MONTANA FIFTH JUDICIAL DISTRICT COURT, MADISON COUNTY

BRAD TERRELL, Plaintiff, vs. E&I CONSTRUCTION AND DESIGN, LLC and NATHAN E. NUTTER, Defendants.	Cause No. DV-29-2020-65 **ORDER ON MOTIONS**
E&I CONSTRUCTION AND DESIGN, LLC and NATHAN E. NUTTER, Third-Party Defendants, vs. STEVEN J. ANDERS d/b/a 24SEVEN GENERAL CARPENTRY, and JOHN DOES I-V, Third-Party Defendants.	

On October 14, 2022, the Defendants/Third Party Plaintiffs, E&I Construction and Design, LLC (hereinafter "E&I") and Nathan E. Nutter (hereinafter "Nutter") filed their Motion for Summary Judgment. On the same day Third-Party Defendant Steven J Anders d/b/a 24Seven General Carpentry (hereinafter "Anders") filed a Joinder in E&I and Nutter's Motion. On February 3, 2023, the Plaintiff, Brad Terrell (hereinafter "Terrell") filed his Answer Brief Opposing Summary Judgment. E&I and Nutter filed their Reply on February 13, 2023.

Additionally, and intertwined with the Motion for Summary Judgment on October 14, 2022, Anders filed a Motion *in Limine* and Request for Hearing. On December 27, 2022, E&I and Nutter filed a Motion *in Limine* regarding Expert Witnesses. Anders joined in the Motion.

On February 3, 2023, Terrell filed his opposition which globally addressed all the pending issues. On February 13, 2023, Anders filed a Reply which was joined by E&I and Nutter. E&I and Nutter are represented by Bryan Kautz. Anders is represented by Jordan Crosby and James Zadick. Terrell is represented by Terry Schaplow. The Court declines to grant a hearing as these issues are fully and adequately briefed and no hearing was specifically requested on the summary judgment motion in which a hearing is mandatory. These matters are fully briefed and ready for ruling.

On September 24, 2020, Terrell filed his Complaint against E&I and Nutter alleging counts of Breach of Contract, Breach of Implied Duty of Workmanlike Manner, Breach of the Implied Covenant of Good Faith and Fair Dealing and Fraud. On February 10, 2021, E&I and Nutter filed a Third-Party Complaint against Anders for contribution and/or indemnification. This case arises from Terrell alleging construction defects to the buildings on his property located near Cameron, Montana. E&I were retained to work on the property and worked on the project until they were fired in October of 2019. Anders provided construction and supervision services on the project.

A motion *in limine* is made for the purpose of preventing the introduction of evidence, which is irrelevant, immaterial, or unfairly prejudicial. *City of Helena v. Lewis*, 260 Mont. 421, 425-26, 860 P.2d 698, 700 (1993). "Accordingly, the authority to grant or deny a motion in limine rests in the inherent power of the court to admit or exclude evidence and to take such precautions as are necessary to afford a fair trial for all parties." *Id.*

A district court has broad discretion to determine whether evidence is relevant and admissible. *State v. Frey*, 2018 MT 238, ¶ 12, 393 Mont. 59, 427 P.3d 86. Evidentiary rulings are reviewed for an abuse of discretion. *Id.* "A district court abuses its discretion 'if it acts arbitrarily

without the employment of conscientious judgement or [if it] exceeds the bounds of reason, resulting in substantial injustice.'" *Id* (internal citation omitted). Under this standard, there may be more than one correct answer to an evidentiary issue. *Id.* The district court is bound by the rules of evidence or applicable statutes in exercising its discretion. *State v. Daniels*, 2011 MT 278, ¶ 11, 362 Mont. 426, 265 P.3d 623.

Anders moves the Court for a motion *in limine* seeking exclusion of Terrell's speculative past and future economic damages due to his failure to disclose "any factual basis" and that he "has also failed to disclose any quantification or basis for claim future damages."

