum depth. TR 621. Neely had to have Grosvold's work corrected. TR 526-527.

Grosvold, although he attempted to justify his actions, also admitted to damaging existing septic, power, propane, irrigation, and fire suppression systems. TR 231-232. Although his crew attempted to fix the sewer line, Neely had it scoped and learned that the connection made by Grosvold's crew was misaligned. TR 532-533. Mark Edin fixed Grosvold's error. TR 652-654. He testified the line was not "mated up correctly," creating a blockage in the sewer line. *Id.* Edin fixed the connection and reburied the line with proper bedding and compaction. *Id.*

Neely testified to pipes and waterlines damaged by Grosvold. TR 533-536. This included lines for a fire suppression system and for landscaping purposes. *Id.* Grosvold failed to cap pipes after he destroyed them during his excavation, causing flooding. *Id.* Additionally, Grosvold installed a greywater septic line to the kitchen that was undersized to code, not actually connected, buried, and filled with dirt. TR

551-553. Neely paid another plumber to fix this work—work that was clearly done to the residence. *Id.*

Johnny Burford testified that a retaining wall off some of the cabins was installed incorrectly. TR 623. Specifically, the footer on the retaining wall was deficient because the wall was going to run off it. *Id.* Neely also explained this problem—the footer was not long enough for the wall. TR 523-526. It had to be torn out and redone. *Id.*

Neely's reference to "[o]perating without reference to existing plans and directions," aside from the issues identified above, focused on Grosvold's failure to excavate to the elevations set in the architectural and engineering plans. TR 472. Prior to beginning the project, Neely met with Grosvold to discuss its scope. TR 418-419. One of the points of discussion was the foundation for the main cabin because it was sinking. *Id.* Grosvold assured Neely he could perform the work. *Id.*

At trial, however, Grosvold testified that the plans did not include elevations for the footings on the buildings. TR 253-254. His workers admitted there were elevations in the plans but testified that the elevations in the plans "[d]idn't make sense to any of us." TR 370, 382. Unlike Grosvold's crew, Burford testified he was able to follow the plans. TR 616. He testified that when he showed up to the project to pour footings, he had to "redo some of the dirt work...[to] get the grade to the right elevation[.]" TR 618-619. The work he had to redo was Grosvold's

work because the elevations were off by at least a foot. TR 619-620. Burford, who is also an excavator, testified that elevations should be within 1 to 2 inches to be acceptable. *Id.* at 620-621.

Finally, there was testimony from Mark Edin and Bowman Neely regarding settling in areas where Grosvold and his crew did not properly compact the soil after digging and trenching. TR 520-521, 655-657. Edin testified that there was "massive settling...due to lack of compaction." *Id.* Proper compaction prevents the occurrence of bellies in the pipe. *Id.* When bellies in the pipe occur, air bubbles collect and stop the flow of water. TR 470-471. Neely must periodically flush the system to keep the geothermal heat system working. *Id.* Edin was clear that settling does not occur when excavation work and backfilling is done to the industry standard. TR 520-521, 655-657. The jury was shown photographs demonstrating the areas where settling occurred. *Id.*

STANDARD OF REVIEW

The District Court's summary judgment on the construction defect claim is reviewed de novo. *McClue v. Safeco Ins. Co.*, 2015 MT 222, ¶ 8, 380 Mont. 204, 354 P.3d 604. "Summary judgment is appropriate when the moving party demonstrates the absence of a genuine issue of material fact and entitlement to judgment as a matter of law." *Id.* The facts must be viewed "in the light most favorable to the non-moving party." *Id.*

"A party has a right to jury instructions adaptable to his or her theory of the case when the theory is supported by credible evidence and it is reversible error to refuse to instruct on an important part of a party's theory of the case." *Camen v. Glacier Eye Clinic, P.C.*, 2023 MT 174, ¶ 21, 413 Mont. 277, 539 P.3d 1062. Refusal of jury instructions "constitutes reversible error when 'such refusal affects the substantial rights of the party proposing the instruction, thereby prejudicing him.'" *Id.* (quoting *Warrington v. Great Falls Clinic, LLP*, 2019 MT 111, ¶ 10, 395 Mont. 432, 443 P.3d 369).

