DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

PRO FIRE PROTECTION, LLC, Appellant, v. METRO FIRE PROTECTION, INC., Appellee.	)	No. 1 CA-CV 10-0909 DEPARTMENT A **MEMORANDUM DECISION** (Not for Publication – Rule 111, Rules of the Arizona Supreme Court) **FILED 12/27/2011**

Appeal from the Superior Court in Maricopa County

Cause No. CV2008-020277

The Honorable Jeanne M. Garcia, Judge

AFFIRMED IN PART, VACATED IN PART AND REMANDED

Lewis Law Firm PLC — Phoenix
By Robert K. Lewis
Christopher Treadway
Amy M. Pokora
Attorneys for Appellant

Jones, Skelton & Hochuli, P.L.C. — Phoenix
By Edward G. Hochuli
Lori L. Voepel
Attorneys for Appellee

T I M M E R, Presiding Judge

¶1 Pro Fire Protection, LLC, ("Pro Fire") appeals the superior court's entry of summary judgment in favor of Metro Fire Protection, Inc. ("Metro Fire"). Pro Fire additionally challenges the court's orders deeming as admitted four requests for admissions served by Metro Fire on Pro Fire, awarding Metro Fire attorney fees associated with the motion to compel admissions, and ruling that Metro Fire cannot be named as a non-party at fault in the ongoing litigation. For the reasons that follow, we affirm in part, vacate in part, and remand.

BACKGROUND

¶2 This appeal concerns water damage from burst fire sprinkler pipes at a commercial bakery in Phoenix. The bakery building contains both office space and a production floor, which includes certain temperature-controlled zones such as a large freezer room. The building's fire suppression system comprises three "wet" sprinkler lines and two "dry" sprinkler lines. Wet lines always contain water while dry lines access water only when triggered by fire.

¶3 In the early morning hours of January 15, 2007, cold temperatures froze the water in one of the wet sprinkler lines, expanding the water and cracking the pipes. As the ice in the frozen line melted, water began to leak from these pipes onto the freezer and production lines below. The bakery contacted Metro Fire, which had contracted to maintain the sprinkler

lines, and Metro Fire instructed bakery employees to close the water valves and drain the sprinkler lines until the broken pipes could be fixed. Metro Fire then contacted Pro Fire, which maintained the dry sprinkler lines for Metro Fire, to ensure the dry lines were activated and functional.

¶4 The next day, on January 16, Pro Fire employee David Hale came to the bakery to service and activate the dry sprinklers. After inspecting and repairing the dry systems, which had been non-functional for reasons other than the freeze, Hale and bakery maintenance employee Vicente Echeveste began to reactivate the wet systems by opening water valves to fill the sprinkler pipes. According to Pro Fire and Hale, the bakery and its insurer had asked Hale to reactivate the wet systems. Hale successfully refilled one unaffected wet line; the second valve he opened, however, allowed water to flow into the damaged wet line, which expelled water onto the freezer and production area.

¶5 The bakery's insurer, Atlantic Specialty Insurance Company ("Atlantic Specialty"), paid claims for the harm caused by the leaking pipes on both January 15 and January 16. Atlantic Specialty then brought this subrogation suit against Metro Fire and Pro Fire, alleging each company had negligently caused the water loss resulting from the January 16 leak; the insurer did not seek damages stemming from the January 15 leak. Significantly, for purposes of this appeal, Atlantic Specialty

alleged Metro Fire negligently failed to label the wet sprinkler lines to clarify which valve controlled which lines and that the failure to label contributed to Hale's act in opening the line that caused the water loss on January 16.

¶6 After several months of discovery, Metro Fire moved for summary judgment, arguing no evidence showed it had breached the standard of care or caused the January 16 leak. Metro Fire separately moved the court to deem admitted four requests for admissions denied by Pro Fire. Both Pro Fire and Atlantic Specialty opposed the motion for summary judgment, but the latter stated it would dismiss Metro Fire from the suit so long as Pro Fire agreed to refrain from (or was precluded from) arguing Metro Fire had caused the harm. Shortly thereafter, Atlantic Specialty moved the court for an order precluding Pro Fire from naming Metro Fire as a non-party at fault in the event the court granted Metro Fire's motion for summary judgment.

