IN THE SUPREME COURT OF THE STATE OF MONTANA

Supreme Court Cause No. DA 25-0686

MCNAIN HOLDINGS LP, an 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,
The Honorable Matthew J. Cuffe, district judge, presiding

APPELLEES' RESPONSE BRIEF

Brian M. Joos
GERSH, SIMPSON & JOOS, PLLP
121 Wisconsin Avenue
Whitefish, Montana 59937
Telephone: (406) 862-7800
Facsimile: (406) 862-7820
Email: joos@bigskyattorneys.com

Attorney for Appellant

Fred Simpson / Jill Gerdrum
HALL & EVANS, LLC
125 Bank St., Ste. 403
Missoula, Montana 59802
Telephone: (406) 532-2635
Facsimile: (406) 519-2035
Email:simpsonf@hallevans.com
gerdrumj@hallevans.com

Attorney for Appellees

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

Appellees McNain Holdings, LP (the "McNains") and Jay and Naomi Blake (the "Blakes") (collectively, the "Homeowners") submit their Answer Brief in response to the Brief of Appellant Wilderness Preserve, US, LP ("Wilderness"). This Court should affirm the judgment and award the Homeowners their attorney's fees and costs on appeal pursuant to the terms of the parties' contracts.

STATEMENT OF THE ISSUES

1. Did the district court correctly deny Wilderness's motion to alter or amend the judgment because the verdict was consistent with Montana law?

2. Did the district court correctly deny Wilderness's motion for a new trial because substantial, credible evidence supported the verdict?

3. Did the district court correctly award the Homeowners their attorney's fees as the prevailing party?

4. Are the Homeowners entitled to their attorney's fees and costs in defending the appeal pursuant to the parties' contracts?

STATEMENT OF THE CASE

The Homeowners filed their Complaint and Demand for Jury Trial on August 28, 2023 alleging Wilderness was liable to them for breaching the parties' purchase agreements. District Court Docket No. ("Doc.") 1. In addition to breach of contract, their Complaint alleged counts for unjust enrichment, violation of the Montana Consumer Protection Act ("CPA"), and requested an award of attorney's

fees pursuant to the purchase agreements. Doc. 1 at 5-8. Wilderness answered, denying liability. Doc. 3.

Following written discovery and depositions, the parties filed cross-motions for summary judgment. By their motion, the Homeowners sought summary judgment that Wilderness had breached the parties' agreements, was liable for their attorney's fees, and had violated the CPA. Doc. 10. Wilderness sought summary judgment that it was not liable for the Homeowners' claims. Doc. 14. The district court entered partial summary judgment for the Homeowners finding that Wilderness had breached the parties' contracts, and was liable under the contracts for their attorney's fees in an amount to be determined after trial. Doc. 36 at 8-9. The district court also held there was a genuine issue of material fact precluding summary judgment on the CPA claim. It denied Wilderness's motion. *Id*. at 9.

The case was tried to a jury on April 7-9, 2025. The only issues for trial were the amount of damages caused by Wilderness's breach of contract, and whether Wilderness violated the CPA. The jury returned its verdict on April 9, 2025, in which it found that Wilderness's breach of contract caused damages in the amount of $250,000 to the McNains and $250,000 to the Blakes. Doc. 45. It also found that Wilderness did not violate the CPA. *Id*. The district court entered judgment on the verdict on June 10, 2025, awarding the Homeowners $250,000 each on their claims for breach of contract. Doc. 52. The judgment provided for

"further post-trial proceedings as allowed under Montana law" to resolve the issue of attorney's fees and costs. *Id*.

The Homeowners filed their motion for award of attorney's fees and costs with supporting materials on June 27, 2025. Doc. 55. On July 7, 2025, Wilderness filed its motion to alter or amend the judgment or for a new trial, and supporting brief. Doc. 60. After briefing on both motions, the district court entered two orders on September 19, 2025: one granted the Homeowners' motion for an award of attorney's fees and costs (Doc. 74); the other denied Wilderness's Rule 59 motion (Doc. 75). Final judgment was entered on September 24, 2025. Doc. 80.