E&I and Nutter have moved for the exclusion of the testimony "proposed by Plaintiff from his four identified non-retained/hybrid expert witnesses and to exclude testimony from the Plaintiff himself regarding the standing of care for a general contractor." Anders has joined in this request and notes alternatively if they are permitted to testify, they lack the required expertise to render the opinions of the standard of care.

Terrell replied to the Motion *in limine* by Anders and incorporated his Response in Opposition to the Summary Judgment to avoid duplication of arguments. Additionally, in the aforementioned Response in Opposition to Summary Judgment, Terrell also incorporated his response to the motion *in limine* filed by E&I and Nutter.

In Reply to Anders' Motion Terrell notes the discovery requests from Anders required supplementation up until the time of trial and thus are ongoing at their request and he hasn't failed to provide what they require, second as they are to blame for the damage they can't now assert it is his fault for failing to get complete amounts to him as the rehab is ongoing, and finally

Anders failed to ask further questions in the deposition or request clarification of the supplemental disclosures so they can't assert an issue now.

In Response to E&I and Nutter's Motion Terrell opines the Defendant's arguments are to the weight to be given to the damage claims by the jury, not the admissibility. Terrell further opines his affidavit sets forth the reasonable basis for the calculation of damages and the lost profit arguments are cured by potential jury instructions.

Anders replies noting he and the Defendants are not required to "repeatedly provide untimely opportunities for Terrell to prove" his case and that his lost profit evidence is inherently and improperly speculative.

E&I and Nutter note in their reply "rather than offering substantive responses in the form of admissible evidence considered under the correct legal standard, he (Terrell) simply asserts that facts are true because he has alleged they are true."

Turning first to Ander's Motion in Limine the Court agrees they are not required to provide Terrell unlimited time for him to provide information nor are they required to prove the case for Terrell. His assertions they could have followed up and continued to ask for additional information is not supported by law. Additionally, Terrell's own claim of "rough estimates" and "forecasting" do not rise to more than a guess or speculation as to the amount of damages. *See Lenz Const. Co v Cameron*, 207 Mont. 506 (1984). The Court further agrees as to lost profits, Terrell's estimates are guess work at best, and he cannot rely on a proposed jury instruction to cure this deficiency. While Terrell is correct there is some fluidity in damages, some concrete evidence supporting the estimations is required. *See Olson v. Parchen*, 249 Mont. 342 (1991) and *Sebena v. American Auto Ass'n.* 280 Mont. 305 (1996). The Court agrees with Anders "no

data beyond guessing backs Terrell's lost profits claims" and exclusion of the lost profit evidence is appropriate.

Similarly, the Court agrees with E&I and Nutter on the necessity of exclusion of Terrell's witnesses. Terrell did not comply with expert witness disclosures and now appears to label his witnesses as "hybrid/not-retained" when they are clearly attempting to offer testimony regarding the standard of care. None of these witness disclosures comport with the requirements and the Defendants are not required to prove Terrell's case for him. An expert is required to recognize the standard of performance and Terrell's witnesses do not rise to the level of reaching this standard. *See Pierce v. ALSC Architects, P.S.,* 270 Mont. 91 (1995). For the Court to make the determination they do, would require not only the Defendant to prove Terrell's case but it would require the Court to make many assumptions as well.

Summary judgment is properly granted "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Mont. R. Civ. P. 56(c)(3) (2019). Whether a fact is "material" is determined by the elements of the substantive cause of action or defenses at issue. *Broadwater Dev., L.L.C. v. Nelson*, 2009 MT 317, ¶ 15, 352 Mont. 401, 408, 219 P.3d 492, 499 (citing *Arnold v. Yellowstone Mountain Club, LLC*, 2004 MT 284, ¶ 15, 323 Mont. 295, 298, 100 P.3d 137, 140; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986)). Summary judgment will be properly precluded only if there is a genuine dispute over facts that might affect the outcome of the suit under the governing law. *Id.* "A dispute is genuine if the evidence is such that a reasonable fact-finder could return a verdict for the nonmoving party." *Id.*

