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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0639**

Carole H. McMorrow,
individually and as Trustee of
Carole H. McMorrow Living Trust,
Respondent,

vs.

R. E. C., Inc.,
d/b/a Ron Clark Construction,
Defendant,

Village Homes of Grandview
Square Association,
Appellant.

**Filed February 11, 2013
Affirmed in part, reversed in part, and remanded
Stoneburner, Judge**

Hennepin County District Court
File No. 27-CV-10-6306

Vincent W. King, Vincent W. King, P.A., Minneapolis, Minnesota (for respondent)

G. John Veith, Brown & Carlson, P.A., Minneapolis, Minnesota (for appellant)

Considered and decided by Chief Judge Johnson, Presiding Judge; Stoneburner,
Judge; and Toussaint, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to
Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

STONEBURNER, Judge

In cross appeals following a trial on a condominium owner's action against the condominium builder and condominium association for damages to her unit caused by water intrusion from common areas, owner challenges the district court's apportionment of breach-of-contract damages by percentages of fault that the jury attributed to builder and association, and association challenges the district court's failure to similarly apportion attorney fees awarded to owner. We reverse the apportionment of contract damages, affirm denial of apportionment of attorney fees, and remand for entry of judgment consistent with this opinion.

FACTS

In 2002, R.E.C., Inc. d/b/a Ron Clark Construction (REC), developed a common-interest community, known as Village Homes of Grandview Square, in Edina. Respondent Carole McMorrow (owner) purchased a condominium unit from REC in December 2005 and received documents governing the community, including a declaration that provides, in relevant part, for administration of the community by appellant Village Homes of Grandview Square Association (association).

The declaration

The declaration is composed of 17 sections and constitutes "covenants to run with the Property." The parties do not dispute the rights and responsibilities of the association and the owners created by the declaration. The most relevant sections of the declaration provide:

- Under section 3.1, the “common elements” of the Village Homes are comprised of all property not included within the individual units, and the association is responsible for all maintenance, repair, replacement, management, and operation of the common elements unless expressly stated otherwise by the declaration or the Articles of Incorporation and Bylaws of the association.
- Under section 5.1, the ability of the association to administer and operate Village Homes is governed by the declaration, the rules and regulations of the association, and by the Minnesota Common Interest Ownership Act (MCIOA).
- Under section 5.1, the goals of the association in operating and managing Village Homes are (1) to administer and enforce the declaration and the rules and regulations of the association, (2) to maintain, repair, and replace any portions of Village Homes for which it is responsible, which includes the common elements, and (3) to “preserv[e] the value and architectural character” of Village Homes.
- Under sections 8.1 and 8.2, the association is responsible for the expenses incurred for performing maintenance, repair, and replacement of common elements. The owner of an individual unit is responsible for the expenses incurred for performing maintenance, repair, and replacement of all parts of the owner’s individual unit.
- Under section 12.1, the association may bring a suit against an owner, or an owner may bring a suit against the association, to enforce compliance with the declaration, the rules and regulations of the association, and the MCIOA.

Water intrusion

Beginning in February 2007, owner experienced water intrusion into her unit from common elements of the community. She notified the association’s building management company, asking that someone be sent to her unit to see what needed to be done to correct the problem. Owner also notified REC, asserting that REC was

responsible for ice dams on her roof and damages to her unit caused by the ice dams.

The problem was not corrected.

Owner experienced additional water intrusion incidents in August and September 2007 and January 2008. She continued to notify REC and the association of the problem, which went uncorrected.

Association suit v. REC

In February 2008, the association sued REC for alleged construction defects. This lawsuit was settled in July 2009. The settlement agreement did not include the claims of individual unit owners against REC. The settlement agreement provided in relevant part that the association and REC “hereby unconditionally mutually release and forever discharge each other from any and all claims, known or unknown, that have been or could have been asserted in the lawsuit.”

Owner’s suit v. association and REC

After the settlement, REC attempted, unsuccessfully, to resolve owner’s claims for repairs to her unit caused by water intrusion, and in November 2009, owner served the REC and the association with a summons and complaint. Owner alleged breach of contract, breach of warranty, and negligence against REC. Owner alleged breach of contract, negligence, and breach of fiduciary duty against the association. Owner also asserted that she was entitled, as a third-party beneficiary, to damages for breach of the settlement agreement. The breach-of-fiduciary-duty claim was dismissed prior to trial.

