STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1764

Big-D Construction Midwest, LLC,
Appellant,

vs.

JL Schwieters Construction, Inc.,
Respondent,

vs.

Chicago Flameproof & Wood Specialties Corp.,
Respondent.

Filed September 8, 2020
Affirmed
Reilly, Judge

Hennepin County District Court
File No. 27-CV-16-16766

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Considered and decided by Larkin, Presiding Judge; Reilly, Judge; and Jesson, Judge.

U N P U B L I S H E D O P I N I O N

REILLY, Judge

This appeal follows a jury trial on construction-defect claims brought by appellant-general-contractor against respondent-carpentry-subcontractor and subcontractor's third-party claims against respondent-materials-supplier. Appellant argues that the district court erred by denying appellant's posttrial motion for judgment as a matter of law on its contractual-indemnity claims, and abused its discretion by awarding attorney fees and costs to respondent-subcontractor as the prevailing party. We affirm.

FACTS

Appellant Big-D Construction Midwest LLC (Big-D) is a general contractor with its principal place of business in Minneapolis, Minnesota. Respondent/third-party plaintiff JL Schwieters Construction Inc. (JLS) is a carpentry contractor in Hugo, Minnesota. Respondent/third-party defendant Chicago Flameproof & Wood Specialties Corp. (CFP) is an Illinois-based supplier that manufactures and distributes treated lumber products.

In 2015 and 2016, Big-D entered into contracts to serve as the general contractor on two separately-owned, mixed-use building complexes in the Minneapolis area, one at 3118 Lake Street (the 3118 Project) and the other at 1700 Minnetonka Boulevard (the 1700 Project or, together, the projects). Big-D subcontracted with JLS for the wood-frame construction of the buildings. JLS agreed to provide "all supervision, labor and equipment" required for the construction projects, and to perform its work in accordance with the plans and specifications for each project. Big-D agreed to pay JLS $2,636,335 for the 3118 Project, and $2,252,450 for the 1700 Project.

JLS subcontracted with CFP to supply specialized fire-retardant treated lumber, known as FRT lumber, for the exterior wall panels of buildings. The Minnesota Building Code requires that wood-framed exterior walls, such as those used in the projects, be constructed with FRT lumber. Industry practice also stipulates that once an architect has stamped and approved a proposal specifying certain materials, only those approved materials may be used on the construction project. The subcontracts required JLS to procure FRT lumber from one of the approved manufacturers for that product. JLS submitted a proposal to Big-D and the architect, identifying three brand-name types of FRT lumber for the projects. Big-D and the architect approved JLS's proposal to use one of these three types of FRT lumber on the construction projects.

JLS believed that it ordered a specific brand of FRT lumber from CFP. But CFP instead delivered a generic brand of FRT lumber to JLS. This generic lumber was not one of the three FRT lumber brands preapproved by Big-D or the architect. CFP shipped the generic FRT lumber to JLS, which JLS used to manufacture the wood-frame panels for the exterior walls of the projects. JLS prefabricated the wood-frame panels at its shop and began installing these panels on the projects in the spring of 2015.

Big-D agreed, under the construction contracts, to ensure that the materials installed in the projects and its subcontractors' work complied with the contract documents and the Minnesota Building Code. The contracts obligated Big-D to arrange for a special inspection at JLS's shop to verify that its work conformed to approved construction documents and referenced standards. But Big-D did not arrange for a special inspection at JLS's shop. In June 2016, city officials learned that JLS installed uncertified lumber in the

projects. City officials ordered Big-D to stop all work on the exterior framing of the projects. In August 2016, Big-D issued a stop-work order, directing JLS to remove all of the generic FRT lumber and replace it with preapproved FRT lumber at no cost to Big-D. The parties agreed that Big-D would pay JLS the amount due and owing under the original subcontracts, and that JLS would pay for labor and materials related to removing and replacing the lumber. JLS completed the removal and replacement process at a cost of $2,107,944.06 on the 3118 Project, and $350,524.73 on the 1700 Project.

