

IN THE SUPREME COURT OF THE STATE OF MONTANA

Supreme Court Cause No. DA 25-0686

MCNAIN HOLDINGS LP, and Arizona
Limited Partnership; JAY ROBERT BLAKE;
and NAOMI MONICA BLAKE,

Appellees (Plaintiffs),

v.

WILDERNESS PRESERVE US LP,

Appellant (Defendant).

On Appeal from the Montana Nineteenth Judicial District Court,
Lincoln County, Cause No. DV-27-2023-0000158-BC,
Honorable Matthew J. Cuffe

APPELLANT'S BRIEF

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

Appellant Wilderness Preserve US LP states that the following issues are presented for review:

1. Whether the District Court erred in letting stand a jury verdict which was unsupported by the evidence through denial of Wilderness' Rule 59 motion.
2. Whether the District Court erred in letting stand a jury verdict which was contrary to the law through denial of Wilderness' Rule 59 motion.
3. Whether the District Court erred in awarding attorney's fees and costs to Appellees McNain Holdings LP, Jay Robert Blake, and Naomi Monica Blake on a claim they lost.

STATEMENT OF THE CASE

Appellees McNain Holdings LP, Jay Robert Blake, and Naomi Monica Blake (hereafter, “McNain and Blake”) filed this action, in which they made claims (1) for breach of contract and (2) for violation of the Montana Consumer Protection Act. They asserted both claims in relation to their 2015 purchase of two 1/12 interests in a 3-bedroom villa at Wilderness Club, a luxury golf resort near Eureka, Montana.

The district court ruled on McNain’s and Blake’s motion for summary judgment that Wilderness breached the parties’ contract and that McNain and Blake were entitled to fees and costs on the breach of contract claims. However, the district court did not make any summary judgment ruling on damages under the breach of contract claims, and declined to make any summary judgment rulings at all on the Montana Consumer Protection Act claims.

Following the district court’s ruling on summary judgment, a trial was conducted on (1) McNain’s and Blake’s breach of contract damages and (2) the Montana Consumer Protection Act claims. The jury returned a verdict of \$500,000.00 in damages for the breach of contract claims, and a defense verdict in favor of Wilderness on the Montana Consumer Protection Act claims.

Post-trial, the district court awarded fees and costs to McNain and Blake on both claims after briefing and oral argument from both parties. Wilderness then moved under Rule 59, M.R.Civ.P., for a reduction of the verdict amount on the grounds that it is unsupported by the evidence and that it is contrary to law, or in the alternative, for a new trial. That motion was deemed denied pursuant to Rule 59(f), M.R.Civ.P., when the district court did not address the motion in a written order within 60 days of its filing date. The district court also entered an opinion and order purporting to deny the motion after the 60 days had run.

Wilderness appeals both (1) the denial of its Rule 59, M.R.Civ.P., motion, and (2) the award to McNain and Blake of attorneys' fees and costs for the Montana Consumer Protection Act claims, which McNain and Blake lost.

STATEMENT OF FACTS

In 2015, McNain and Blake entered into a contract with Wilderness under which they paid \$150,000.00 for two 1/12 interests in a 3-bedroom villa at the Wilderness Club, a luxury golf resort near Eureka, Montana. *Trial Transcript*, 45:7-46:11; *Trial Exhibits 7 and 11* (Exhibit 7-*Trial Transcript*, 212:17-215:3; Exhibit 11-*Trial Transcript*, 272:9-19). These interests would enable McNain and Blake to use the villa for 4 weeks per year each (one week per quarter), including the enjoyment of golf and other amenities the resort offered. *Trial Transcript*, 158:24-159:1, 216:1-23, 302:2-7. Pursuant to the contract, McNain and Blake were deeded those interests, and McNain and Blake still own them. *Trial Exhibits 7 and 11* (Exhibit 7-*Trial Transcript*, 212:17-215:3; Exhibit 11-*Trial Transcript*, 272:9-19).