¶7 After briefing and oral argument, the court granted summary judgment in favor of Metro Fire, finding the evidence failed to establish a causal link between Metro Fire's actions and the January 16 water loss. Specifically, the court ruled that Hale's deposition testimony established that whether the pipes were labeled had no bearing on Hale's decision to open the valves. The court also granted the motion to compel admissions and awarded Metro Fire its related attorney fees. Finally,

although the court denied Atlantic Specialty's motion as moot, the court ruled that in light of its ruling on the motion for summary judgment, Pro Fire could not name Metro Fire as a non-party at fault. After the court entered judgment for Metro Fire pursuant to Arizona Rule of Civil Procedure ("Rule") 54(b), this timely appeal followed.[1]

DISCUSSION

I. Summary judgment

¶8 Pro Fire argues the trial court erred by entering summary judgment for Metro Fire because genuine issues of material fact exist that a jury must resolve. Pro Fire does not challenge the superior court's ruling that Metro Fire did not cause the January 16 harm by failing to label the sprinkler lines. Pro Fire also does not contest that Atlantic Specialty

[1] Although entry of a Rule 54(b) judgment was permissible in this case, we urge the court to carefully consider the wisdom of entering such judgments in future, similar cases. This case was originally scheduled for trial last February but was stayed pending the outcome of this appeal. If Pro Fire prevails against Atlantic Specialty at trial, the propriety of the summary judgment for Metro Fire will be rendered moot, and this appeal would have been unnecessary, for the most part. Additionally, although the Rule 54(b) judgment does not encompass the court's ruling that Pro Fire cannot name Metro Fire a non-party at fault, the issue overlaps with issues concerning the propriety of summary judgment. It would have been more efficient for the court to try the case in February and then enter final judgment on all claims for potential review in a single appeal. *See McHazlett v. Otis Eng'g Corp.*, 133 Ariz. 530, 532, 652 P.2d 1377, 1379 (1982) ("The purpose of Rule 54(b) in requiring a determination that there is no just reason for delay in entering judgment is to prevent piecemeal appeals.").

purports to seek damages only for the harm caused by the January 16 water event. Rather, Pro Fire contends a jury could conclude Metro Fire's acts and omissions gave rise to the January 15 leak, which, in turn, contributed to the harm existing on January 16 for which Atlantic Specialty seeks damages.

¶9 We review the grant of summary judgment de novo, viewing all evidence and reasonable inferences in the light most favorable to Pro Fire as the party opposing summary judgment. *Wells Fargo Bank v. Ariz. Laborers, Teamsters & Cement Masons Local No. 395 Pension Trust Fund*, 201 Ariz. 474, 482, ¶ 13, 38 P.3d 12, 20 (2002) (citing *Thompson v. Better-Bilt Aluminum Prod. Co.*, 171 Ariz. 550, 558, 832 P.2d 203, 211 (1992)). Summary judgment is proper if no genuine issues of material fact exist and Metro Fire is entitled to judgment as a matter of law. Ariz. R. Civ. P. 56(c)(1); *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990).

¶10 A successful negligence claim requires proof of "a causal connection between the defendant's conduct and the resulting injury." *Gipson v. Kasey*, 214 Ariz. 141, 143, ¶ 9, 150 P.3d 228, 230 (2007). This causal link consists of (1) cause in fact, meaning the injury would not have occurred but for the defendant's conduct, and (2) proximate cause, meaning the conduct, "in a natural and continuous sequence, unbroken by any efficient intervening cause, produces [the] injury."

Robertson v. Sixpence Inns of Am., Inc., 163 Ariz. 539, 546, 789 P.2d 1040, 1047 (1990) (citations omitted); *see also Barrett v. Harris*, 207 Ariz. 374, 382, ¶ 27, 86 P.3d 954, 962 (App. 2004). To prove proximate causation, a claimant must show that the conduct at issue was "'a substantial factor in bringing about the harm.'"[2] *Thompson*, 171 Ariz. at 554, 832 P.2d at 207 (citing Restatement (Second) of Torts §§ 431(a), 433 (1965)).

¶11 Although evidence supports a finding that Hale would not have gone to the bakery and opened the valve on January 16 but for the January 15 leak (cause in fact), Pro Fire does not point to any evidence showing that the January 15 leak "in a natural and continuous sequence" produced the new harm suffered by the bakery on January 16 (proximate cause). *Robertson*, 163 Ariz. at 546, 789 P.2d at 1047; *see also A Tumbling-T Ranches v. Flood Control Dist. of Maricopa Cnty.,* 222 Ariz. 515, 540, ¶ 83, 217 P.3d 1220, 1245 (App. 2009) (holding that defendant alleging fault by a third party bears burden of providing evidence of such fault). By the time Hale reached the bakery on January 16, the broken sprinkler system had been shut down at Metro Fire's

[2] Several factors bear on whether conduct constitutes a substantial factor in producing harm: (a) the number and effect of other factors that contributed to producing the harm; (b) whether the tortious act created a situation that actively produced harm or had to be acted upon by other forces to produce harm; and (c) lapse of time. Restatement (Second) of Torts § 433; *see also Thompson*, 171 Ariz. at 554, 832 P.2d at 207; *Barrett*, 207 Ariz. at 381-82 n.7, ¶¶ 24-27, 86 P.3d at 961-62 n.7.