STATEMENT OF FACTS

A. The Purchase and the Promise

In August 2015, the Blakes and McNains each paid $75,000 for fractional interests in what Wilderness represented would be a 4-bedroom villa to be constructed at the Wilderness Club, a luxury golf resort near Eureka, Montana. Doc. 36 at 2-3, ¶¶2-7; Trial Tr. 45:7–46:11; Trial Exs. 7, 11. Each 1/12 interest entitled its owner to four weeks of use per year, along with golf privileges and resort amenities. Trial Tr. 216:1–23, 302:2–7.

Wilderness made an additional promise. Because the 4-bedroom villa had not yet been constructed, Wilderness agreed in written addenda to the purchase agreements that the Homeowners would owe no maintenance fees until the villa

was built. Doc. 36 at 2-3; ¶¶ 3, 6; Trial Ex. 1 at 12–13; Trial Ex. 10 at 12–13. The Homeowners received deeds to their interests in a 3-bedroom villa, with the promise they would be transferred to a 4-bedroom villa once it was constructed. Doc. 36 at 2-3; ¶¶ 3, 6. For seven years, they enjoyed the resort as promised, spending holidays there with their families and using the golf course, pool, and other amenities. Trial Tr. 216:1–23, 326:2–327:1, 332:10–17.

B. The Breach

By 2023, Wilderness had never constructed a 4-bedroom villa. Doc. 36 at 3, ¶ 8. Wilderness's managing partner, Brian Ehlert, admitted at trial that despite Wilderness's agreement to construct the 4-bedroom villa, no one at Wilderness did anything to investigate constructing the 4-bedroom villa, and "it's impossible to put one up now[.]" Trial Tr. 302:25—303:25. Rather than honor its commitment, Wilderness demanded via an email from Mr. Ehlert that the Homeowners begin paying maintenance fees—fees the contract expressly excused:

> I understand that we have an agreement in place that states you do not have to pay maintenance fees until you have been deeded a 4 bedroom unit. . . The value of your weekly stay with amenities and golf exceeds $15,000. It is important to note that you are receiving the benefits of our agreement without paying the corresponding maintenance fees. We must make an adjustment to this arrangement as we cannot continue to lose money while providing upgraded accommodations.

Trial Ex. 2 at 5; Trial Tr. 232:18–233:9. When Mr. Ehlert pressed them to accept new terms, the Homeowners declined. They had already paid for their rights under

the purchase agreements. Trial Ex. 2 at 3-4; Trial. Tr. 233:22—234:4; 240:18—241:2.

On May 18, 2023, Wilderness canceled the Homeowners' reservations. Mr. Ehlert's email was blunt: "Please be advised that we have regrettably canceled your reservations until we receive the outstanding maintenance payments." Trial Ex. 2 at 1; Trial Tr. 241:4–17. That was the last communication the Homeowners ever received from Wilderness. Trial Tr. 241:13–22.

C. The Homeowners' Damages

The damages evidence was straightforward. At trial, Mr. Ehlert confirmed his $15,000-per-week valuation:

> Q: And you were—your estimate is that the value of what they were receiving there was $15,000 a week, right?
>
> A: Yes.

Trial Tr. 313:18–21. Each couple was entitled to four weeks per year. Trial Tr. 206:4–13, 286:16–21, 302:2–6. That yields $60,000 per year in lost use per couple, or $120,000 combined.

The Homeowners testified about how long they intended to use the property. Tom McNain testified to five to ten more years. Trial Tr. 245:4–15. Jay Blake said twenty to forty years – "a lifetime purchase." Trial Tr. 282:9–16. Codie McNain confirmed it was "absolutely" a place she and Tom planned to spend time with their children and grandchildren for years to come. Trial Tr. 332:10–13.

The evidence also addressed what happened after Wilderness sold the resort to Escalante Golf on December 31, 2023. Mr. Ehlert is a member of the new entity and its registered agent. Trial Tr. 297:14–298:11, 375:9–376:11. Yet neither he nor anyone from Escalante ever contacted the Homeowners to restore their rights or invite them to return. Trial Tr. 242:17–243:11, 298:17–21, 325:17–326:1, 327:2–5, 335:14–24. As Tom McNain put it: "It went quiet." Trial Tr. 243:7–8.