However, Wilderness' realtor had hand-scribbled some notes on addenda to the buy-sell contracts which McNain and Blake never signed, to the effect that McNain and Blake would be "transferred" into a 4-bedroom villa when a 4-bedroom villa was constructed, and the addenda further provided that McNain and Blake would be given a break from HOA fees and maintenance dues until a 4-bedroom villa was constructed. *Trial Exhibit 1* at 12-13 and *Trial Exhibit 10* at 12-13 (Exhibit 1-*Trial Transcript*, 199:22-201:19; Exhibit 10-*Trial Transcript*, 267:23-272:8).

By 2023, McNain and Blake had enjoyed relief from HOA fees and maintenance dues for eight years, and it was apparent that no 4-bedroom villas would be constructed. *Trial Transcript*, 216:1-23, 221:19-222:2, 254:19-23, 272:19-273:9. Wilderness contacted McNain and Blake to visit the resort in order to come to some agreement through which they would begin to pay for their use of Wilderness Club like all of the other owners. *Trial Exhibit 2 (Trial Transcript*, 230:19-232:8). During the negotiations, Wilderness representative Brian Ehlert opined in an email that each week's stay was worth \$15,000.00. *Trial Exhibit 2 at 5 (Trial Transcript*, 230:19-232:8). Unfortunately, McNain and Blake refused to visit the resort, and negotiations broke down. *Trial Exhibit 2 at 1-5 (Trial Transcript*, 230:19-232:8). In April of 2023, Wilderness canceled McNain and Blake's reservations for the remainder of 2023 (*Trial Exhibit 2 at 1 [Trial Transcript*, 230:19-232:8]), at which point there were three weeks each, for a total of six weeks, remaining unused of McNain's and Blake's usable weeks at Wilderness Club that year. Wilderness then sold the Wilderness Club resort to a third-party on December 31, 2023. *Trial Transcript* 45:3-7, 364:9-14. Wilderness retained no interest in the resort, and while Brian Ehlert ended up holding an interest in the purchasing entity, this was a silent interest that entitled Mr. Ehlert to no control

whatsoever over the operations of the Wilderness Club. *Trial Transcript* at 297:9-298:11, 364:14-365-7.

Following the cancelation of McNain's and Blake's reservations in April of 2023, including after the resort sold to a new owner, McNain and Blake did not attempt to make new reservations for 2024 or for any subsequent year, or to sell their property interests. *Trial Transcript* at 246:17-248:6, 253:10-254:23, 284:25-285:8; 285:20-286:10, 328:18-329:8, 329:23-330:5, 334:19-335:8. They never made any attempt to contact the resort's new owner by any method at any time for any purpose. Instead, they took no action whatsoever other than filing and pursuing this lawsuit.

STANDARD OF REVIEW

As to Issues 1 and 2, on the matter of a jury's verdict, the standard of review is whether there is substantial credible evidence in the record to support it, and the Supreme Court of Montana reviews that evidence in the light most favorable to the prevailing party in the District Court. *Rocky Mountain Enterprises, Inc. v. Pierce Flooring*, 286 Mont. 282, 295, 951 P.2d 1326, 1334 (1997).

The standard of review for a District Court's denial of a M.R.Civ.P. 59(e) motion to alter or amend is abuse of discretion. *Folsom v. Mont. Pub. Emps. Ass'n*, 2017 MT 204, ¶59, 388 Mont. 307, ¶59, 400 P.3d 706, ¶59. When reviewing a district court's conclusions of law, the Supreme Court of Montana's standard is whether the trial judge's interpretation of the law is correct. *Carr v. Bett*, 1998 MT 266, ¶35, 291 Mont. 326, ¶35, 970 P.2d 1017, ¶35.

As to Issue 3, the Supreme Court of Montana reviews the order granting or denying attorney's fees for an abuse of discretion. *Hurly v. Lake Cabin Dev., LLC*, 2012 MT 77, ¶14, 364 Mont. 425, ¶14, 276 P.3d 854 ¶14.