direction to prevent further water loss, and Hale was aware of the situation. Hale admitted that Metro Fire asked him only to service and activate the dry systems, he had never had an agreement to work on the wet systems, and Metro Fire never authorized him to turn on the water valve to the wet sprinkler systems. And fully conscious of his uncertainty about which valve controlled which wet sprinkler lines, Hale opened what turned out to be the valve controlling water flow to the broken sprinkler pipes, spilling water across the bakery. Had Hale not opened the valve to the leaky pipe, the bakery would not have been newly harmed by the flow of water into the freezer. Thus, the January 15 water event was not a "substantial factor" in bringing about the January 16 water event as Hale's wholly independent action, taken with full knowledge of the leaky pipe, produced the harm at issue in this case. *See Thompson*, 171 Ariz. at 554, 832 P.2d at 207; Restatement (Second) of Torts §§ 431(a), 433.

¶12 Pro Fire points to evidence that Hale and others observed significant injury to the contents of the freezer before Hale opened the valve to the leaky pipe. But Atlantic Specialty is not seeking compensation for these damages; it only seeks compensation for harm incurred after Hale refilled the leaky pipe. Atlantic Specialty will bear the burden at trial of proving the harm attributable solely to Hale's actions. Nothing

prevents Pro Fire from arguing at that time that some portion of the harm claimed pre-existed Hale's decision to open the wet-system valves. This argument would not amount to a comparative fault claim; it merely would counter Atlantic Specialty's assessment of harm incurred on January 16.

¶13 Pro Fire next argues the water events on January 15 and January 16 created an "indivisible injury" for which Metro Fire is at least partially liable based on the January 15 leak. Because Pro Fire raised this argument for the first time during oral argument on the motion for summary judgment, it waived that argument, and the superior court was justified in ignoring it. *Cf. Westin Tucson Hotel Co. v. State Dep't of Revenue*, 188 Ariz. 360, 364, 936 P.2d 183, 187 (App. 1997) (explaining party waives an argument by raising it for the first time in a reply to a motion for summary judgment).

¶14 Even assuming Pro Fire did not waive the argument, however, we reject it. Under Arizona tort law, a plaintiff is not required to apportion damages when an injury is indivisible. *Piner v. Superior Court*, 192 Ariz. 182, 188, ¶ 26, 962 P.2d 909, 915 (1998). When multiple actors contribute to one indivisible injury, the jury is required to calculate the total damages and then allocate a percentage of fault to each actor. *Id*. at 188-89, ¶¶ 26-27, 962 P.2d at 915-16. The flaw in Pro Fire's argument is that Atlantic Specialty does not allege it suffered

an indivisible injury; indeed, Atlantic Specialty adjusted the claims arising from the January 15 and January 16 events separately. Consequently, Pro Fire cannot use the indivisible injury principle as a defense to Metro Fire's motion for summary judgment. As previously explained, however, Pro Fire can hold Atlantic Specialty to its burden of proving Pro Fire proximately caused the damages claimed in this lawsuit.

¶15 For all these reasons, the court correctly ruled that no evidence shows that Metro Fire proximately caused the harm incurred on January 16, and, consequently, summary judgment for Metro Fire was appropriate.[3] In light of our decision, we need not address Metro Fire's contention that summary judgment was also appropriate because no evidence showed it breached the standard of care.

II. Requests for admissions

¶16 Following Hale's deposition, Metro Fire served on Pro Fire a second request for admissions regarding factors motivating Hale's decision to open the valves to the wet systems. Pro Fire denied each of the four requests with

[3] Pro Fire also challenges the court's order deeming admitted four requests for admission bearing on factors motivating Hale's decision to open the water valve to the damaged sprinkler lines. Because we conclude summary judgment was proper even absent these admissions, we need not address the propriety of the court's ruling in the context of summary judgment; we address them in the context of determining the propriety of the attorney-fee award, however. *See infra* ¶¶ 16-24.

explanations. Metro Fire, after seeking an amended response, moved to deem admitted all requested admissions on the ground that Pro Fire had no basis to deny them; Metro Fire also requested an award of attorney fees associated with the motion. After full briefing and oral argument, the court ordered the four facts underlying the requests be deemed admitted "because that's what Mr. Hale testified to." We review the court's ruling for an abuse of discretion. *Scottsdale Ins. Co. v. Cendejas*, 220 Ariz. 281, 285, ¶ 17, 205 P.3d 1128, 1132 (App. 2009).