Shortly after the jury trial began, owner settled all of her claims against REC with a *Pierringer* release.¹

Jury instructions

Before the jury entered deliberations on owner's remaining claims against the association,² the district court instructed the jury, in relevant part, as follows:

Definition of "breach of contract"

A contract is breached when there is a failure without legal justification to perform a substantial part of the contract.

....

Deciding damages for a breach of contract

In answering question 13, you are to determine the amount of money that will fairly and adequately compensate [owner] for damages caused by the breach of the contract.

The damages award, if any, should put [owner] in the position she would have been in, if the contract had not been breached.

....

Definition of "concurring cause"

There may be more than one direct cause of the harm or damage.

This occurs if the effects of the fault of each of two or more persons work at about the same time to cause the harm or damage. If this occurs, each may be a direct cause of the harm or damage.

¹ See *Frey v. Snelgrove*, 269 N.W.2d 918, 920 n.1 (Minn. 1978) (citing *Pierringer v. Hoger*, 124 N.W.2d 106 (Wis. 1963)) (listing the elements and effect of a *Pierringer* release).

² The jury was also asked to determine REC's liability even though the jury's determination on this issue would have no bearing on the settlement agreement reached between REC and owner.

Definition of “fault”

- Fault consists of:
(1) Negligence
(2) Breach of warranty

....

Compensatory Damages . . .

Questions 13, 14, and 15 in the verdict form are the damages question(s).

Answer each question independently

You must answer these questions regardless of your answers to the other questions on the verdict form. Your verdict is not complete until these damages questions are answered.

When you decide damages, do not consider the possible effect of your answers to other questions.

Damages are money

The term “damages” means a sum of money that will fairly and adequately compensate a person who has been harmed. Damages may include past and future harm. It must be proved that future harm is reasonably certain to occur.

....

Deciding the amount of damages

In answering questions 13, 14, and 15 you are to decide the amount of money that will fairly and adequately compensate [owner] for her past and future damages.

The jury was also given standard jury instructions on items of personal damages, past and future, and property damage including the cost of repair, damages when the repair did not restore the value, and loss of use.

Special verdict

The jury returned a special verdict in which it found that REC had breached statutory home warranties and implied warranties to owner and was negligent, and that

both REC's breaches of warranties and negligence were a direct cause of owner's damages. The jury also found that the association was negligent and breached the governing documents "with respect to the maintenance or repair of the common elements and limited common elements associated with [owner's] unit," and that both the association's negligence and breach of contract directly caused owner's damages. The jury attributed 80% of "fault" to REC and 20% to the association. In determining the amount of money that will fairly and adequately compensate owner for damages caused by the breach of contract, the jury found that \$20,537.65 would fairly compensate owner for costs of repair and \$100,000 would fairly compensate her for diminution in value.³ There is no question on the special-verdict form relating to damages caused by negligence or breach of warranty.

Based on the special verdict, the district court's findings of fact, conclusions of law, and order for judgment were filed on September 26, 2011, and the district court entered judgment for owner against the association in the amount of \$120,537.65 (the amount found by the jury as breach-of-contract damages), \$121,613.20 in attorney fees under Minn. Stat. § 515B.4-116(b) (2010) (authorizing, in relevant part, an award of reasonable attorney fees and costs of litigation to the prevailing party in an action for

³ The jury also found that \$15,000 would fairly compensate owner for past pain and suffering, \$300 would fairly compensate her for past medical expenses, and that \$0 would fairly compensate her for future pain and suffering and future medical expenses. But no damages were awarded against the association for personal injury because the jury, despite having found that the negligence of REC and the association caused damages, also found that owner did not incur any personal injuries as a result of a failure of the association to maintain or repair common areas.

violation of the declaration), \$25,698.71 for disbursements, \$200 for costs, and \$17,242.68 for interest on the judgment through the date of the verdict.

Post-judgment motions

After entry of the judgment, the association moved for judgment as a matter of law (JMOL), a new trial, and for amended findings of fact, conclusions of law, order for judgment and judgment. The association argued that the jury's damages award for breach of contract should be apportioned according to its allocation of fault between REC and the association and that owner has no right to attorney fees.