Judgment as a matter of law in a jury trial may only be granted "[i]f a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue[.]" Mont. R. Civ. P. 50(a)(1). "A motion for judgment as a matter of law may be made at any time before the case is submitted to the jury. The motion must specify the judgment sought and the law and facts that entitle the movant to the judgment." Mont. R. Civ. P. 50(a)(2). "Courts must 'exercise the greatest self-restraint in interfering with the constitutionally-mandated process of jury decision.'" *Cleveland v. Ward*, 2016 MT 10, ¶ 11, 382 Mont. 118, 364 P.3d 1250 (citation omitted)."

Judgment as a matter of law determination are, like summary judgment awards, reviewed de novo. *Wagner v. MSE Tech. Applications, Inc.*, 2016 MT 215,

¶ 15, 384 Mont. 436, 383 P.3d 727. "A district court should grant judgment as a matter of law only where there is a complete lack of any evidence which would justify submitting an issue to the jury, considering all evidence and any legitimate inferences that might be drawn from it in a light most favorable to the opposing party." *Id.*

SUMMARY OF ARGUMENT

The District Court erred when it granted summary judgment on Neely's construction defect claim at the close of evidence during trial despite testimony from several witnesses demonstrating defective excavation and construction work by Grosvold at Neely's property. Evidence showed that the property was a personal residence to the Neely family and that the construction work involved work to the residence. The jury, not the District Court, should have weighed the evidence to determine whether Neely proved his construction defect claim.

Likewise, the District Court should have allowed the jury to determine Neely's negligence claim. The District Court recognized testimony that Grosvold's work was not performed in a workman-like manner or to reasonable industry standards. TR 756. This testimony, at a minimum, created issues of fact regarding whether Grosvold's work was negligently performed. The jury, not the District Court, should have decided Neely's negligence claim.

ARGUMENT

I. The District Court's Summary Judgment on Neely's Construction Defect Claim was an Error of Law.

The District Court granted summary judgment on Neely's construction defect claim after determining the evidence did not support the conclusion that defective work "was done to a residence." TR 756. It is unclear from the Court's ruling whether it determined Neely's property was not a "residence" under the definitions in the construction defect statutes or that Grosvold's work was not done to a residence on the property. *Id.* Either way, the District Court's decision to grant summary judgment was an error of law. There was substantial evidence from which the jury could conclude that the Neely property was a residence and that the defective work claimed in the lawsuit was done to the residence.

A. The property was a "residence."

The Legislature enacted Mont. Code Ann. § 70-19-426, *et seq.*, to govern residential construction disputes. Mont. Code Ann. § 70-19-427. The statutes permit a "claimant" to commence an "action" against a construction professional for a construction defect. Mont. Code Ann. § 70-19-427(3)(a). The term "claimant" includes "a home owner or association that asserts a claim against a construction professional concerning a defect in the construction or remodeling of a residence." Mont. Code Ann. § 70–19–426(3). "Residence" is defined as "a single-family house or a unit in a multiunit residential structure in which title to each individual

unit is transferred to the owner of a condominium or cooperative system." *Id.* at -426(7).

The "residence" requirement is satisfied in this case because the property is a single-family residence. Neely's testimony established he owns the family property and intends to pass it on to his son. TR 403. The jury learned that there is a main cabin on the property, and that foundation work for that cabin was one of the components of the construction project. TR 419, 421. The scope of work conducted at the Property included construction of additions on two separate buildings, a "main cabin" and a "pool house." Exhibit 100-034—048 (TR 292). Each of these is a house that qualifies as a "residence" under Mont. Code Ann. § 70-19-426(7).

In moving for summary judgment, Grosvold argued the property was not a residence because "[t]here are no permanent residents of the property." CR 26, p. 4. The construction defect statutes, however, do not require that the residence be a primary residence. "The function of the court with respect to statutory construction is to interpret the intention of the statute or rule, if at all possible, from the plain meaning of the words, and if the meaning of the statute or rule can be determined from the language used, the court is not at liberty to add or detract from the language therein." *Glendive Med. Ctr. v. Mont. Dep't of Pub. HHS*, 2002 MT 131, ¶ 15, 310 Mont. 156, 49 P.3d 560. Adding a condition to the statute that the residence

be a primary residence would violate the rules of statutory construction. If the Legislature had intended to only allow claims for a primary residence, it would have included that limitation.