¶17 Arizona Rule of Civil Procedure 36(a) provides that any denial of a request for admission must "fairly meet the substance of the requested admission" and be qualified or partially admitted when good faith so requires. *Id.* Upon the requesting party's motion, the court may order that the fact at issue be deemed admitted if it finds that the answering party violated Rule 36(a). *Id.*

¶18 Metro Fire's first request asked Pro Fire to "[a]dmit that the existence of unlabeled sprinkler system pipes played no role" in Hale's decision to open the wet system valves. Pro Fire denied the request, claiming Hale would not have opened the valve had he known the pipes led to the damaged area. Hale's testimony supports a finding that lack of labels played some role in his decision to open the broken sprinkler valve. Hale's

expressed intent to turn on only the "unaffected" or "good" wet systems and his efforts to trace which valve led to the broken system implicitly suggest Hale would not have opened the broken pipe if labeled. The court therefore erred in deeming admitted this first request for admission.

¶19 Metro Fire's remaining requests sought admissions that the condition of the sprinkler systems and the January 15 leak played no role in Hale's decision to open the valve.[4] Pro Fire denied the requests because any defects in the condition of the pipes might have caused the January 15 leak, which resulted in Hale's presence at the bakery on January 16 and necessitated his decision to turn on the wet systems. The requests addressed the reason for Hale's *decision* to activate the wet systems after he arrived at the bakery; they did not address the reason for Hale's *presence* at the bakery that day. Hale explicitly testified in his deposition that he opened the wet-system pipes at the direction of a bakery employee, and any noted deficiencies in the systems played no role in this decision. Because Pro Fire did not "fairly meet the substance" of requests

[4] Metro Fire asked Pro Fire to admit that the lack of pipe insulation, any defects in the sprinkler systems, and the first and "second water event[s]" played no role in Hale's decision to turn on the wet systems. The reference in the last request regarding the "second water event" is presumably an error as the second event occurred *after* Hale turned on the wet systems and logically could not have caused him to turn on the wet systems. Pro Fire responded to the request as if it asked only about the January 15 leak.

two through four, *see* Rule 36, and in light of Hale's testimony about the reason he turned on the wet systems, the superior court did not abuse its discretion by deeming admitted the facts underlying these requests.

¶20 For these reasons, we vacate the court's order entered May 19, 2010, to the extent it deems admitted Metro Fire's first request for admission. The court did not err by deeming admitted the remaining requests for admissions.

III. Attorney fees

¶21 Because the superior court granted the motion to deem admitted the requests for admissions, it was required to award Metro Fire its expenses, including attorney fees, associated with the motion, unless the court determined that Pro Fire's responses were "substantially justified." Ariz. R. Civ. P. 36(a), 37(a)(4)(A). The court awarded attorney fees to Metro Fire because "there was some dancing around" by Pro Fire in its denials. We review the award for an abuse of discretion. *Seidman v. Seidman*, 222 Ariz. 408, 411, ¶ 18, 215 P.3d 382, 385 (App. 2009).

¶22 Pro Fire argues the superior court erred by failing to find that its responses to the requests for admissions were substantially justified. Specifically, Pro Fire points out it offered explicit reasons and support for its denials.

¶23 In light of our decision that the court erred by deeming Metro Fire's first request admitted, we similarly decide the court erred by awarding fees relating to this request. The court did not err, however, by awarding fees relating to the remaining requests. As explained, even though Pro Fire offered explanations for its responses, it did not fairly address the substance of the requests. Consequently, we cannot say the court erred by failing to find that Pro Fire's responses were "substantially justified."

¶24 For these reasons, we vacate the fee award and remand for the court to reconsider the amount of the award in light of our decision that Pro Fire did not respond inappropriately to Metro Fire's first request for admission.

IV. Non-party at fault

¶25 Pro Fire finally challenges the court's order precluding Pro Fire from naming Metro Fire as a non-party at fault. The ruling does not impact the summary judgment entered in favor of Metro Fire, however. Indeed, the court's ruling precluding Pro Fire from naming Metro Fire as a non-party at fault was entered apparently as a basis for denying Atlantic Specialty's motion as moot. Because the court did not enter a Rule 54(b) judgment encompassing this ruling, the order is interlocutory and not properly before us. *Maria v. Najera*, 222 Ariz. 306, 307, ¶ 6, 214 P.3d 394, 395 (App. 2009) ("[A]bsent

the express 'determination and direction' as set forth in Rule 54(b), the judgment is merely interlocutory." (citation omitted)). We do not address it further.

CONCLUSION

¶26 For the foregoing reasons, we affirm the summary judgment entered in favor of Metro Fire. We vacate the court's order entered May 19, 2010 to the extent it deems admitted Metro Fire's first request for admission. Finally, we remand for a recalculation of attorney fees awarded to Metro Fire in light of our decision.

/s/
Ann A. Scott Timmer, Presiding Judge

CONCURRING:

/s/
Patrick Irvine, Judge

/s/
Lawrence F. Winthrop, Chief Judge