STATE OF MICHIGAN

COURT OF APPEALS

SHARON LUNDIN,

Plaintiff-Appellant,

v

CITY OF BENTON HARBOR,

Defendant-Appellee.

UNPUBLISHED
March 13, 2007

No. 264915
Berrien Circuit Court
LC No. 2004-003312-CZ

Before: Fort Hood, P.J., and Smolenski and Murray, JJ.

PER CURIAM.

Plaintiff appeals as of right a judgment of no cause of action entered after a bench trial on her discrimination claim and claim for writ of superintending control. We affirm the judgment on plaintiff's claim for superintending control, vacate the judgment on her discrimination claim, and remand for further proceedings consistent with this opinion.

If the merits of plaintiff's case were the only issue on appeal, we would have no difficulty affirming the trial court's judgment of no cause of action. The trial court's decision was supported by the evidence presented during the bench trial, and the trial court did not misapply the law. However, that is not the only issue on appeal. Instead, plaintiff has also raised a very interesting issue regarding the application of MCR 2.312(A). In our view, the plain language of that court rule allowed plaintiff to serve the request for admission when she did. By operation of the rule, defendant's failure to answer or object to the request deemed all the matters admitted, which could have caused the trial court to reach a different conclusion on the merits of plaintiff's discrimination claim.[1] Therefore, for the reasons explained more fully below, we vacate the trial court's judgment on plaintiff's discrimination claim.

MCR 2.312(A) provides in pertinent part that,

[1] For the reasons stated by the dissent, with which we are in full agreement, plaintiff's claim for superintending control was properly dismissed and would have no chance of success on a remand.

> *Within the time for completion of discovery, a party may serve* on another party a written request for the admission of the truth of a matter within the scope of MCR 2.302(B) stated in the request that relates to statements or opinions of fact or the application of law to fact, including the genuineness of documents described in the request. [Emphasis added.]

MCR 2.312(B)(1) then provides that in the normal course the responding party has 28 days in which to answer or object (or both) to the request.

The trial court's decision seemed to rest exclusively on its interpretation of MCR 2.312(A), which is a legal issue subject to de novo review. *Knue v Smith*, 269 Mich App 217, 220; 711 NW2d 84 (2005). We use the canons of statutory construction when interpreting court rules, *Hyslop v Wojjusik*, 252 Mich App 500, 505; 652 NW2d 517 (2002), so our duty is to apply the plain and unambiguous language of the court rule. *Yudashkin v Linzmeyer*, 247 Mich App 642, 649; 637 NW2d 257 (2001). The trial court concluded that plaintiff had to serve the request to admit so as to allow defendant time to respond before discovery closed. However, MCR 2.312(A) clearly states that "within the time set for completion of discovery", ie., before the discovery cut-off date, a party may *serve* requests for admissions on another party. There are no exceptions, caveats, or limitations to the language within subrule A. Thus, plaintiff properly served the request to admit because service was accomplished before the discovery completion date.

Although the 28 day deadline for responding to the request came after the discovery completion date, "[a] request for admission is not a typical discovery device . . . because the purpose 'is not to discover facts but rather to establish some of the material facts in a case without the necessity of formal proof at trial . . . .'" *Radtke v Miller, Canfield, Paddock & Stone*, 453 Mich 413, 420 n 6; 551 NW2d 698 (1996). As this is the primary tool for a request for admission,[2] it could be served anytime up to the end of discovery, for the forthcoming responses would not be providing additional information, but only objections, admissions or denials with explanation. MCR 2.312(B)(1)-(4). And, if motions are filed over the requests or responses, MCR 2.312(D) specifically indicates that the court may resolve the issue at a pretrial conference or at any other time before trial. Hence, the court rule contemplates that issues surrounding the requests or responses will need to be addressed after the close of discovery, ie., at a pretrial conference or at any other time before trial.

Pursuant to this analysis, defendant had an obligation to respond to plaintiff's properly served request for admissions. By failing to do so "the matters in the request are deemed admitted," *Medbury v Walsh*, 190 Mich App 554, 556; 476 NW2d 470 (1991), "unless the trial court, on motion, permits withdrawal or amendment for good cause shown." *Employers Mutual Casualty Co v Petroleum Equip Inc*, 190 Mich App 57, 62; 475 NW2d 418 (1991). Defendant

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[2] While a request to admit can also be used to refine the issues for discovery, if that is the intended purpose the request would naturally be served well before the discovery cut-off date (likely at the commencement of discovery), which would still be "within the time for completion of discovery." MCR 2.312(A).

never filed anything that could be amended, and even if it did, it never moved the trial court to do so.[3] Accordingly, all the matters within plaintiff's request for admissions should have been deemed admitted.

Accepting these matters as admitted would not necessarily result in a different decision by the trial court on the merits of plaintiff's discrimination claim. Most of the requests establish procedural type facts that would likely have no bearing on a decision on the merits, except perhaps for the matters requested to be admitted in numbers nine and twelve. Nevertheless, the trial court is the proper forum to make that initial decision. Accordingly, we vacate in part the trial court's judgment and remand for further proceedings on plaintiff's discrimination claim.

Affirmed in part, vacated in part, and remanded. We do not retain jurisdiction.

/s/ Karen M. Fort Hood
/s/ Christopher M. Murray

[3] Unfortunately, defendant has also not filed a brief with this Court.