

Recent Jury Verdicts in Construction Law Cases: Evaluating Your Exposure

By Darwin S. Williams

It is commonly known that the vast majority of court cases settle prior to trial. In construction defect cases, there is a pre-conceived notion going into settlement that the general contractor, if found liable, is going to be held responsible for a majority of the damages. The subcontractors, if found liable, tend to have a lesser apportionment depending upon the type of damage and what work the subcontractor was responsible for. This article takes a look at six recent jury verdicts, as reported in Westlaw® Jury Verdicts Plus.¹ A brief summary of each case, and its resulting verdict, is described below.

Case 1: April 2007

Homeowners filed a lawsuit in Washington County against a general contractor alleging breach of contract, breach of warranty, and negligence for water damage due to improper window installation and stucco work.

The general contractor denied liability and filed a third-party complaint against two subcontractors for indemnity and/or contribution. The district court denied defendants' motion for partial summary judgment on liability.

At trial, a Washington County jury found that none of the parties were negligent in the matter, nor had any party breached a contract or a warranty in the matter. Apart from their findings, the jury found that \$45,781 would fairly and adequately compensate the Plaintiffs for their damages, and despite finding the Defendant not negligent and not in breach of contract, the jury attributed \$10,360 of the \$45,781 to the negligence or breach of contract of the Defendant. The District Court held that there was no negligence, no breach of contract or warranty, thus no damage award. **Verdict: \$0.**

Case 2: Sept. 2006

Homeowners filed a lawsuit in Carver County against the general contractor and the stucco subcontractor alleging that mold growth was causing health problems for their child. The suit alleged breach of statutory warranties and fraud in their failure to disclose building code violations.

The general contractor moved for summary judgment and dismissal of all claims. The Judge granted the summary judgment motion and the dismissal of all claims, including cross-claims and counter-claims in their entirety.

However, while the summary judgment motions were pending, the Plaintiff engaged in mediation with the Defendants and accepted a settlement offer of \$10,000 for personal injuries due to defective construction of the home. The dismissal had come after the negotiated settlement, so the court approved the settlement amount and apportionment. **Settlement: \$10,000.**

Case 3: Aug. 2006

Homeowners filed a lawsuit in Hennepin County against the general contractor for negligence and breach of statutory warranty for extensive water damage around windows, walls and stucco surfaces of their home. The contractor denied the claims and subsequently filed a third-party complaint against various subcontractors for indemnification and/or contribution.

A Washington County jury heard the case and returned a special verdict that the Plaintiffs did not discover or should not have discovered their home's moisture intrusion damage before March 2003 (within two years prior to the commencement of the action). The jurors found the general contractor, the stucco subcontractor, and the Plaintiffs were negligent and that their negligence directly caused the damage to the Plaintiff's home.

The jury attributed 90 percent fault to the general contractor, 5 percent to the stucco subcontractor and 5 percent to the homeowner. The panel found \$315,000 would fairly and adequately compensate the Plaintiffs for the costs of repair. **Verdict: \$315,000, plus costs, disbursements and interest provided by law.**

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Comments or inquiries may be directed to Shannon Banaszewski.

FAIR LABOR STANDARDS ACT

WHO IS EXEMPT FROM THE FLSA?

By Marlene S. Garvis

Recent Department of Labor (DOL) regulations have modified which employees are exempt from the overtime pay provisions and/or minimum wage provisions of the FLSA. Section 13(a)(1) of the FLSA provides an exemption from both minimum wage and overtime pay for employees employed as bona fide executive, administrative, professional and outside sales employees. Section 13(a)(1) and Section 13(a)(17) also exempt certain computer employees.

To initially qualify for exemption, employees must be paid on a salary basis at not less than \$455 per week. In addition, in order for an exemption to apply, an employee's specific job duties and salary must meet all the requirements of the DOL regulations. Job titles will not necessarily be determinative of exempt status.

The Executive Exemption: To be subject to exemption, the employee must meet three tests:

- Primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise;
- Must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; and
- Must have the authority to hire or fire other employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.

Administrative Exemption: To be subject to exemption, the employee's:

- Primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and
- Primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

Professional Exemption: To be subject to exemption, the employee's:

- Primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment;
- Advanced knowledge is in a field of science or learning; and
- Advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

Creative Professional: To be subject to exemption, the employee's primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

Computer Employee Exemption: To be subject to exemption, the employee must be employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field performing the duties described below.