"The purpose of summary judgment is to dispose of those actions which do not raise genuine issues of material fact and to eliminate the expense and burden of unnecessary trials." *Hajenga v. Schwein*, 2007 MT 80, ¶ 11, 336 Mont. 507, 510, 155 P.3d 1241, 1243 (citing *Boyes v. Eddie*, 1998 MT 311, ¶ 16, 292 Mont. 152, 155, 970 P.2d 91, 93; *Kane v. Miller*, 258 Mont. 182, 186, 852 P.2d 130, 133 (1993)). However, the Montana Supreme Court has repeatedly recognized summary judgment as an "extreme remedy," and should thus "never be substituted for a trial if a material factual controversy exists." *Id.* (quoting *Lee v. USAA Cas. Ins. Co.*, 2001 MT 59, ¶¶ 24, 25, 304 Mont. 356, 362, 22 P.3d 631, 636); *See also Sands v. Town of West Yellowstone*, 2007 MT 110, ¶ 16, 337 Mont. 209, 213, 158 P.3d 432, 435. Therefore, the party seeking summary judgment has the initial burden of establishing the absence of genuine issues of material fact and entitlement to judgment as a matter of law. *Gonzales v. Walchuk*, 2002 MT 262, ¶ 9, 312 Mont. 240, 243, 59 P.3d 377, 379 (2002) (citing *Bruner v. Yellowstone Cty.*, 272 Mont. 261, 264, 900 P.2d 901, 903 (1995)).

Once the movant's burden is met, the nonmoving party "must present material and substantial evidence, rather than mere conclusory or speculative statements, to raise a genuine issue of material fact." *Id.* "Substantial credible evidence" is that which "a reasonable mind might accept as adequate to support a conclusion." *Seltzer v. Morton*, 2007 MT 62, ¶ 94, 336 Mont. 225, 257, 154 P.3d 561, 587 (citing *Satterfield v. Medlin*, 2002 MT 260, ¶ 23, 312 Mont. 234, 238, 59 P.3d, 36, overruled on other grounds; *Giambra v. Kelsey*, 2007 MT 158, ¶ 27, 338 Mont. 19, 29, 162 P.3d 134, 140). All reasonable inferences that might be drawn from the offered evidence must be drawn in favor of the nonmoving party. *Hajenga*, ¶ 12.

The Court will not "make findings of fact, weigh the evidence, choose one disputed fact over another, or assess the credibility of witnesses" at the summary judgment stage. *Fasch v.*

M.K. Weeden Constr., Inc., 2011 MT 258, ¶ 17, 362 Mont. 256, 261, 262 P.3d 1117, 1121 (quoting *Andersen v. Schenk*, 2009 MT 399, ¶ 2, 353 Mont. 424, 220 P.3d 675, 676—77).

First E&I and Nutter assert they are entitled to judgment as a matter of law as Terrell cannot prove the damages element of his claim. They note "although damages need not be proved with precision, damages which are a matter of mere speculation cannot be the basis of recovery." *Olson v. Parchen*, 249 Mont. 342, 347 (1991). They assert "Terrell's admissible proof of damages is utterly absent here." The Defendants' note the distinction between uncertainty as to damages when there is underlying documentation with imprecise math as opposed to unsupported speculation from no substantial evidence.

Terrell argues in opposition noting the Montana Supreme Court has held "to the extent that a method of calculating damages my provide a reasonable basis for computation, even if not mathematically precise, when the method is based on the best evidence available under the circumstances to support the damage award, it will be upheld." Terrell further notes an expert is not required for lost profit damages, uncertain damages can be awarded, the figures supplied are sufficient, and the Defendant's cannot elect to not further question the plaintiff then place the blame at his feet. Finally, Terrell asserts when viewing the evidence in his favor and drawing all reasonable inferences summary judgment must be denied.