SUMMARY OF ARGUMENT

The district court erred in its denial of Wilderness' Rule 59 motion because no evidence exists to support the amount of the jury's verdict. The amount of supportable damages can be calculated mathematically based upon the evidence admitted at trial, and it falls far short of the amount the jury ultimately awarded. The verdict amount is based upon a manifest error of fact, namely that McNain's and Blake's loss of use continued after December 2023, a fact that the evidence admitted at trial does not establish, and it was manifest error of law for the district court to deny Wilderness' Rule 59 motion under such circumstances.

The district court also erred in its denial of Wilderness' Rule 59 motion because the jury's verdict violates Montana law as set forth in the jury instructions. First, while the court instructed the jury that the verdict should not award speculative damages or place McNain and Blake into a better position than they would be had the contract's terms been performed, the verdict rendered unquestionably does both by replacing the duty to pay HOA dues and maintenance fees into perpetuity with a half-million dollar windfall while McNain and Blake still own the property interests in question. Second, while the court instructed the jury that McNain and Blake had a duty to mitigate their damages, the jury ignored McNain's and Blake's failure to take any action whatsoever to mitigate their

damages, including failing to attempt to make new reservations, failing to attempt to sell their property, indeed even failing to contact the resort's new owner in any manner at all when the resort sold, and awarded a verdict far in excess of what the evidence supports anyway. Thus, the verdict and the district court's denial of Wilderness' Rule 59 motion were both manifest errors of law.

The district court further erred in awarding McNain and Blake their fees and costs on the Montana Consumer Protection Act claims despite the fact that the jury rendered a defense verdict in Wilderness' favor on those claims. McNain and Blake cannot be entitled to fees and costs on claims where they are not the prevailing party.

Therefore, this Court should reduce the verdict to the mathematically calculable amount supported by the evidence admitted at trial, and should reduce the fee amount to remove fees attributed to the Montana Consumer Protection Act claims on which McNain and Blake lost. In the alternative, this Court should remand the case back to district court for a new trial and for new post-trial proceedings regarding fees and costs.

ARGUMENT

ISSUE 1: WHETHER THE DISTRICT COURT ERRED IN LETTING STAND A JURY VERDICT WHICH WAS UNSUPPORTED BY THE EVIDENCE THROUGH DENIAL OF WILDERNESS' RULE 59 MOTION.

A. McNain and Blake bore the burden of proof on the issue of their breach of contract damages, including most importantly the amount of time during which they lost the use of their property interests.

It is a fundamental principle of law that a plaintiff bears the burden of proving the elements of their affirmative claims and its damages. § 26-1-401, MCA; *Instruction No. 2* (Doc. 45 at 7) (“...the plaintiffs have the burden of proof...”). Here, McNain and Blake asserted the breach of contract claims as plaintiffs. *Complaint* (Doc. 1 at ¶¶ 24-37); *Pretrial Order* (Doc. 24 at 3-9). Therefore, they bear the burden of proof on all of the elements of those claims, including damages. Per McNain’s and Blake’s counsel, one of the elements of those damages was loss of use of the property at issue. *Trial Transcript* at 472:25-473:9.

While claimants bearing the burden of proof may seem an elementary point, McNain and Blake somehow do not concede it. Instead of agreeing that they bore the burden of proving the duration of their loss of use of the property at issue, they argue that somehow Wilderness, the defendant, instead bore that burden. *Plaintiffs’*

Response to Defendant's Rule 59 Motion, Doc. 68 at 8. They cite no authority for this proposition, likely because none exists. *Id.* Further, they argue, Wilderness failed to “prove” that following the sale of the resort to a third party over which Wilderness had no control, McNain’s and Blake’s alleged loss of use did not continue. *Id.* Of course, this is entirely backwards. McNain and Blake obviously bore the burden of proving the duration of their loss of use, an element of their damages on a claim that they asserted as plaintiffs, including proving that such alleged loss continued under the resort’s new owner.

The Court must ignore this burden-shifting nonsense argued without supporting authority and find that, as has been the case for plaintiffs since the inception of jurisprudence in this country, McNain and Blake bore the burden of proof to prove all of the elements of claims they asserted as plaintiffs.

B. The evidence presented at trial proves with mathematical certainty that the maximum amount of McNain’s and Blake’s damages is \$115,984.00. Despite this, the jury awarded \$500,000.00 because, while the evidence shows McNain and Blake lost the use of their property interests for six weeks, the jury awarded loss of use damages for nearly thirty-two weeks, over five times in excess of what the evidence supports.