In November 2016, Big-D initiated a civil action against JLS alleging two counts of contractual indemnity and two counts of breach of contract, and claimed $6.6 million in delay damages. JLS filed an answer generally denying Big-D's claims and asserting a breach-of-contract counterclaim against Big-D for $2.5 million, asserting that (1) Big-D failed to pay JLS the full amounts owed on the subcontract, and (2) for costs incurred in removing and replacing the FRT lumber. JLS impleaded CFP as a third-party defendant and asserted third-party claims against CFP for common-law indemnity and contribution, if Big-D obtained judgment against JLS.[1]

Before trial, JLS filed a motion in limine to preclude Big-D from introducing evidence of the indemnity provisions at trial on the ground that the provisions were unenforceable under Minnesota law. At the motion hearing, Big-D noted that the enforceability of the indemnity clauses was a question of law and could be addressed after trial. Big-D agreed not to introduce evidence about the indemnity provisions at trial. The

[1] CFP notes on appeal that, while it settled its differences with JLS before trial, it remains exposed to potential indemnity obligations to JLS.

district court granted JLS's in limine motion and ruled that "Indemnity will be addressed after the trial. If circumstances change, [Big-D] may request permission from the Court to address it during the trial." Big-D did not request permission to address its indemnity claims at trial.

The district court conducted a ten-day jury trial. At the close of testimony, the district court reviewed the proposed jury instructions and special verdict form with counsel. Big-D did not object to the jury instructions or the special verdict form. The special verdict form included questions related to Big-D's claims against JLS, asking: (1) whether JLS breached its subcontract with Big-D for the 3118 Project and 1700 Project; (2) whether JLS's breach caused damage to Big-D; and (3) what amount of money would fairly and adequately compensate Big-D for its damages. The parties did not ask the district court to instruct the jury on the issue of JLS's indemnity obligations to Big-D.

After six hours of deliberation, the jury returned its verdict, finding that: (1) JLS breached the subcontracts with Big-D; (2) Big-D suffered damages as a result of the breaches; and (3) Big-D was entitled to damages of $0, presumably because it should have discovered JLS's failures by facilitating a special inspection.[2] The jury awarded JLS $506,614.76 on its breach-of-contract counterclaim, which included $284,892.86 for the 3118 Project and $221,721.90 for the 1700 Project.

[2] Because the jury determined that Big-D was not entitled to monetary damages, it did not reach the question of whether JLS was entitled to indemnity from CFP on JLS's third-party claim.

Following trial, Big-D moved for judgment as a matter of law on its contractual-indemnity claims.[3] Big-D argued that JLS was obligated under the subcontracts to indemnify Big-D for any and all damages arising out of JLS's breach, "regardless of whether any other party engaged in any other wrongful act or omission that contributed to those damages." Big-D sought indemnity damages of nearly $6.6 million—the same damages it sought under its breach-of-contract claims. The district court denied the motion and determined that "[t]he indemnity clauses in the subcontracts for [the projects] are valid." But despite its determination that the indemnity clauses were valid, it denied Big-D's motion because there were no damages to indemnify. Specifically, the district court noted that Big-D was not entitled to contractual indemnity because the jury did not award any damages to Big-D on its breach-of-contract claims and "there are no damages to indemnify."

After trial, JLS moved for its attorney fees and costs under the subcontracts. The subcontracts contained a fee-shifting provision stating that, "In the event of a dispute, the prevailing party shall be entitled to recover from the other party all reasonable attorney fees, expert fees, costs and expenses incurred, including statutory interest." The district court determined that JLS was entitled to recover its attorney fees and costs as the prevailing party and appointed a special master to evaluate the request. The special master recommended an award to JLS of $800,020.25 in attorney fees and $119,519.99 in costs and disbursements. Big-D objected to the special master's recommended award on the

[3] Big-D also moved for judgment as a matter of law on its breach-of-contract claims. The district court denied the motion; Big-D does not challenge this determination on appeal.

ground that JLS was not the prevailing party. The district court rejected Big-D's argument, adopted the special master's recommendations in full, and entered judgment in JLS's favor for $800,020.25 for attorney fees and $119,519.99 for costs and disbursements.

This appeal follows.

D E C I S I O N

I. The district court did not err by denying Big-D's posttrial motion for judgment as a matter of law on its contractual-indemnity claims.

a. Big-D forfeited appellate review of this issue.