Wilderness presented no evidence that the sale relieved it of liability for its breach. It also failed to present evidence that Escalante assumed Wilderness's contractual obligations, or that the Homeowners' consented to any transfer of Wilderness's duties to Escalante. And Wilderness introduced no evidence that the Homeowners' loss of use ended when the sale closed.

D. The Verdict and Post-Trial Proceedings

The jury returned a verdict of $500,000—$250,000 for each couple—on the breach of contract claim. Doc. 52. On the CPA claim, the jury found for Wilderness. Doc. 45 at 1.

Using Wilderness's own valuation, the $500,000 award represents approximately four years of combined lost use, plus the value differential between the 3-bedroom in which they received interests, and the 4-bedroom villa they were promised but will never receive. The Homeowners' evidence supported damages

ranging from $300,000 to $2.4 million per couple. The jury's award fell at the conservative end of this range.

STANDARD OF REVIEW

This Court reviews *de novo* an order denying a motion for a new trial based upon insufficiency of the evidence. *Carestia v. Robey*, 2013 MT 335, ¶ 7, 372 Mont. 438, 313 P.3d 169 (citation omitted). This Court reviews a jury verdict to determine whether substantial credible evidence supports it, viewing the evidence in the light most favorable to the prevailing party. *Rocky Mountain Enterprises, Inc. v. Pierce Flooring*, 286 Mont. 282, 295, 951 P.2d 1326, 1334 (1997). A verdict will not be overturned "unless there is a complete absence of any credible evidence to support it." *Suzor v. Int'l Paper Co.*, 2016 MT 344, ¶ 40, 386 Mont. 54, 386 P.3d 584. Even if the supporting evidence "is inherently weak or contradicted by other evidence, it will be considered substantial if a reasonable mind could find it adequate to support a conclusion." *Id.* (quoting *D.R. Four Beat Alliance, LLC v. Sierra Prod. Co.*, 2009 MT 319, ¶ 23, 352 Mont. 435, 218 P.3d 827).

This Court does not retry cases on appeal. "It is not our function to agree or disagree with the jury's verdict and, consequently, if conflicting evidence exists, we do not retry the case because the jury chose to believe one party over the other." *Suzor*, ¶ 40 (quoting *Ele v. Ehnes*, 2003 MT 131, ¶ 25, 316 Mont. 69, 68

P.3d 835). "Reversal is rarely warranted under this strict standard." *Id.* (citing *Magart v. Schank*, 2000 MT 279, ¶ 4, 302 Mont. 151, 13 P.3d 390).

This Court reviews the denial of a Rule 59(e) motion for abuse of discretion. *Folsom v. Mont. Pub. Emps. Ass'n*, 2017 MT 204, ¶ 59, 388 Mont. 307, 400 P.3d 706. A Rule 59(e) motion is properly denied when it does not seek to correct manifest errors of law or fact, raise newly discovered evidence, prevent manifest injustice, or address an intervening change in controlling law. *Nelson v. Driscoll*, 285 Mont. 355, 360, 948 P.2d 256, 259 (1997). Such motions are "not intended merely to relitigate old matters" or "to routinely give litigants a second bite at the apple." *Lee v. USAA Cas. Ins. Co.*, 2001 MT 59, ¶ 76, 304 Mont. 356, 22 P.3d 631.

This Court reviews an attorney's fee award for abuse of discretion. *Hurly v. Lake Cabin Dev., LLC*, 2012 MT 77, ¶ 14, 364 Mont. 425, 276 P.3d 854.

SUMMARY OF THE ARGUMENT

Wilderness sold the Homeowners a fractional interest in a luxury Montana golf resort for $150,000, entitling them to stay at the resort for one week per quarter in a yet-to-be-built 4-bedroom villa. Since it promised them a 4-bedroom villa and the Homeowners paid for it, Wilderness agreed they would owe no maintenance fees until that villa was built, and would lodge them in alternative accommodations in the meantime. But Wilderness *never* built the 4-bedroom villa purchased by the Homeowners. After nearly eight years of honoring the deal,

Wilderness decided it had made a bad bargain and demanded that the Homeowners start paying fees their contract said they did not owe. When they refused, Wilderness locked them out.