Notably, "home owner" includes "any person, company, firm, partnership, corporation, or association who contracts with a construction professional for the remodeling, construction, or construction and sale of a residence[.]" Mont. Code Ann. § 70–19–426(6)(a)(i). Including someone who contracts for the "construction and sale of a residence" (i.e., someone building a spec home) in the definition of "home owner" clearly demonstrates the lack of any requirement that the residence be a primary residence. Individuals contracting for a spec home would never live in the home—certainly Neely can bring a claim under the statutes when he spends substantial time at the property and ultimately intends to live there.

To the extent summary judgment was based on a legal determination that Neely was not entitled to relief because he does not live as a full-time resident at the property, it was erroneous. The statutes do not require full-time residence at a property.

B. Grosvold's work was done to a residence.

As detailed in the facts, above, Grosvold did extensive work to the residence. Neely's position is that all of the construction work was done to the residence (i.e., the property). Even if, for the sake of argument, building a bridge

on the driveway to the property is not considered construction done to a residence, the excavation and foundation work Grosvold completed clearly was done to the residence. At a minimum, there were issues of fact for the jury to weigh to determine whether the construction work performed by Grosvold involved construction to a residence. The jury would have had a strong factual basis to find in Neely's favor.

"Construction defect" is defined as "a deficiency in or arising out of the supervision, construction, or remodeling of a residence that results from any of the following:

> (a) defective materials, products, or components used in the construction or remodeling of a residence;
>
> (b) violation of the applicable building, plumbing, or electrical codes in effect at the time of the construction or remodeling of a residence;
>
> (c) failure to construct or remodel a residence in accordance with contract specifications or accepted trade standards."

Mont. Code Ann. § 70-19-426(4). Neely's claim focused on subsection (c) of the "construction defect" definition. Neely had plans created for all aspects of the project and Grosvold failed to follow those plans. Additionally, as the Court recognized when it granted judgment against Neely on the negligence claim, the jury heard testimony that Grosvold's work did not meet accepted trade standards. TR 756.

Grosvold's defective work on the Property "[arose] out of" the construction/remodeling work on the main cabin, pool house, and elsewhere on the property like the kitchen/dining cabin and sleeping cabins. To be sure, Grosvold acknowledged that excavation work is "a necessary part of construction work." TR 302-303. Invoices, which were introduced as exhibits, show that Grosvold "poured footings on porch of main cabin," "dug at sleeping cabin," "set up retaining wall backfill around porch," and "backfill[ed] heat line." Exhibit 5 (TR 186). The construction defect statute specifically references plumbing as being encompassed by the statute, and Grosvold's work on the geothermal heat lines, work on the greywater septic line installed in the kitchen, and the main septic system are part of the project's plumbing. Mont. Code Ann. § 70-19-426(4)(b).

Simply put, the construction/remodeling work throughout the Property was the only reason Grosvold was hired. As a result, Grosvold's work arose out of the other construction and/or remodeling work on the residences located on the Property, as required by Mont. Code Ann. § 70-19-426(4). The numerous construction defects identified in Neely's November 1, 2022 letter, supported by trial testimony, stem from Grosvold's failure to perform his work in accordance with contract specifications and/or accepted trade standards. *See* Mont. Code Ann. § 70-19-426(4)(c). The remaining defects identified by Neely similarly stem from the same type of "faulty workmanship" the construction defect statutes were

intended to address. *Atlas Cas. Ins. Co. v. Quinn*, No. CV 18-76-M-DWM, 2019 U.S. Dist. LEXIS 103566 at *16 (D. Mont. June 20, 2019) ("The statutory construction defect claim is merely an allegation of faulty workmanship.").

The facts establish that Neely asserted a viable construction defect claim against Grosvold. The District Court should have allowed the claim to go to the jury.

II. The District Court's Dismissal of Neely's Negligence Claim was an Error of Law.

The District Court's error in granting summary judgment on Neely's construction defect claim was compounded by the decision to also dismiss Neely's negligence claim. Grosvold did not move for judgment as a matter of law. Nonetheless, the District Court decided not to instruct on the claim, effectively dismissing it as a matter of law. This dismissal, combined with the dismissal of the construction defect claim, hamstrung Neely's arguments that Grosvold had an obligation to perform work in a reasonable manner, consistent with industry standards. The dismissal was an error of law that substantially prejudiced Neely.