The district court denied the association's motions for JMOL, a new trial, and elimination of the attorney fees award but granted the motion to apportion the breach-of-contract damages, concluding that the jury must have intended to allocate damages awarded in question 13 according to its allocation of fault.⁴ Based on this conclusion, the district court reduced the breach-of-contract damages from \$120,537.65 to \$24,107.53. In the amended conclusions of law, the district court indicated that owner's attorney-fees award would also be apportioned according to percentages of fault, but the order for judgment awarded owner the full amount of reasonable attorney fees without apportionment. The association wrote to the district court, noting the inconsistency concerning apportionment of attorney fees and asking permission to bring a motion for reconsideration. The district court did not immediately respond, and the association

⁴ The district court also amended the award of attorney fees to \$126,330.70 to correct a mathematical error in the original order for judgment and judgment; this amendment is not challenged on appeal.

appealed the district court's failure to reduce the attorney fees by the percentage of fault the jury attributed to REC.

Approximately one week after the association's appeal was filed, the district court issued a second amended order for judgment, deleting the language about apportioning attorney fees, leaving the amount of the judgment unchanged. On appeal, the association asserts that because the district court was without authority to issue the second-amended judgment, the second-amended judgment should be stricken.

The owner filed a related appeal, challenging the district court's allocation of breach-of-contract damages according to the jury's fault allocation.

D E C I S I O N

I. Effect of second-amended judgment

The association correctly argues that once it filed the appeal, jurisdiction over its posttrial motions shifted from the district court to this court, leaving the district court without jurisdiction to issue the second-amended judgment and rendering the second-amended judgment of no effect. *Evans v. Blesi*, 345 N.W.2d 775, 780 (Minn. App. 1984) (stating that an order of the district court, "if entered after an appeal is taken is of no effect"), *review denied* (Minn. June 12, 1984).

The inconsistency in the district court's first-amended judgment would require a remand from this court so that the district court could clarify its intent. In the interest of judicial economy, we are, as we did in *Evans*, recognizing the second-amended judgment "for the insight it affords." *Id.* And we order, as the district court attempted, that the language in the first-amended judgment indicating that attorney fees would be allocated

according to the percentages of fault found by the jury be stricken, permitting us to address the issue on the merits. Because the issue of fault-based apportionment of attorney fees depends on the apportionment of contract damages, we turn first to that issue.

II. Apportionment of contract damages according to jury’s allocation of fault

A. Standard of review

Owner argues that, because the district court amended only its conclusions of law and was applying Minn. Stat. § 604.02, subd. 1 (2010), when it amended the judgment to allocate breach-of-contract damages under a fault theory, the issue on appeal involves a question of law, reviewed de novo.⁵ The association argues that because the district court was reconciling conflicts in the special-verdict form, review is for abuse of discretion. *See Daly v. McFarland*, 812 N.W.2d 113, 125-26 (Minn. 2012) (stating that if the district court, faced with a potentially inconsistent verdict, exercises its own powers of interpretation, the reviewing court gives broad discretion to any interpretive choice made by the district court). But the association’s argument depends on a threshold determination that the special-verdict form constituted an inconsistent verdict that required interpretation.

“As the United States Supreme Court held in *A. & G. Stevedores v. Ellerman Lines*, 369 U.S. 355, 364, 82 S. Ct. 780, 786 . . . (1962), the Seventh Amendment to the

⁵ The district court stated that it was amending the judgment under Minn. R. Civ. P. 52.02 which allows the district court to “amend its findings or make additional findings” and to “amend the judgment accordingly if judgment has been entered.” But the district court did not, in fact, specifically amend any findings of fact.

