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ARKANSAS COURT OF APPEALS

DIVISION II
No. CV-20-12

	Opinion Delivered June 1, 2022
ACTION, INC. APPELLANT V. MCQUEENY GROUP, INC. APPELLEE	APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT, SEVENTEENTH DIVISION [NO. 60CV-16-251] HONORABLE MACKIE M. PIERCE, JUDGE AFFIRMED

WAYMOND M. BROWN, Judge

Action, Inc., brings this appeal from the judgment of the Pulaski County Circuit Court rejecting its claim for implied indemnity against McQueeny Group, Inc., after a jury found Action negligent. On appeal, Action argues that its negligence does not bar its claim and that it was entitled to a new trial. We affirm.

This case has a complicated procedural history. For purposes of this opinion, we provide the following background. Action was the mechanical subcontractor on a construction project at the University of Arkansas in Fayetteville in 2011. Clark Contractors, LLC, was the general contractor on the project. Action's work included the installation of a variable refrigerant flow HVAC system. The original plans and specifications called for the installation of a Mitsubishi HVAC system; however, the cost of that system exceeded the University's budget, so Action proposed—and the University accepted—installation of a less

expensive system manufactured by LG Electronics U.S.A. Action agreed to pay for the design changes for this alternative system in its bid. However, no changes were made to the design or specifications to accommodate the differences between the two systems. Action then contracted with McQueeny, LG's Arkansas representative, for the purchase of the LG system.

Action experienced significant problems with the system after installation, and troubleshooting efforts by Action failed to fix the problems. Clark decided to engage another mechanical contractor to resolve the problems with the system. It was determined that Action incorrectly installed thousands of feet of pipe in the system. Action's failure to properly install the piping in the system forced Clark to have the system rebuilt. As the piping was replaced, additional installation errors were discovered. Clark would later demand that Action pay approximately $650,000 for the remedial work on the project.

After Action finished its work on the project and was paid for that work, it contracted with Clark for other, unrelated projects. Clark set off amounts owed to Action on these other projects to recoup the cost of the remedial work on the original project.

In January 2016, Action filed suit against Clark to collect the amounts owed Action for the other projects. Clark answered and counterclaimed, asserting claims for breach of contract, unjust enrichment, and negligence. Action filed a third-party complaint against McQueeny, LG, the architect, the engineer, the commissioning agent, and LG's Texas representative, asserting claims for contribution, apportionment of fault, negligence, and implied indemnity. The claims between Action and Clark were settled prior to trial, as were

Action's claims against the architect, the engineer, the commissioning agent, and the Texas representative.

The claims against McQueeny and LG were tried by a jury. After one of the claims against LG was dismissed on a motion for directed verdict, Action nonsuited its remaining claims against LG. Action elected to submit its indemnity claim against McQueeny to the jury and dismissed its claims for contribution and negligence. The case was submitted to the jury on interrogatories. In the first interrogatory, the jury found that Action was negligent and that its negligence was a proximate cause of its damages. In the second and third interrogatories, the jury found that Action was entitled to implied indemnity from McQueeny and fixed its damages at $255,000. The circuit court declined to enter a judgment based on the jury's answers to the interrogatories. Instead, the court held that a negligent party was not entitled to indemnity and that contributory negligence was a complete bar to an indemnity claim. The court dismissed Action's complaint against McQueeny with prejudice. After Action's motion for new trial was deemed denied, this appeal followed.

On appeal, Action argues that the circuit court erred in failing to enter judgment in conformity with the jury's verdict and in denying its motion for new trial.

The primary issue is whether Action's negligence in its installation of the LG HVAC system bars its claim for implied indemnity from McQueeny. We hold that it does.

The Restatement (Second) of Torts[1] sets out the general rule of indemnity as follows: "If two persons are liable in tort to a third person for the same harm and one of them

[1]Section 886B(1) (1977).

discharges the liability of both, he is entitled to indemnity from the other if the other would be unjustly enriched at his expense by the discharge of the liability." Section 886B(2) gives examples of typical indemnity situations. In all of these situations, the indemnitee is liable as a matter of law, but the loss is primarily caused by the indemnitor, not the indemnitee.