Big-D argues that the district court erred by denying its posttrial motion for judgment on its contractual-indemnity claims against JLS. Big-D specifically challenges the district court's jury instructions on the grounds that the jury was not asked to determine indemnity damages and was not instructed on the standard for an indemnity award. "The district court has broad discretion in determining jury instructions and we will not reverse in the absence of abuse of discretion." *Hilligoss v. Cargill, Inc.*, 649 N.W.2d 142, 147 (Minn. 2002). The district court also has "broad discretion in framing special verdict questions." *Lake Superior Ctr. Auth. v. Hammel, Green & Abrahamson, Inc.*, 715 N.W.2d 458, 480 (Minn. App. 2006) (citations omitted), *review denied* (Minn. Aug. 23, 2006).

The subcontracts between Big-D and JLS contained a "Duty to Indemnify, Defend and Hold Harmless" provision, under which JLS agreed to indemnify Big-D "from any and all claims . . . of every kind and nature whatsoever" related to the construction subcontracts. Big-D argues that JLS has to indemnify Big-D against all damages arising from JLS's acts or omissions, even if any of Big-D's acts contributed to those damages. Thus, Big-D argues

that its errors—such as not conducting a special investigation—did not absolve JLS of its obligation to indemnify Big-D from damages otherwise attributable to JLS's breach. "[A]n action based on an indemnity agreement is for the recovery of money based upon the promise to pay and is therefore triable by a jury. If fact issues exist with respect to the indemnity agreement, they are for the jury." *United Prairie Bank-Mountain Lake v. Haugen Nutrition & Equip., LLC*, 813 N.W.2d 49, 55 (Minn. 2012) (quotation omitted); *see also* Minn. R. Civ. P. 49.01(a) (requiring party demand submission of fact issue to jury).

Big-D stated in its posttrial motion that the underlying factual basis for its indemnity claims was identical to the factual basis for its breach-of-contract claims. During the posttrial hearing, the district court inquired, "if [the court] had decided the enforceability question before trial and ruled in your favor and we had a jury trial on damages, your case, your factual case, would be the same." Big-D's counsel responded, "Correct." And Big-D did not request jury instructions or special-verdict-form questions about its claims for indemnity damages. After the parties finished presenting their cases, the district court met with counsel to review the proposed jury instructions and the special verdict form. Big-D did not object to the jury instructions, nor did it object to the lack of questions related to indemnity damages. The district court presented the stipulated instructions and special-verdict-form questions to the jury.

The failure to request a jury instruction constitutes forfeiture of the issue on appeal. *Germann v. F.L. Smithe Mach. Co.*, 381 N.W.2d 503, 509-10 (Minn. App. 1986) (stating that when party does not request jury instruction and neither jury instructions nor special-

verdict form include issue, appellate court may not consider it), *aff'd*, 395 N.W.2d 922 (Minn. 1986); *see also Murphy v. City of Minneapolis*, 292 N.W.2d 751, 755 (Minn. 1980) (concluding that party's failure to object to jury instructions at trial waives right to appeal issue). Similarly, "a failure to object to a special verdict form prior to its submission to the jury constitutes a waiver of a party's right to object on appeal." *Kath v. Burlington N. Railroad Co.*, 441 N.W.2d 569, 572 (Minn. App. 1989) (citation omitted), *review denied* (Minn. July 27, 1989); *see also H Window Co. v. Cascade Wood Prods.*, 596 N.W.2d 271, 274 (Minn. App. 1999) (stating that "a party who fails to object to a special verdict form before its submission to the jury, waives any later objection"), *review denied* (Minn. Aug. 17, 1999).

Here, it is uncontroverted that Big-D did not request jury instructions or special-verdict-form questions related to its contractual-indemnity claims. Thus, the district court did not instruct the jury on JLS's indemnity obligations to Big-D, or on indemnity damages. The special verdict form included no questions related to the indemnification provisions of the subcontracts between Big-D and JLS. Because Big-D failed to object to the jury instructions and special verdict form, we consider this issue forfeited.