After a three-day trial, the jury awarded the Homeowners $500,000 in damages. In light of the largely undisputed evidence presented at trial, the verdict was restrained, not excessive. Wilderness's own managing partner, Brian Ehlert, valued each week's stay at $15,000. Each couple was entitled to use its interest for four weeks per year, and the unrefuted testimony of the Homeowners was they would have used the property for another five to forty years. By Wilderness's own math, the damages could have exceeded $2 million, but the jury awarded far less.

Wilderness now asks this Court to slash the verdict to $115,984. Its theory is that damages stopped when it sold the resort—to a new entity in which its managing partner is a member, and the registered agent. But Wilderness introduced no evidence that this sale extinguished its liability. It introduced no evidence that the new owner assumed its contractual obligations. And it introduced no evidence that anyone ever invited the Homeowners to return. The only evidence on that point came from Wilderness's own witness, Brian Ehlert, who admitted he never contacted the Homeowners to restore their rights.

The standard here is demanding: this Court affirms if substantial credible evidence supports the verdict. The evidence does more than that. It proves the jury

could have awarded significantly more. Wilderness is not entitled to a new trial or a reduction of the judgment simply because it dislikes the result.

Wilderness also challenges the attorney's fee award, arguing the Homeowners should not recover fees because the jury found that Wilderness did not violate the Montana Consumer Protection Act. But the Homeowners were unquestionably the prevailing parties—they obtained a $500,000 judgment on their breach of contract claim. The contract itself entitled them to fees, and the district court so ruled at summary judgment. That Wilderness prevailed (or rather, did not lose) on one claim does not transform it into the prevailing party entitled to fees.

The judgment should be affirmed, and the Homeowners awarded their attorney's fees and costs on this appeal.

ARGUMENT

I. Substantial Credible Evidence Supports the Jury's $500,000 Verdict.

Wilderness's attack on the verdict rests on a false premise: that the Homeowners bore the burden of proving their damages did not end when Wilderness sold the resort, and that their failure to contact the new owner forecloses any damages beyond December 2023. This inverts the law and ignores the evidence.

A. The Evidence Established Damages Far Exceeding $500,000.

The jury heard uncontradicted evidence of the Homeowners' damages. Wilderness's own managing partner, Brian Ehlert, valued a weekly stay at $15,000. Trial Tr. 313:18–21. Each couple was entitled to four weeks per year. Trial Tr. 206:4–13, 286:16–21, 302:2–6. That yields $60,000 per year per couple in lost use value.

The Homeowners testified about the duration of their intended use. Tom McNain testified he planned to use the property for five to ten years. Trial Tr. 245:4–15. Jay Blake testified to his anticipated future use from twenty to forty years. Trial Tr. 282:9–16. At the low end—five years of lost use at $60,000 per year—the McNains alone suffered $300,000 in damages for loss of use of their property. At the high end—forty years—the Blake suffered $2.4 million in lost use.

The jury awarded $250,000 to each couple. That figure is consistent with approximately four years of lost use per couple (two years up to the time of trial, and two years into the future), plus the $12,992 per-couple value differential that Wilderness's own expert assigned to the difference between the 3-bedroom interest the Homeowners received and the 4-bedroom interest they were promised but will never receive. Trial Tr. 342:10–23. By any measure, the verdict fell at the conservative end of what the evidence supported.

Wilderness does not dispute the $15,000-per-week valuation—it came from its own witness. It does not dispute that each couple was entitled to four weeks per year. And it does not dispute that the Homeowners testified to years of intended future use. Its only argument is that damages must have stopped in December 2023 because it sold the resort. That argument fails.

B. Wilderness Presented No Evidence That the Sale Extinguished Its Liability.

Wilderness's central contention is that its damages exposure ended when it sold the resort to Escalante Golf. Wilderness cannot escape liability for its undisputed breach of contract by claiming, without proof, that its liability magically disappeared when it sold the resort – a transaction in which the Homeowners played no part, and from which they received no benefit.