The basis for indemnity when, as here, there is no express contract of indemnity is liability based on an implied or quasi-contract.[2] The *Larson Machine* court held that the theory of indemnity is based on the equitable principles of restitution that permit one who is compelled to pay money—which, in justice, ought to be paid by another—to recover the sums so paid unless the payor is barred by the wrongful nature of his own conduct. However, Arkansas courts have applied the doctrine of implied indemnity only in limited situations where there is no express-indemnity contract, such as imputed or vicarious liability or product liability where a supplier seeks indemnity against the product manufacturer.[3] Action's claim does not arise under either of these theories. First, this is not a case involving vicarious liability: Clark sued Action for Action's own negligence in installing the HVAC system; it did not sue McQueeny, LG, or the other entities involved in the installation. Thus, Action did not discharge McQueeny's liability to Clark. Second, this obviously is not a product-liability case.

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[2]*Larson Mach., Inc. v. Wallace*, 268 Ark. 192, 600 S.W.2d 1 (1980).

[3]*Wilcox v. Wooley*, 2015 Ark. App. 56, 454 S.W.3d 792; *see also Elk Corp. of Ark. v. Builders Transp., Inc.*, 862 F.2d 663 (8th Cir. 1988); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. First Nat'l Bank of Little Rock*, 774 F.2d 909 (8th Cir. 1985).

Arkansas cases make clear that the right of indemnity cannot exist when the party seeking indemnity has proximately caused the harm.[4] This is because the justification for indemnity disappears when the indemnitee has proximately caused the harm.[5] The jury's finding that Action was negligent and that its negligence proximately caused its damage renders the problem one of contribution, not of indemnity.[6] The jury was not asked directly to determine whether McQueeny was at fault in the installation of the HVAC system in the original project. Nor was the jury asked to allocate fault between Action and McQueeny in that installation.

While some jurisdictions have blurred the differences, there is an important substantive difference between contribution and indemnity. Contribution refers to an order distributing loss among tortfeasors by requiring each to pay a proportionate share, while indemnity shifts the entire loss from the party found liable to a party who should bear the entire loss.[7] Action has lost sight of this distinction. The circuit court did not err in entering judgment in favor of McQueeny on the basis of its determination that Action's own negligence barred its claim for indemnity.

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[4]*Berkeley Pump Co. v. Reed-Joseph Land Co.*, 279 Ark. 384, 653 S.W.2d 128 (1983); *Larson Mach.*, *supra*; *Merrill Lynch*, *supra*; *Fidelity & Cas. Co. of N.Y. v. J.A. Jones Constr. Co.*, 325 F.2d 605 (8th Cir. 1963).

[5]*Merrill Lynch*, *supra*.

[6]*Berkeley Pump Co.*, *supra*.

[7]W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 51, at 341–42 (5th ed. 1984); Dan Dobbs et al., *The Law of Torts* § 489, at 75 (2d ed. 2011); *see also Berkeley Pump Co.*, *supra*; *McFall v. Compagnie Maritime Beige*, 107 N.E.2d 463 (N.Y. 1952).

Next, Action asserts that the circuit court should have submitted the case to the jury on a general verdict form instead of on interrogatories. Submission of a case on interrogatories alone is within the discretion of the circuit court.[8] Action's argument presupposes that its own negligence does not bar its claim for indemnity, and it offers no convincing argument as to how the trial court abused its discretion in the matter.[9] It is the appellant's burden to demonstrate reversible error.[10] Points asserted without citation to authority or convincing argument will not be considered.[11]

This brings us to Action's arguments concerning its motion for new trial. As its first ground, Action argues that the circuit court erred in requiring it to elect the theory of implied indemnity for submission to the jury instead of submitting both indemnity and contribution theories to the jury. The court did not err.