We determine, further, that Big-D failed to preserve this issue for appeal. Generally, we will not consider matters not argued to, or considered by, the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). A party may neither raise a new issue on appeal nor "obtain review by raising the same general issue litigated below but under a different theory." *Id.*; *see also Crowley v. Meyer*, 897 N.W.2d 288, 293 (Minn. 2017). A party must object to jury instructions at trial to preserve its objection. Minn. R. Civ. P. 51.04(a).

Further, "matters such as . . . jury instructions are subject to appellate review only if there has been a motion for a new trial in which such matters have been assigned as error." *Sauter v. Wasemiller*, 389 N.W.2d 200, 201 (Minn. 1986); *see also County of Hennepin v. Bhakta*, 922 N.W.2d 194, 198 (Minn. 2019) (noting that a new-trial motion provides the district court with an opportunity to remedy errors or more fully develop the record).

JLS filed an in limine motion to prohibit Big-D from introducing evidence of the indemnity provisions at trial. Big-D noted that the enforceability of the indemnity clauses was a question of law for the court and could be presented to the bench after trial. The district court ruled that "Indemnity will be addressed after the trial. If circumstances change, [Big-D] may request permission from the Court to address it during the trial." At trial, Big-D did not request permission to address or prove anything related to its indemnity claims. Big-D did not offer, or seek to offer, any separate proof or instructions related to indemnity damages.

The record establishes that the district court afforded Big-D the opportunity to raise the indemnity issue during trial if circumstances changed. Before trial the district court determined that indemnity "might be another issue that comes up in . . . the verdict form or the instructions." The district court reasoned that while indemnity was "a legal question," it also had "some evidentiary aspects to it and evidence to argue." Thus, the district court did not preclude Big-D from eliciting testimony or proposing jury instructions related to the measure of indemnity damages, if circumstances changed during trial. *See, e.g., State v. Word*, 755 N.W.2d 776, 783 (Minn. App. 2008) (recognizing that "evidentiary

objections should be renewed at trial when an in limine or other evidentiary ruling is not definitive but rather provisional or unclear").

Because Big-D failed to exercise its opportunity to propose jury instructions or special-verdict-form questions related to indemnity damages, failed to object to the jury instructions prepared by the district court and parties, and failed to seek relief from the district court in a new-trial motion, we determine that Big-D did not preserve the issue for appeal.

b. Big-D is not entitled to a new trial under the plain-error standard of review.

While we determine that Big-D forfeited this issue because it failed to object to the jury instructions, we determine, further, that Big-D cannot prove it is entitled to a new trial under a plain-error analysis. "A party who objects to an instruction or the failure to give an instruction must do so on the record, stating distinctly the matter objected to and the grounds of the objection." Minn. R. Civ. P. 51.03(a). To preserve an assignment of error for a failure to give a requested instruction, a party must request the instruction in writing and object on the record before the district court delivers jury instructions. Minn. R. Civ. P. 51.04(a)(2). Even if a party fails to preserve an issue, we may review the failure to give an instruction for plain error. Minn. R. Civ. P. 51.04(b). A reviewing court applies "the plain-error test of rule 51.04(b) to a civil case in which a party sought a new trial based on an allegedly erroneous instruction to which it did not object." *Poppler v. Wright Hennepin Coop. Elec. Ass'n*, 834 N.W.2d 527, 550 (Minn. App. 2013) (citing *Frazier v. Burlington N. Santa Fe Corp.*, 811 N.W.2d 618, 626 (Minn. 2012)), *aff'd*, 845 N.W.2d 168 (Minn. 2014). We also review an unobjected-to special verdict form "to determine whether there

is an error of fundamental law or controlling principle." *Estate of Hartz v. Nelson*, 437 N.W.2d 749, 752 (Minn. App. 1989), *review denied* (Minn. July 12, 1989).

"Under the plain-error test, an appellate court reviews an assertion of error to determine (1) whether there is an error, (2) whether the error is plain, and (3) whether the error affects a party's substantial rights." *Poppler*, 834 N.W.2d at 551 (citations omitted). If an appellant fails to object to the district court's jury instructions, we review for plain error. *Id.* If these requirements are satisfied, we consider "whether correction of the error is necessary to ensure fairness and the integrity of the judicial proceedings." *Id.* Even so, "[f]ailure to satisfy any of the prongs of the plain-error test dooms the claim." *Frazier*, 811 N.W.2d at 626.