The components of McNain’s and Blakes’ breach of contract damages, according to their own counsel, are (1) the difference in value between two 1/12 interests a 4-bedroom villa, which is what McNain and Blake testified they thought

they were purchasing, and two 1/12 interests in a 3-bedroom villa, which is what McNain and Blake actually received via their respective deeds; and (2) the loss of use of McNain's and Blake's respective 1/12 interests following the April, 2023 email in which they were informed by Wilderness Club that their reservations had been canceled. *Trial Transcript* at 472:25-473:9.

McNain and Blake offered no evidence at trial or in discovery as to element (1). Therefore, the only evidence admitted that could be used to determine that amount is the opinion of Wilderness' expert, realtor Allyson Sabo, as to the present value of each 1/12 interest in a 3-bedroom villa. She opined that value to be \$38,976.00. *Trial Transcript* at 342:10-23. If one divides that amount by the number of bedrooms, one comes to the value of \$12,992.00 per bedroom. This means that McNain, and Blake, could each claim only \$12,992.00 for element (1) because that is the only evidence admitted as to that value, and that the total for McNain and Blake for element (1) is \$25,984.00. There can be no argument that this amount is not correct, because there was no other evidence introduced regarding it.

As to element (2), the only evidence offered by either party as to the value of a week's stay at a 4-bedroom villa was an April, 2023 email in which Wilderness' representative Brian Ehlert stated that value to be \$15,000.00. *Trial Transcript* at

165:14-19, 240:11-17, 244:25-245:3, 313:18-22, 371:2-16. It was also undisputed that the Defendant, Wilderness Preserve US LP, sold the resort to Escalante Golf on December 31, 2023 (*Trial Transcript* at 296:3-8, 364:10-365:7). Additionally, all McNain and Blake witnesses testified that they never contacted the resort's new owner or made any other effort whatsoever to determine whether the new owner would permit McNain and Blake to return to the same use of their properties they enjoyed prior to April 2023, or to return on some other terms acceptable to them. *Trial Transcript* at 246:17-248:6, 253:10-254:23, 284:25-285:8; 285:20-286:10, 328:18-329:8, 329:23-330:5, 334:19-335:8.

This means that there is no evidence whatsoever that McNain and Blake lost the use of their properties during any period of time other than April 2023 through December 2023, and that it was a fundamental error of fact to determine otherwise. Thus, if McNain and Blake were each entitled to 4 weeks per year at the resort (*Trial Transcript* at 286:15-22, 302:2-6), then they each lost 3/4 of those weeks during 2023. This amounts to a total of \$90,000.00, calculated as \$15,000.00 per week for each of McNain's and Blake's two ownership interests. Added to the \$25,984.00 difference in value between a 2 3-bedroom interests and 2 4-bedroom interests, this amounts to a total verdict of \$115,984.00, i.e. \$384,016.00 lower than the jury's \$500,000.00 verdict. No higher amount can be supported by the

evidence admitted at trial. This is because, while McNain and Blake failed to meet their burden of proof in demonstrating that their loss of use continued after the resort sold to a third-party over which Wilderness had no control, the jury awarded damages for such loss of use anyway.

Since \$115,984.00 is, objectively, the maximum amount of damages supportable by the evidence admitted at trial, the district court committed manifest errors of both fact and law when it failed to reduce the verdict amount accordingly through denial of Wilderness' Rule 59 motion. As a result, this Court should reduce the verdict amount from \$500,000.00 to \$115,984.00.¹ In the alternative, this Court should remand the case to the district court for a new trial.

¹McNain and Blake did not contest below that the Court's powers to amend a judgment include the ability to reduce the amount of a jury's verdict when it is excessive or unsupported by the evidence presented at trial under *Nesbitt v. City of Butte*, 118 Mont. 84, 163 P.2d 251 (1945); *Miller v. Emerson*, 120 Mont. 380, 186 P.2d 220 (1947); and *Klemens & Son v. Reber Plumbing and Heating Co.*, 139 Mont. 115, 360 P.2d 1005 (1961). *Response to Defendant's Rule 59 Motion*, Doc. 68. Thus, Wilderness will not belabor that point here.