A plaintiff may pursue multiple and inconsistent remedies until the jury is instructed; at that point the plaintiff must make an election.[12] The record shows that Action waited until the court decided what jury instructions would be given before making its election. After further discussion of the jury instructions, Action elected to proceed without objection

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[8] *Williams v. Mozark Fire Extinguisher Co.*, 318 Ark. 792, 797, 888 S.W.2d 303, 305 (1994); *Thompson v. Sanford*, 281 Ark. 365, 663 S.W.2d 932 (1984); *Hough v. Cont'l Leasing Corp.*, 275 Ark. 340, 630 S.W.2d 19 (1982).

[9] *See Neste Polyester, Inc. v. Burnett*, 92 Ark. App. 413, 214 S.W.3d 882 (2005).

[10] *Id.*

[11] *Id.*

[12] *Regions Bank v. Griffin*, 364 Ark. 193, 196, 217 S.W.3d 829, 832 (2005); *Marx Real Est. Invs., LLC v. Coloso*, 2011 Ark. App. 426, 384 S.W.3d 595.

under the implied-indemnity theory. Because Action did not object, we cannot say that the circuit court erred in the timing of the election.[13] The fact that a party elects a certain remedy does not guarantee that the court will afford relief to the party making the election.[14] Nor does the lack of success mean that the election is not binding.[15]

Action also sought a new trial based on the circuit court's failure to strike McQueeny's third amended answer, filed shortly before trial, raising for the first time the defense of contributory negligence. However, the issue is not preserved for our review because Action failed to obtain a specific ruling on striking the affirmative defenses. At a hearing held just prior to the start of trial, the court ruled that it was not going to allow McQueeny to introduce a new exhibit or something outside the scope of discovery and that Action would have to object to the new material at that time. The court also noted that some of the matters complained of were simply McQueeny getting its record straight, while other issues, such as the statute of limitations, were still in play. The court did not expressly address striking the contributory-negligence affirmative defense.

It is well settled that a party must obtain a ruling from the circuit court on an issue in order to preserve an argument for appeal.[16] Because the circuit court did not rule on striking McQueeny's third amended answer, we have nothing to review.[17]

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[13] *Coloso*, *supra*.

[14] *See Sharpp v. Stodghill*, 191 Ark. 500, 503, 86 S.W.2d 934, 936 (1935).

[15] *Id.*; *see also Coloso*, *supra*.

[16] *Boeuf River Farms v. Browder*, 2012 Ark. App. 482, 422 S.W.3d 194.

[17] *Id.*

Action's final basis for a new trial is that the jury's answer to interrogatory number 1 finding it negligent is clearly against the preponderance of the evidence. Typically, this court reviews the circuit court's denial of a motion for a new trial for whether there is substantial evidence to support the jury's verdict.[18] Substantial evidence is that which goes beyond speculation or conjecture and is sufficient to compel a conclusion one way or the other.[19]

Action's argument tends to minimize the consequences of its actions and how much harm it caused. It is basically asking this court to reweigh the evidence differently from the jury. Action cites evidence that it merely followed the plans and instructions provided by McQueeny. It ignores other evidence that shows the extensive nature of Action's negligent installation and how much work was required to remedy that negligence. Determining the weight of the evidence is for the jury and not an appellate court.[20] We cannot say that the jury's finding that Action was negligent is clearly against the preponderance of the evidence.

Affirmed.

ABRAMSON and KLAPPENBACH, JJ., agree.

Newland & Associates, PLLC, by: *Joel Hoover*, for appellant.

Barber Law Firm, by: *Michael J. Emerson*, *M. Evan Stallings*, and *Rachel E. Hildebrand*, for appellee.

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[18] *Traveler's Cas. & Sur. Co. of Am. v. Sweet's Contracting, Inc.*, 2014 Ark. 484, at 9, 450 S.W.3d 229, 235.

[19] *Switzer v. Shelter Mut. Ins. Co.*, 362 Ark. 419, 208 S.W.3d 792 (2005).

[20] *Marvel v. Parker*, 317 Ark. 232, 234, 878 S.W.2d 364, 365 (1994).