Big-D's substantial rights were not affected. "[A]n error affects substantial rights where there is a reasonable likelihood that the absence of the error would have had a significant effect on the jury's verdict." *Poppler*, 834 N.W.2d at 553. "In a civil case, a plain error may affect substantial rights if the error has a significant effect on the amount of damages awarded by the jury." *Id.* Here, the jury determined that Big-D was not entitled to any money damages. And the record does not show that the jury would have awarded any more damages if the indemnity issues had been presented. Big-D has not satisfied its burden of establishing that the result of the trial would have been different if Big-D had presented factual evidence of its damages under an indemnity theory of recovery. *See id.* (noting that party asserting error bears burden of persuasion that district court's plain error affected party's substantial rights). Because Big-D's substantial rights were not affected,

we do not address the remaining plain-error factors. Big-D is not entitled to a new trial under the plain-error test.[4]

II. The district court did not abuse its discretion by awarding JLS its attorney fees and costs.

Big-D challenges the district court's attorney-fee award. We review the district court's award for an abuse of discretion. *Carlson v. SALA Architects, Inc*., 732 N.W.2d 324, 331 (Minn. App. 2007), *review denied* (Minn. Aug. 21, 2007). Appellate courts also "generally review a district court's award of costs and disbursements for an abuse of discretion." *Dukowitz v. Hannon Sec. Servs*., 841 N.W.2d 147, 155 (Minn. 2014). A district court abuses its discretion when its decision is "against logic and facts on the record." *Posey v. Fossen*, 707 N.W.2d 712, 714 (Minn. App. 2006). The party challenging the district court's exercise of discretion bears the burden of proof. *Id*.

Big-D argues that JLS is not entitled to its attorney fees and costs because it is not a "prevailing party." We disagree. "In determining who qualifies as the prevailing party in an action, the general result should be considered, and inquiry made as to who has, in the view of the law, succeeded in the action." *Elsenpeter v. St. Michael Mall, Inc*., 794 N.W.2d 667, 673 (Minn. App. 2011) (citation omitted). "The prevailing party in any action

[4] JLS also argues that Big-D's new-trial motion is unwarranted by the record, is contrary to public policy, and is unenforceable under Minnesota law. Because we determine that Big-D forfeited these issues and cannot prevail under the plain-error test, we do not reach the alternative arguments. Nor did JLS file a notice of related appeal regarding the enforceability of the contractual-indemnification provision. Thus, that issue is not before us in this appeal.

is one in whose favor the decision or verdict is rendered and judgment entered." *Id.* "We review a district court's determination of a prevailing party for an abuse of discretion." *Id.*

The record supports the district court's determination that JLS was the prevailing party because JLS succeeded in the action and the jury returned a verdict in JLS's favor on its breach-of-contract counterclaim. Following a ten-day jury trial, the jury awarded Big-D $0 on its breach-of-contract claims and awarded JLS $506,614.76 on its breach-of-contract counterclaim. JLS sought attorney fees and costs under the fee-shifting provisions of the subcontracts, which stated, "In the event of a dispute, the prevailing party shall be entitled to recover from the other party all reasonable attorney fees, expert fees, costs and expenses incurred, including statutory interest." The district court determined that "[u]nder any reasonable interpretation of 'prevailing,' [JLS] prevailed."

The district court appointed a special master to evaluate the reasonableness of the amount requested. The special master reasoned that "JLS prevailed completely on the claim by Big-D and prevailed substantially on their counterclaim" and that "JLS's request for attorney fees after the adjustments is fair and reasonable, considering the difficulty of issues, the amount of money in controversy, and the results of the jury verdict." The special master recommended an award of $800,020.25 in attorney fees and $119,519.99 in costs and disbursements.

The district court adopted the special master's recommendations in full, and determined that JLS was the prevailing party and therefore entitled to attorney fees and costs under the subcontracts. The district court awarded JLS $800,020.25 in attorney fees

and $119,519.99 in costs and disbursements against Big-D. Because we discern no abuse of discretion in this decision, we affirm.

Affirmed.