- The employee's primary duty consists of (1) the application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications; (2) the design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications; (3) the design, documentation, testing, creation or modification of computer programs related to machine operating systems; or (4) a combination of (1)-(3), the performance of which requires the same level of skills.

Outside Sales Exemption: To be subject to exemption, the employee's:

- Primary duty must be making sales (as defined in the FLSA), or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and
- Primary duty must include being customarily and regularly engaged away from the employer's place or places of business.

Highly Compensated Employees: A highly compensated employee performing office or

non-manual work and paid total annual compensation of \$100,000 or more (which must include at least \$455 per week paid on a salary or fee basis) is exempt from the FLSA:

- If the employee customarily and regularly performs at least one of the duties of an FLSA-exempt executive, administrative or professional employee.

WHO IS NOT EXEMPT?

Blue Collar Workers: The exemption provided by FLSA Section 13(a)(1) applies only to "white collar" employees who meet the salary and duties tests set forth in the Part 541 regulations.

- They do not apply to manual laborers or other "blue collar" workers who perform work involving repetitive operations with their hands, physical skill and energy.
- FLSA-covered, non-management employees in production, maintenance, construction and similar occupations such as carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, longshoremen, construction workers and laborers are not exempt under the Act no matter how highly paid.

Police, Fire Fighters, Paramedics & Other First Responders: The FLSA exemption does not apply to police officers, detectives, deputy sheriffs, state troopers, highway patrol officers, investigators, inspectors, correctional officers, parole or probation officers, park rangers, fire fighters, paramedics, emergency medical technicians, ambulance personnel, rescue workers, hazardous materials workers and similar employees, regardless of rank or pay level.

THE FLSA IS HERE TO STAY

The FLSA provides minimum standards that may be exceeded, but employers can not waive or reduce them. Employers must comply, for example, with any Federal, State or municipal laws, regulations or ordinances that establish higher minimum wage or lower maximum workweek than those established under the FLSA. Similarly, employers may, on their own initiative or under a collective bargaining agreement, provide a higher wage, shorter workweek, or higher overtime premium than is provided under the FLSA. While collective bargaining agreements cannot waive or reduce FLSA protections, nothing in the FLSA or the Part 541 regulations relieves employers from their contractual obligations under such bargaining agreements. •

Congratulations to Jessica E. Schwie and Lawrence M. Rocheford for obtaining a decision from the Court of Appeals which affirms the grant of summary judgment to Anoka-Hennepin School District No. 11. The wrongful suicide death claim brought against the school district was dismissed on the following basis: (1) that the school district did not have a duty because the suicide was not foreseeable, (2) that there was no evidence in the record establishing that anything the school did, or failed to do, caused the student to commit suicide, (3) that the challenged acts and/or omissions of school staff was discretionary and entitled to official

immunity, and (4) that the school district shared in the official immunity vicariously.

Please visit www.jlolaw.com where a link is available to review the decision.

Congratulations Marlene S. Garvis

Marlene S. Garvis has been elected to the Executive Committee of the ABA's National Council of Bar Presidents' Metropolitan Caucus.

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Case 6: April 2006

Case 4: May 2006

Homeowners filed a lawsuit in Washington County against the general contractor for breach of contract, breach of statutory warranty, breach of implied warranty and negligence in construction. The contractor denied liability and subsequently filed a third-party complaint asserting that various subcontractors were liable for contribution and/or indemnification.

A Washington County jury determined that only the general contractor and the subcontracted framer's negligence was the direct cause of the damage, and that the general contractor had breached the statutory warranty, but had not breached the implied warranty of habitability. The panel determined that \$45,000 would fairly and adequately compensate the Plaintiffs for the cost to repair the damage, including any incidental damages.

The panel attributed 90 percent fault to the general contractor and 10 percent fault to the framer. **Verdict: \$45,000** for damages.

Case 5: May 2006

Owners of a home originally built in 1910 filed a lawsuit in Carver County against a masonry company for negligence in their failure to take safety measures to prevent setting fire to their home when using a heating torch to heat masonry materials used to set concrete block for a home addition. The resulting fire destroyed both the addition and the original home.