Regardless, Wilderness introduced no evidence to support this theory at trial. It presented no evidence that the sale agreement assigned its contractual obligations to Escalante, nor did it present evidence that Escalante assumed Wilderness's duties to construct a 4-bedroom villa or to allow the Homeowners to use the property free of any maintenance fees until the 4-bedroom villa was constructed. And it presented no evidence that the Homeowners' loss of use ended when the sale to Escalante closed. On the other hand, as discussed in Section I.A., *supra*, the Homeowners presented uncontradicted testimony that they had been

locked out of their property since the Spring of 2023 and had never been invited back. That testimony more than sufficed to meet the Homeowners' burden of proof on their damages.

Wilderness introduced no evidence at trial that its obligations under the purchase agreements with the Homeowners had been assigned to Escalante Golf. There was no testimony from any witness on this point, nor was Wilderness's agreement with Escalante introduced as an exhibit. In the absence of proof of an assignment, Wilderness still owed the Homeowners the duties under the purchase agreement to provide them with the promised 4-bedroom villa, and to allow them to stay at the resort without the duty to pay any maintenance fees until the 4-bedroom villa had been completed.

Moreover, Wilderness did not offer any evidence that Wilderness had notified the Homeowners and obtained their consent to any purported transfer of its obligations under the purchase agreements. In the absence of the Homeowners' consent, Wilderness could not transfer its obligations under the purchase agreements to Escalante. Montana Code Annotated § 28-1-1002 ("The burden of an obligation may be transferred with the consent of the party entitled to its benefits, but not otherwise . . .") Because there was no evidence the Homeowners consented to Wilderness's purported assignment of its duties under the purchase

agreements, Wilderness remains liable to the Homeowners regardless of its sale of the resort at the end of 2023.

The testimony of Wilderness's managing partner, Mr. Ehlert—who remains a member of the new entity and its registered agent—supported the Homeowners' position as Mr. Ehlert admitted he never contacted the Homeowners on behalf of Escalante to restore their rights. Trial Tr. 297:14–298:11, 298:17–21. Indeed, no one from Escalante ever invited the Homeowners back to the resort. Trial Tr. 242:17–243:11, 325:17–326:1, 327:2–5, 335:14–24. After the sale to Escalante, the Homeowners stopped receiving the reservation emails they had received for seven years. Trial Tr. 325:13–326:1. As far as the evidence shows, the lockout that began in May 2023 continues to this day.

Wilderness cannot escape liability for its breach by selling the resort to an entity it controls—and then arguing that the Homeowners should have begged that entity for restoration of the rights Wilderness took from them.

C. Wilderness's "Mathematical" Calculation Is a Prohibited Invitation to Reweigh the Evidence.

Wilderness presents an elaborate calculation purporting to show that the "maximum" supportable damages are $115,984. Appellant's Br. At 11–14. This calculation assumes that damages stopped in December 2023, that the

Homeowners are entitled to only six weeks of lost use (three weeks each for the remainder of 2023), and that they may recover nothing for future lost use.

Every premise of this calculation is wrong. The jury heard evidence that the Homeowners intended to use the property for years—not weeks. Their testimony on this point was uncontested. The jury also heard evidence that no one ever invited them back. And it heard evidence that the man who locked them out, Brian Ehlert, remains involved with the entity now operating the resort. The jury weighed this evidence and reached its verdict.

Wilderness's argument is not that the evidence compels a different result. It is that Wilderness would have weighed the evidence differently. That is precisely the kind of second-guessing this Court does not undertake. *Suzor*, ¶ 40 ("It is not our function to agree or disagree with the jury's verdict.")

II. The Verdict Does Not Violate Montana Law.

Wilderness argues the verdict violates the jury instructions because it supposedly awards speculative damages and places the Homeowners in a better position than performance would have. Neither contention withstands scrutiny.

A. The Damages Are Not Speculative.

Instruction No. 17 told the jury that "mere conjecture and speculation cannot provide the basis for an award of damages." Doc. 45 at 26. Wilderness argues that

any damages beyond December 2023 are "speculative" because the Homeowners did not prove their loss of use continued under the new owner.

