

Nelson & Dahle, P.C.

McDonald v. Ponderosa Enterprises, et al. (verdict)

DISTRICT COURT

VERDICT: Defense, dropped newly framed wall, claim of common law negligence following \$332,000 comp settlement, lumbar burst fracture.

A 12-0 Bozeman jury found that Ponderosa Enterprises was not negligent in connection with injuries sustained by Cody McDonald when a wall being lifted into place fell on him.

McDonald, an independent contractor dba Head First Const., agreed 6/28/11 to frame a shop in Sidney with Ponderosa. Ponderosa's Matt Orrell performed the majority of the building of one wall while McDonald worked on another wall. They lifted up 6' pieces of McDonald's wall. When Orrell was done with his 12x25 wall he asked McDonald and 2 Campbells Plumbing employees to help raise it. When it was 75-80% up, a Campbells employee complained about the weight and McDonald shifted over to help him. McDonald gave the order to lower the wall and one or both of the Campbells employees stepped away and the wall crashed down on McDonald and Orrell. McDonald, 26, suffered a burst fracture at L5 with displacement of the posterior superior endplate and underwent anterior corpectomy and fusion.

On 9/8/11, McDonald applied for and obtained work comp. On 3/1/12 his lawyer filed a petition with MSF claiming he was an employee of Ponderosa on the date of his injury.

McDonald sued Ponderosa, general contractor RTK Const., and Campbells 2/29/12 claiming failure of Ponderosa to provide work comp, contractual obligation & vicarious liability, negligent retention, failure to provide a safe place to work, strict liability and/or negligence per se, common law negligence, damages, and punitives. He claimed in the suit to be an employee of Ponderosa on the date of his injury.

McDonald settled with MSF 2/26/13 for \$332,000 new money. He settled with Campbells 4/22/13 on undisclosed terms.

To avoid the employee exclusion in Ponderosa's insurance policy, McDonald stipulated 8/7/13 that he was now an independent contractor, and Judge John Brown signed an order to that effect 8/28/13.

Ponderosa requested summary judgment, claiming that McDonald was an independent contractor and as such the Montana Safety Act, OSHA, and other claims associated with Ponderosa's failure to have work comp should be dismissed. On 1/2/14, Brown dismissed McDonald's claims of failure to have work comp and strict liability and found that neither the Safety Act nor OSHA applied due to his assertion that he was now an independent contractor. The order left common law negligence as McDonald's remaining claim against Ponderosa and RTK. Brown also found that Campbells was to appear on the verdict form as a settled party under § 27-1-703(6). RTK was dismissed on directed verdict the 2nd day of trial.

Plaintiff's experts: Ken Ryder, Bozeman (responsibilities between general contractors and subcontractors); physiatrist Bill Rosen, Missoula; Reg Gibbs, Billings (voc-rehab, life-care plan); CPA David Johnson, Helena.

Defendant's experts: none.

Demand, \$1,750,000; offer, 0. Jury request, \$2,048,000 - \$2,486,000; jury suggestion, 0. Ward Taleff, mediator.

Jury deliberated 2.4 hours 5th day.

McDonald v. Ponderosa Enterprises, Gallatin DV-12-148, 1/31/14.

Lucas Foust (Foust Law Office), Bozeman, for McDonald; Edward Guza (Guza, Nesbitt & Putzier), Bozeman, for Ponderosa (Farmers Union Mutual Ins.); Randall Nelson (Nelson & Dahle), Billings, for RTK (Mountain West Farm Bureau Mutual Ins.).