ISSUE 2: WHETHER THE DISTRICT COURT ERRED IN LETTING STAND A JURY VERDICT WHICH WAS CONTRARY TO THE LAW THROUGH DENIAL OF WILDERNESS' RULE 59 MOTION.

A. The jury's verdict violates the law because it places McNain and Blake in a position far better than if the terms of the contract been performed, and because it contains speculative damages.

At trial, the district court instructed the jury both (a) that damages may not be speculative, and (b) that damages should not place the Plaintiffs into a better position than they would have been had the contract's terms been performed, but rather into as good a position:

INSTRUCTION NO. 16

Damages for breach of contract serve to compensate the aggrieved party for the loss sustained. The nonbreaching party should receive a sum that will put it in as good a position as if the contract had been performed.

INSTRUCTION NO. 17

Although damages need not be proved to a mathematical certainty, mere conjecture and speculation cannot provide the basis for an award of damages, and damages must be the proximate result of the wrong of which the complaint is made.

Doc. 45 at pages 24, 26.

Here, in violation of these instructions, the jury awarded speculative damages which place McNain and Blake into a position far better than the position

they would be in had the contracts' terms been performed. This was a manifest error of law.

First, it cannot be argued that the jury's verdict does not include loss of use damages past the Wilderness' ownership of the resort—there would be no way to award such damages otherwise based upon the evidence presented, and indeed McNain and Blake specifically asked for 20 years of loss of use damages, over 19 years in excess of the actual loss of use demonstrated at trial. *Trial Transcript* at 454:2-455:1. But such damages are speculative. Again, all McNain and Blake witnesses testified that they never contacted the resort's new owner or made any other effort whatsoever to determine whether the new owner would permit them to return to the same use of their properties they enjoyed prior to April 2023, or under some other arrangement satisfactory to them. *Trial Transcript* at 246:17-248:6, 253:10-254:23, 284:25-285:8; 285:20-286:10, 328:18-329:8, 329:23-330:5, 334:19-335:8. Thus, it is pure speculation, supported by no evidence whatsoever, that McNain and Blake lost the right to use their property at any time other than April through December of 2023. As Instruction 17 provides, “conjecture and speculation cannot provide the basis for an award of damages.” Thus, this portion of the verdict is unsupported by any evidence, and must be reduced to an amount actually supportable by the evidence produced at trial.

Second, a \$500,000.00 award places McNain and Blake into a far better position than they would have been had the contract been performed. *Doc. 45* at pages 1-2. They paid only \$150,000.00 in the first place for their property interests (*Trial Transcript* at 45:7-15, 198:8-15, 215:21-25, 382:15-18), meaning that the verdict more than triples their investment even though McNain and Blake undisputedly still own the property interests they purchased (*Trial Transcript* at 45:15-46:5, 246:7-16, 268:23-270:272-13, 284:19-24, *Trial Exhibit 7* and *Trial Exhibit 11* [Exhibit 7-*Trial Transcript*, 212:17-215:3; Exhibit 11-*Trial Transcript*, 272:9-19]), which are worth a total of \$77,952.00. *Trial Transcript* at 342:10-23. If the contracts had been performed, McNain and Blake would have been paying maintenance dues to maintain their properties moving forward, not receiving a half-million dollar cash windfall. It is difficult to conceive of any way in which McNain's and Blake's position following the verdict is not far better than where they would be had the contracts been performed.²

Thus, because the amount of the jury's verdict, unsupported by the evidence, contains speculative damages which place McNain and Blake into a far better position than had the contract been performed, in violation of the law as contained

²It should also be noted that McNain's and Blake's response brief in opposition to Wilderness' Rule 59 motion does not appear to contest that the verdict places McNain and Blake in a better position than they would have been in had the contract been performed. *Response to Defendant's Rule 59 Motion*, Doc. 68.

in the jury instructions, it should be reduced to the amount actually supported by the evidence admitted at trial: \$115,984.00. It was a manifest error of law for the district court to fail to do so, and this Court should correct said error. In the alternative, this Court should remand the case to the district court for a new trial with appropriate instructions to avoid the error.