First, as discussed above, that argument fails because Wilderness presented no evidence that it assigned its duties under the purchase agreements to the new owner, or that the Homeowners had consented to the transfer of Wilderness's duties to the new owner.

Second, Wilderness's argument confuses uncertainty with speculation. The Homeowners testified to concrete, quantifiable losses: the value of weekly stays (established by Wilderness's own representative), the number of weeks per year they were entitled to stay at the property (established by the contract), and the duration of intended use (established by the Homeowners' testimony). Wilderness presented no conflicting evidence on any of these points. The jury was entitled to credit this unrefuted evidence and to conclude that Wilderness's breach caused years of lost use—not merely a few months.

Moreover, even if its position was legally justified (and it is not), Wilderness's position would require the Homeowners to prove a negative: that the new owner *would not* have honored their rights. But the evidence showed the opposite. No one from the new entity ever contacted the Homeowners or invited them back. The same person who locked them out—Mr. Ehlert—remains involved with the new entity as its registered agent and admitted he never contacted the

Homeowners to restore their rights. The jury reasonably inferred that the loss of use continued; indeed, no other result is warranted based on this evidence.

"Although damages need not be proved to a mathematical certainty," the instruction stated, they must be "the proximate result of the wrong." Doc. 45 at 26. The jury found they were. That finding is more than supported by the substantial credible evidence described above.

B. The Verdict Does Not Place the Homeowners in a Better Position Than Performance.

Instruction No. 16 told the jury that contract damages should put the nonbreaching party "in as good a position as if the contract had been performed." (Doc. 45 at 24.) Wilderness argues that a $500,000 verdict exceeds what the Homeowners would have received under the contract because they paid only $150,000 for their interests.

This argument misunderstands the measure of damages. The Homeowners did not lose $150,000. They lost years of use of a promised 4-bedroom villa at a luxury resort property—use that Wilderness itself valued at $15,000 per week. That was one of the benefits of their bargain that Wilderness unlawfully took away. Had the contract been performed, the Homeowners would have enjoyed that use indefinitely, subject only to a duty to pay maintenance fees once a 4-bedroom

villa was constructed. Wilderness never built the villa, so that condition was never triggered.

The Homeowners still own their fractional interests. But those interests are worthless if they cannot use them. The $500,000 verdict compensates them for years of lost use—not for the purchase price they paid a decade ago.

Moreover, Wilderness's argument is contrary to Montana law governing the measure of damages for breach of contract:

> For the breach of an obligation arising from contract, the measure of damages, except when otherwise expressly provided by this code, is the amount which will compensate the party aggrieved for all the detriment which was proximately caused thereby or in the ordinary course of things would be likely to result therefrom. Damages which are not clearly ascertainable in both their nature and origin cannot be recovered for a breach of contract.

Mont. Code Ann. § 27-1-311. The statute allows recovery of both expectancy damages and consequential damages. *Kostelecky v. Peas in a Pod LLC*, 2022 MT 195, ¶ 41 n. 25, 410 Mont. 239, 518 P.3d 840 (citing *State Farm Mut. Auto. Ins. Co. v. Freyer*, 2013 MT 301, ¶ 31 n. 2, 372 Mont. 191, 312 P.3d 403). Expectancy damages are "the amount necessary to compensate for what the non-breaching party 'would [have] receive[d] if the contract were performed[.]'" *Kostelecky*, ¶ 41 n. 25 (citing *Arrowhead Sch. Dist. No. 75 v. Klyap*, 2003 MT 294, ¶ 20, 318 Mont. 103, 79 P.3d 250). "Consequential damages are those damages 'within the contemplation

of the parties when they entered into the contract, and such as might naturally be expected to result from its violation.'" *Freyer*, ¶ 31 (citing *Mont. Petroleum Tank Release Comp. Bd. v. Crumleys*, 2008 MT 2, ¶ 64, 341 Mont. 33, 174 P.3d 948).