Constitution of the United States requires that ‘where there is a view of the case that makes the jury’s answers to special interrogatories consistent, they must be resolved that way.’” *Bigham v. J. C. Penney Co.*, 268 N.W.2d 892, 897 (Minn. 1978) (alteration omitted). We have found no caselaw determining the standard of review to be applied to a district court’s determination that a jury’s answers to a special verdict are inconsistent, but by analogy to caselaw concerning statutory and contract interpretation, we conclude that review of this threshold issue is de novo. *See Dykes v. Sukup Mfg. Co.*, 781 N.W.2d 578, 582 (Minn. 2010) (“Whether a contract is ambiguous is a question of law that we review de novo.”); *Lee v. Lee*, 775 N.W.2d 631, 637 (Minn. 2009) (“[S]tatutory construction is a question of law which we review de novo.”); *Roemhildt v. Kristall Dev., Inc.*, 798 N.W.2d 371, 373 (Minn. App. 2011) (“Absent ambiguity, the interpretation of a contract is a question of law.”), *review denied* (Minn. July 19, 2011).

B. Special verdict not inconsistent

The district court began its analysis of the special verdict by noting that the jury found that the association’s breach of contract and negligence both caused damages, but the special verdict contained a property-damages question (question 13) that the jury was instructed pertained only to breach of contract. The district court concluded, without explanation, that the answer to question 13 constituted the jury’s determination “for the whole of the Association’s conduct but also affixed a percentage of fault to it.” The district court then found “that the jury’s ultimate intention was to allocate twenty percent of [owner’s] total damages to the Association regardless of the label affixed to the action as shown by the jury’s answer to question 12 on the Special Verdict form.” This

“finding” is not supported by the jury instructions or the special-verdict form and is clearly erroneous.

We must presume that the jury understood and complied with the jury instructions. *Flatin v. Lampert Lumber Co.*, 298 Minn. 577, 580 n.3, 215 N.W.2d 783, 785 n.3 (1974). The jury was instructed that “fault” consists of negligence and breach of warranty. Question 12 asked the jury to allocate fault between REC and the association. The jury was instructed not to consider the possible effect of answers to other questions when it answered the questions concerning property damages and personal-injury damages. Question 13 specifically requested the jury to determine owner’s damages for breach of contract. Only the association was found by the jury to have breached a contract with owner. There is no support in the record or the plain language of the jury instructions and special-verdict form for a finding that the jury’s answer to question 13 constituted the jury’s determination of damages for the association’s negligence as well as for breach of contract, and no support for a finding or conclusion that the jury intended question 12 to apportion contract damages according to the percentage of fault assigned to REC and the association.⁶ We conclude that, as a matter of law, the verdict was not inconsistent with the instructions or the law, and that the district court erred by “reconciling” the special verdict in a manner that is not consistent with the jury instructions or the jury’s answers to the special-verdict form.

⁶ The association also argues that the contract damages must be apportioned because the *Pierringer* release from owner to REC forecloses the association’s ability to seek contribution from REC. But the association has no authority for the proposition that a *Pierringer* release requires apportionment of damages found to have been caused by one party’s breach of contract, and we conclude that the argument has no merit.

The association's arguments and the district court's analysis based on joint and several liability of tortfeasors are irrelevant to the award of contract damages in this case and do not support the district court's apportionment of contract damages by fault allocation. Because the district court erred by apportioning contract damages awarded to owner, we reverse and remand with instructions to enter judgment for the entire breach-of-contract award against the association.

III. No basis for apportioning attorney fees

The association appeals the district court's denial of its request to apportion attorney fees according to the jury's fault allocation. "We review the district court's award of attorney fees or costs for abuse of discretion." *Brickner v. One Land Dev. Co.*, 742 N.W.2d 706, 711 (Minn. App. 2007), *review denied* (Minn. Mar. 18, 2008).

The district court rejected the association's argument because Minn. Stat. § 515B.4-116 (2012) provides for an award of reasonable attorney fees against any person who is held to have breached the governing documents of the community. Because the association's argument for apportioning attorney fees is based on the same arguments we have rejected for apportioning contract damages, we conclude that the district court did not abuse its discretion by failing to apportion attorney fees.

The association's arguments concerning attorney fees have shifted several times over the course of this litigation. For purposes of appeal, the only issue involves the apportionment claim. The association's arguments that the district court abused its discretion by applying the lodestar method of determining reasonable fees and failing to make an item-by-item evaluation of the claim to parse out those fees not related to a

violation of Minnesota Statutes chapter 515B were not asserted in the district court and are waived on appeal. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

Affirmed in part, reversed in part, and remanded.