B. The jury's verdict violates the law because it ignores McNain's and Blake's complete failure to mitigate their damages.

At trial, the jury was instructed that McNain and Blake had a duty to mitigate their damages:

INSTRUCTION NO. 18

The plaintiffs have a duty to minimize their damages, However, they duty does not require them to do what is unreasonable or impracticable.

Doc. 45 at page 27.

The evidence at trial demonstrates that McNain and Blake took no action whatsoever to minimize their damages even though reasonable ways to do so existed. All four McNain and Blake witnesses testified that they never contacted the resort's new owner or made any other effort whatsoever to determine whether the new owner would permit them to return to the same use of their properties they enjoyed prior to April 2023, or under some other terms acceptable to them. *Trial Transcript* at 246:17-248:6, 253:10-254:23, 284:25-285:8; 285:20-286:10, 328:18-

329:8, 329:23-330:5, 334:19-335:8. They also testified that they never made any attempt to sell their property. *Id.* There is no colorable argument that when the resort sold to a new owner, it was unreasonable or impracticable for McNain and Blake to contact the new owner about the property they own in the resort, and indeed McNain and Blake presented no such evidence at trial. Thus, the evidence actually admitted at trial shows that McNain and Blake made no effort whatsoever to mitigate their damages. None. In other words, while McNain and Blake proved at trial that they lost the use of their property from April 2023 through December 2023, they failed to prove any such thing for any other time period. Indeed, all they proved was that they never even bothered to find out whether their loss of use continued under the new owner, or not. They chose instead to claim excessive damages against the former owner, Wilderness, and to blame it for their own failure to act to minimize their damages.

As a result of McNain and Blake's complete failure to mitigate their damages, the verdict should be reduced from \$500,000.00 to \$115,984.00, the amount actually supportable by the evidence admitted. It was a manifest error of law for the district court to fail to do so, and this Court should correct said errors. In the alternative, this Court should remand the case to the district court for a new trial with appropriate instructions to avoid such errors.

ISSUE 3: WHETHER THE DISTRICT COURT ERRED IN AWARDING ATTORNEYS' FEES AND COSTS TO MCNAIN AND BLAKE ON A CLAIM THEY LOST.

A. McNain and Blake lost on their Montana Consumer Protection Act claims.

It is a matter of record that McNain and Blake were not the prevailing party on their Montana Consumer Protection Act claims; rather, they lost. The jury made their defense verdict in favor of Wilderness in this regard unmistakably clear:

3. Did Wilderness violate the Montana Consumer Protection Act in its dealings with McNain Holdings?
YES _____ NO X _____
4. Did Wilderness violate the Montana Consumer Protection Act in its dealings with the Blakes?
YES _____ NO X _____

Verdict Form, Doc 45 at page 1. Given this, there is no colorable argument that McNain and Blake were the prevailing party with respect to their Montana Consumer Protection Act claims.

B. As the losing party, and not the prevailing party, McNain and Blake are not entitled to attorneys' fees and costs.

The Supreme Court of Montana has held clearly that fee awards should be based upon the time spent on claims where fees are actually allowable, not on lost claims:

Where a lawsuit involves multiple claims or theories, an award of attorney fees must be based on the time spent by the prevailing

party's attorney on the claim or theory under which attorney fees are allowable.

Mandell v. Ward, 2016 MT 205, ¶27, 384 Mont. 377, ¶27, 377 P.3d 1228. Only in situations “when it is impossible to segregate the attorney’s time between claims,” i.e. the claims are “inextricably intertwined,” is a party entitled to the entire fee even though the party did not prevail on all of their claims. *Kenyon-Noble Lumber Co. v. Dependant Foundations, Inc.*, 2018 MT 308 at ¶¶ 26-27. This is simply not the case here, where most of the trial centered on the Montana Consumer Protection Act claims.