In this case, the Homeowners would have received use of their property through the time of trial and indefinitely into the future, which Wilderness valued at $60,000 per year per couple, if Wilderness had performed the contract. They would have also received a 4-bedroom unit, which had more value than the 3-bedroom unit which they actually received. Regardless of the label attached – expectancy or consequential damages – pursuant to Montana Code Annotated § 27-1-311, the Homeowners were entitled to recover their loss of use and the difference between the value of the 3-bedroom unit they received and the 4-bedroom unit they were promised.

If the Homeowners were limited to recovering only their $150,000 (combined) purchase price, then any breaching party could escape liability for expectancy and consequential damages by refunding the contract price. That is not Montana law. The measure of damages is the value of what was lost, not the price paid.

C. The Jury Properly Considered Mitigation.

Instruction No. 18 told the jury that the Homeowners had "a duty to minimize their damages," but that duty "does not require them to do what is unreasonable or impracticable." Doc. 45 at 27.

Wilderness argues the Homeowners failed to mitigate because they never contacted the new owner to request restoration of their contract rights. But the duty to mitigate does not require a victim of breach to beg the breaching party—or its successor/assignee—for relief. The Homeowners had a contract with Wilderness, not Wilderness's assignee, and Wilderness breached it. The onus was on Wilderness (or its successor) to remedy the breach, not on the Homeowners to plead for what they were already owed.

The evidence showed the Homeowners acted reasonably. They had been locked out and told their reservations were canceled "until we receive the outstanding maintenance payments." Trial Tr. 241:4–17. The Homeowners received no further communication from Mr. Ehlert or anyone else at Wilderness or Escalante inviting them to return to the property. They reasonably concluded they were not welcome. When the resort sold to a new entity—in which Wilderness's managing partner remained involved—no one contacted the Homeowners to offer that they could return and resume use of the property without

paying maintenance fees. According to Tom McNain, "It went quiet." Trial Tr. 243:7–8.

The jury heard this evidence and awarded damages. This was substantial, credible evidence upon which the jury could conclude that the Homeowners acted reasonably under the circumstances. Wilderness's disagreement with that conclusion does not make it erroneous.

III. The District Court Properly Awarded Attorney's Fees to the Prevailing Homeowners as Required by the Contracts.

Wilderness argues the district court erred in awarding attorney's fees because the Homeowners did not prevail on their CPA claim. This argument fails for three independent reasons.

A. The Homeowners Are the Prevailing Parties.

"Generally, the party receiving a net benefit from the judgment is the prevailing party." *Kenyon-Noble Lumber Co. v. Dependant Foundations, Inc.*, 2018 MT 308, ¶ 24, 393 Mont. 518, 432 P.3d 133. The Homeowners obtained a $500,000 judgment. Wilderness obtained nothing. By any measure, the Homeowners are the prevailing parties.

That the Homeowners did not prevail on every claim does not change this analysis. Parties routinely assert multiple theories of recovery. A plaintiff who wins on one theory and loses on another is still the prevailing party if the plaintiff obtained the principal relief sought. Here, the Homeowners sought and received an

award of damages for being locked out of their property and for being deprived of the 4-bedroom villa they had been promised. Thus, the Homeowners prevailed.

B. The Contract Entitles the Prevailing Party to Fees.

The district court ruled at summary judgment that the Homeowners were entitled to attorney's fees under paragraph 16(J) of their contracts with Wilderness. Doc. 36 at 9. Wilderness did not appeal that ruling. It cannot challenge it now.

The contract's fee-shifting provision applies to the breach of contract claim—the claim on which the Homeowners prevailed. The Consumer Protection Act claim is irrelevant to the contractual fee entitlement. The Homeowners won the contract claim, and the contract says they get their fees.

C. The Claims Cannot Be Segregated, and the Homeowners Are Entitled to the Entire Fee.

When a case involves multiple claims, "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 the attorney fees are allowable." *Kenyon-Noble*, ¶ 26. But "when it is impossible to segregate the attorney's time between claims"—that is, when the claims are "inextricably intertwined"— "the prevailing party is entitled to the entire fee." *Id.* at ¶¶ 26–27.