The Defendant eventually admitted liability, so the issue remaining for trial was the amount of damages.

A Carver County jury returned a special verdict finding \$335,500 would fairly and adequately compensate the Plaintiffs for their original home. The panel also found that \$186,140 would fairly and adequately compensate the Plaintiffs for personal property loss and \$20,880 for time spent inventorying their personal property, replenishing the items lost and moving expenses. **Verdict: \$542,520.**

In 1995, homeowners purchased a "unique residential homestead" in Washington County. In March 2001, the homeowners discovered water leaking through their roof and entering the home from a brick chimney. The homeowners reportedly contacted their insurer, but according to the homeowners, the insurer delayed the investigation and mold developed.

A mold remediation contractor was selected and they submitted a bid to the insurer to do the work for \$200,000. However, a few weeks after starting the work, the remediation contractor allegedly doubled its bid.

In November 2001, the homeowners ended their relationship with the remediation contractor claiming the roof continued to leak and the contractor had failed to properly manage the remediation.

The homeowners brought suit against the insurance company and their agent, asserting breach of contract, breach of fiduciary duty, negligence, fraud in the inducement, misrepresentation, false advertising, deceptive trade practices and/or consumer fraud, and respondeat superior claims against the insurance company.

Plaintiffs also named the remediation contractor as a defendant alleging breach of contract, negligence, conversion, false advertising, deceptive advertising, deceptive trade practices and/or consumer fraud, fraud in the inducement, and misrepresentation.

Defendant insurers denied all claims and insisted that an accord and satisfaction had been accomplished with the Plaintiffs. They then cross-claimed against the Co-Defendant remediation contractor for repair damages they allegedly caused.

After summary judgment motions by Defendants eliminated some claims, the Defendant insurer settled with the Plaintiffs for an undisclosed amount. The court approved the parties' stipulation of dismissal and ordered all claims and counterclaims between Plaintiffs and the settling Defendants be dismissed with prejudice.

The case between Plaintiffs and Defendant remediation contractor proceeded to trial on the remaining negligence and breach of contract claims. A Washington County jury returned a special verdict that found that the remediation contractor had not breached its contract with Plaintiffs, but Plaintiffs did breach their contract with the remediation contractor. As to the negligence issue, the jury found that the Defendant contractor was negligent with respect to the remediation work it performed at the Plaintiffs' home and that such negligence was a direct cause of Plaintiffs' damages. The jury found \$263,103.58 would fairly and adequately compensate the Plaintiffs for any damages caused by the remediation contractor and that \$39,103.58 would fairly and adequately compensate the contractor for the Plaintiff's breach of contract. **Verdict: \$263,103.58, reduced to \$224,000.00 due to fault apportionment.**

The results in these cases vary, of course, and they do not and cannot predict the verdict result in any future or pending cases. Verdicts will vary based upon many factors, including, but not limited to: the facts of a particular case; the evidence presented; the jury pool selected; the persuasiveness and skill of the attorneys; and the believability of witnesses. This review of recent jury verdicts may provide a useful basis from which to assess your particular position, and along with the assistance and advice of counsel on a particular case, may help you make an informed decision on whether to settle a case for a certain dollar amount, or to proceed to trial.

¹ A search of Westlaw Jury Verdicts Plus resulted in eight Minnesota construction law cases in 2006 and 2007. This review is limited to the results in six of those cases, and is not intended to be an exhaustive search of all recent construction law verdicts in Minnesota. The cases included in the study are, respectively: *Cain v. Cates Constr., Inc.*; *Caldwell v. Michael Homes Inc.*; *Kern v. Dan Brown Builders Inc.*; *Dooley v. Reliable Homes Inc.*; *Steinhagen v. Wachholz Masonry*; and *Soukup v. Illinois Farmers Ins. Co.* The two cases not included dealt with an attorney fee dispute and a mechanic's lien, thus were not relevant to the subject of this article. •

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Marlene is a partner at Jardine, Logan & O'Brien, P.L.L.P., and focuses her legal practice on representing clients in professional liability, employment, product liability and licensing and disciplinary matters. Marlene practiced as an RN, MSN, prior to receiving her J.D. from Hamline University School of Law and was the President of the Hennepin County Bar Association in 2005-06.

If you have any questions about the subject matter of the articles in this newsletter, please feel free to contact the authors.

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