McNain and Blake argue that the claims at issue here were inextricably intertwined, but the only reason they give for this position is that time cannot be segregated because Plaintiffs’ counsel did not separately account for time spent between the distinct claims. *McNain and Blake Response Brief*, Doc. 67, at 2. But it cannot be the case that claimants can get around Montana law as stated in *Mandell* and always get their entire fee simply by having their attorney not account separately for distinct claims.

Only in situations “when it is impossible to segregate the attorney’s time between claims,” i.e. the claims are “inextricably intertwined,” not simply that the attorney failed to account for them separately, is a party entitled to the entire fee

even though the party did not prevail on all of their claims. *Kenyon-Noble*, 2018 MT 308 at ¶¶ 26-27. This is simply not the case here, as explained below.

McNain and Blake received via summary judgment a ruling that Wilderness had breached its contracts with them, but they did not move for or receive any judgment regarding whether they had been damaged by the breach or, if so, the amount of those damages. *Doc. 36* at Page 8. The elements of Breach of Contract are (1) that a party breached the contract, (2) that the aggrieved party suffered damages, and (3) that the damages were caused by the breach. *Tin Cup County Water v. Garden City Plumb.*, 2008 MT 434, ¶39, 347 Mont. 468, ¶39, 200 P.3d 60, ¶39. Plaintiffs thus proceeded to trial on the limited issues of whether the breach caused damages, and if so, the amount of those damages.

McNain and Blake were denied summary judgment on their Montana Consumer Protection Act claims. *Doc. 36* at Page 9. The elements of a Montana Consumer Protection Act claim are that a party engaged in an act or practice (1) which offends established public policy, and (2) which is either immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers. McNain and Blake thus proceeded to trial on the entirety of their Montana Consumer Protection Act claims.

In the breach of contract situation, McNain and Blake must prove the damages which allegedly resulted from Wilderness' breach. This inquiry necessarily focuses on McNain and Blake themselves—how they expected to use the benefits they should have received, the value of what they paid verses the value of what they received, etc. The Montana Consumer Protection Act situation, in stark contrast, focuses exclusively on the conduct of the Wilderness—what it did, what it failed to do, whether its conduct offends public policy or is substantially injurious to consumers, etc. Because these inquiries are almost entirely different under the circumstances presented here, it is difficult to imagine how they could be “inextricably intertwined.” Rather, it would be quite possible to split a fee award between them. Any fee award to Plaintiffs must therefore be reduced to account for the defense verdict on their Montana Consumer Protection Act claims.

Thus, the amount of the fee award simply must be reduced to account for their loss of the Montana Consumer Protection Act claims, which took up nearly the entire trial. And if McNain's and Blake's counsel's assertions to the effect that the claims are based upon similar facts and evidence, then half of the pre-trial work should be removed as well. Whatever the method, it is clearly the just result that some fee reduction take place given that McNain and Blake at present hold a judgment for fees on a claim they lost. Thus, this Court should affect that reduction

or, in the alternative, remand the case to the district court with instructions on how to perform said reduction.

CONCLUSION

Based upon the foregoing, this Court should reduce the verdict to the mathematically calculable amount supported by the evidence admitted at trial, and should reduce the fee amount to remove fees attributed to the Montana Consumer Protection Act claims, on which McNain and Blake lost. In the alternative, this Court should remand the case back to district court for a new trial and for new post-trial proceedings regarding fees and costs.

DATED this 8th day of December, 2025.

GERSH, SIMPSON & JOOS, PLLP
Attorneys for Appellant
Wilderness Preserve US LP

By: /s/ Brian M. Joos
Brian M. Joos

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(e) of the Montana Rules of Appellate Procedure, I certify that this document is printed in proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by a word processor does not exceed 10,000, excluding the certificate of service and the certificate of compliance.

DATED this 8th day of December, 2025.

Attorney for Appellant

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Appendix Per Rule 12(1)(i)

McNain Holdings LP, Jay Robert Blake & Naomi Monica Blake

v.

Wilderness Preserve

Supreme Court Cause No. DA 25-0686

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CERTIFICATE OF SERVICE

I, Brian Michael Joos, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 12-08-2025:

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