Initially, the District Court's refusal to instruct the jury on Neely's negligence claim violated Neely's right to instructions on his theory of the case. *Camen*, ¶ 21. The Court did not refuse Neely's proposed instructions because there was an absence of evidence, but rather due to a belief that the instructions would "confuse the jury." TR 756. Neely's proposed instructions, however, were the

pattern instructions for negligence claims. There was an active negligence claim and Neely was entitled to instructions on that claim. *See Goles v. Neumann*, 2011 MT 11, 359 Mont. 132, 247 P.3d 1089. It was reversible error to refuse the instructions.

The jury was not instructed on negligence and the verdict form did not include questions that would allow the jury to find Grosvold liable for his negligence. CR 48.10. Although the District Court did not rule that it was dismissing the negligence claim as a matter of law, that is what occurred. During the settling of jury instructions Grosvold's counsel stated:

> We object to the giving of any negligence instruction because this isn't a negligence case. This is a breach of contract case. That's what all of the evidence and testimony has been.

TR 745-746. Later, Grosvold's counsel claimed there was no expert to set the standard of care for negligence. *Id.* At no time, did Grosvold make a motion for judgment as a matter of law. Mont. R. Civ. P. 50.

Contrary to the assertions of Grosvold's counsel, there was ample evidence of negligence during the trial. The District Court acknowledged: "[T]hroughout this case we have heard testimony with regards to good workman-like manner, industry standards...obviously, the parties can argue industry standards because there's been plenty of testimony with regards to that[.]" TR 756. That evidence included, for example, Grosvold's workers ripping up water lines and sewer lines.

TR 533-536, 652-654. Their failure to cap the destroyed water lines demonstrated further negligence. *Id.* Johnny Burford testified to a retaining wall that was installed incorrectly. TR 623. Burford also testified that he had to re-dig elevations because Grosvold was off by at least a foot and industry standards did not allow for more than 1-2 inches of deviation. TR 618-621. Mark Edin, an expert excavator, testified to several breaches of industry standards, including the failure to properly compact fill material, by Grosvold. TR 655-657.

Grosvold took advantage of the District Court's dismissal of the construction defect and negligence claims by arguing that the oral contract with Neely was for hourly work. In closing, counsel argued: "[Grosvold] and his crew were to work by the hour, keep track of those hours, provide materials, and they would get paid for the hours that they worked." TR 766. He added, "Because [Neely] hired him on an hourly basis he could have fired him at any time he was dissatisfied with his work." TR 768-769. Grosvold's summation of the case was, ultimately, that the quality of his work did not matter because he was to be paid by the hour and for materials provided. Neely's best response to this argument would have been instructions on the construction defect statutes and negligence law, but the District Court had dismissed those claims.

The District Court's dismissal of Neely's negligence claim is reversible error. The negligence claim was active at the time of settling jury instructions and

there was no motion for judgment as a matter of law. Even if a motion for judgment as a matter of law had been made by Grosvold, there was ample evidence to submit the negligence claim to the jury.

CONCLUSION

The jury verdict in favor of Grosvold should be reversed and the case should be remanded to the District Court for a new trial wherein the jury should determine liability under Neely's construction defect and negligence claims, in addition to the breach of contract claims.

DATED: August 28, 2024

J. Bowman Neely
Pro se for Appellant/Cross-Appellee

CERTIFICATE OF COMPLIANCE

Pursuant to Montana Rules of Appellate Procedure 11 and 14(9), I certify that this brief is printed with a proportionally spaced Times New Roman text typeface of 14 points; is double-spaced, except for footnotes and for quoted an indented material; and the word count calculated by Microsoft Word is not more than 10,000 words pursuant to Montana Rule of Appellate Procedure 11(4)(a), being 4280 words, excluding the caption, Table of Contents, Table of Authorities, Signature Block, Certificate of Compliance, Certificate of Service, and Exhibits.

DATED: August 28, 2024

J. Bowman Neely
Pro se for Appellant/Cross-Appellee

CERTIFICATE OF SERVICE

I hereby certify that I have filed a true and accurate copy of the foregoing brief with the Clerk of the Montana Supreme Court, and that I have served a true and accurate copy of the foregoing brief via US mail as follows:

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