In Reply the Defendant acknowledges damages may be awarded "if the evidence is sufficient to afford a reasonable basis for determining the specific amount awarded" but asserts Terrell has completely ignored the other portion of the rule that "although damages need not be proven with precision, damages which are a matter of mere speculation cannot be the basis for recovery."

The Defendants further note while an expert may not be necessary Terrell has ignored that his own testimony setting forth his figures came solely from his own forecasting and educated guesses based on no documentation. Second, Terrell has alleged expenses are necessary but has not set forth more than a conclusory allegation or speculation. They aver Terrell had every opportunity to supplement the record with documentation but "he elected to attempt to prove his damages via only his own hearsay testimony and hearsay, self-serving documents that do nothing more than list unsupported damages figures." Third, they note the specific documents he addressed again are unsupported and self-serving. For his fourth point they again note there is no reference for these numbers, and they come after the close of discovery.

Finally, they address his oft repeated argument about their inability to complain about lack of evidence while they did nothing to clarify his damages. The Defendants note, and the Court agrees, it is the plaintiff's burden to prove his case and the amount of damages. *See Kraft v. High Country Motors*, 2012 MT 83, ¶ 59.

The Defendants close on this argument noting "nothing in Terrell's reply brief comes close to refuting any of the arguments in E&I and Nutter's summary judgment brief regarding damages…As such, the defendants are entitled to summary judgment on all his claims and the court's analysis need proceed no further."[1]

"A plaintiff will not be denied recovery simply because it is too difficult to ascertain the amount of his damages, as long as the amount can be proven with a reasonable degree of certainty." *Mont. Petroleum Tank Release Comp. Bd. v. Crumleys, Inc.* 2018 MT 2, ¶ 91.

[1] In addition to the general summary judgment the Defendant's addressed each count specifically as well.

"Recovery of damages will not be denied, even if the mathematical precision of the figure is challenged, provided the evidence is sufficient to afford a reasonable basis for determining the specific amount awarded." *Id*, ¶ 92. "Every award of damages is grounded, to some degree, upon speculation." *Id.* However, "the plaintiff must provide the trial judge with, a reasonable basis for computation and the best evidence obtainable under the circumstances . . . which will enable the judge to arrive at a reasonably close estimate of the loss." *Sack v. A.V. Design*, 211 Mont. 147, 153 (1984). "The prohibition against speculative profits does not necessarily apply to uncertainty about the amount of such profits, but applies to uncertainty about whether the loss of profits is the result of the wrong and whether such profit would have been derived at all." *Olson* at 348.

Here, as in *Olson* the question is square on the second part of the quote as to "whether such profit would have been derived at all." Similarly, here as well "[a]ll of the theories underlying (the) damage claims for loss of rents and profits are speculative." The Court fully acknowledges Terrell's assertions damages are not un-awardable simply because they may be difficult to prove mathematically or because there is of course some amount of speculation in all awards. Where this case differs is the sole reliance on speculation. Terrell's guess work was derived from no documentation or set piece of evidence. Terrell's damages rely on the Court fully accepting his forecasting and guess work assertions, denying the motions *in limine*, and faulting the Defendants and Third-Party Defendant for not proving Terrell's case for him. While the Court agrees there are jury instructions on damages and reasonable inferences to be drawn, for the Court to accept Terrell's position it would require the Court to draw every inference possible and tie his assertions only to his admittedly guess work assertions. Such an inference would be wholly circular in nature on all levels. In addition, even if the Court were to

draw inferences from Terrell's own testimony, some of this would require the Court to allow Terrell to offer expert opinions, which he is not permitted to do.

Accordingly, IT IS HEREBY ORDERED at follows:

1) Anders and E&I and Nutter's Motions *in Limine* are GRANTED.
2) E&I and Nutter's Motion for Summary Judgment is GRANTED.
3) The Clerk of Court shall distribute a copy of this Order to the parties.

Electronically Signed By:
Hon. Judge Luke Berger
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