Here, the breach of contract and CPA claims arose from the same facts: Wilderness's promise of a 4-bedroom villa, its failure to build one, and its decision to lock out the Homeowners when they refused to pay fees they did not owe. The

same witnesses testified to the same events. The same documents were introduced. The same damages were sought. The claims were inextricably intertwined.

Wilderness argues that the claims can be segregated because "most of the trial centered on the Montana Consumer Protection Act claims." Appellant's Br. at 23. This is incorrect. The trial centered on damages—specifically, the value of lost use and the duration of that loss. Those issues were common to both claims. The CPA claim added only a legal question—whether Wilderness's conduct was "immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers"—that required no separate factual development.

The district court did not abuse its discretion in awarding the full fee amount.

D. Wilderness Is Not Entitled to Fees on the Consumer Protection Act Claim.

Wilderness does not explicitly seek fees for its defense of the CPA claim, but to the extent it does, that request fails. A prevailing defendant may recover fees under the CPA only "upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation[.]" *Tripp v. Jeld-Wen, Inc.*, 2005 MT 121, ¶ 37, 327 Mont. 146, 112 P.3d 1018.

The Homeowners' CPA claim was not frivolous, unreasonable or without foundation. The district court denied Wilderness's motion for summary judgment

on that claim, finding a genuine issue of material fact. Doc. 36 at 9. A claim that survives summary judgment is, by definition, not frivolous, unreasonable or without foundation. That the jury ultimately found that Wilderness did not violate the CPA does not convert the Homeowners' claim into a frivolous, unreasonable or foundationless one.

IV. The Homeowners are Entitled to an Award of their Attorney's Fees and Costs on Appeal.

Paragraph 16(J) of the purchase agreements provides the prevailing party the right to recover its attorney's fees and costs, "In the event either party defaults under the terms of this Agreement, the nondefaulting party shall be entitled to reasonable costs and attorney fees incurred because of such default." Doc. 36 at 8-9. When a contract provides for an entitlement to attorney's fees and costs, "that entitlement includes costs and attorney fees on appeal." *Kenyon-Noble*, ¶ 28 (citing *Gibson v. Paramount Homes*, 2011 MT 112, ¶ 21, 360 Mont. 421, 252 P.3d 903). Thus, the Homeowners as the non-defaulting parties are entitled to their fees and costs incurred on this appeal upon affirmation of the judgment.

CONCLUSION

The jury heard and weighed the evidence, and returned a verdict well within the range that evidence supported. Wilderness's own representative valued weekly stays at $15,000. The Homeowners testified they would have used the property for

years to come. The verdict of $500,000—representing roughly four years of combined lost use—was conservative, not excessive.

Wilderness's Rule 59 motion sought to relitigate the damages question by presenting a post hoc calculation the jury rejected. That is not a proper use of Rule 59. The district court did not err in denying the motion.

The Homeowners were unquestionably the prevailing parties. They obtained a $500,000 judgment on their breach of contract claim. The contract entitled them to fees. The district court did not abuse its discretion in awarding them.

The judgment should be affirmed and the matter remanded for a determination of the Homeowners' attorney's fees and costs on appeal.

Respectfully submitted this 3rd day of February, 2026.

s/ *Fred Simpson*
Fred Simpson
HALL & EVANS, L.L.C.

Attorneys for Plaintiffs/Appellees

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 Microsoft Word is 5,526, excluding the Table of Contents, Table of Authorities, Certificate of Service and the Certificate of Compliance.

DATED this 3rd day of February, 2026.

s/ *Fred Simpson*
Fred Simpson
HALL & EVANS, L.L.C.

Attorneys for Plaintiffs/Appellees

CERTIFICATE OF SERVICE

I, J. Fred Simpson, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 02-03-2026:

Jill Melissa Gerdrum (Attorney)
125 Bank Street
Millennium Building, Suite 403
Missoula MT 59802
Representing: Jay Robert Blake, Naomi Monica Blake, McNain Holdings LP
Service Method: eService

Brian Michael Joos (Attorney)
121 Wisconsin Avenue
Whitefish MT 59901
Representing: Wilderness Preserve US LP
Service Method: eService

Electronically signed by Jessica Neville on behalf of J. Fred Simpson
Dated: 02-03-2026