STATE OF MICHIGAN

COURT OF APPEALS

GERALD FAHEY, Plaintiff-Appellant/Cross-Appellee,	UNPUBLISHED November 20, 2007
v	No. 270947 Wayne Circuit Court
CITY OF DETROIT, Defendant-Appellee/Cross-Appellant.	LC No. 04-427949-NO

Before: Servitto, P.J., and Sawyer and Murray, JJ.

PER CURIAM.

Plaintiff was injured when he fell while crossing the street at an intersection. He brought this action alleging that the fall was caused by a loose brick in the street and that defendant breached its statutory duty to "maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel." MCL 769.1401(2). A jury found that the area where plaintiff fell was "in reasonable repair, and in a condition reasonably safe and fit for travel." The trial court entered a judgment of no cause of action in favor of defendant, and denied plaintiff's motions for a directed verdict, judgment notwithstanding the verdict, or a new trial. Plaintiff appeals as of right and defendant cross appeals, arguing alternative grounds for affirmance. We affirm.

The evidence at trial showed that road construction work was being performed in the area of Woodward Avenue and Clifford Street in downtown Detroit. Plaintiff began to cross Woodward Avenue on foot at the only point where pedestrians were permitted to cross. As he neared the center of the street, he placed his weight on his right foot and felt his foot suddenly slip between two bricks and one brick rolled in. Plaintiff was not sure exactly how he fell, but thought that his foot became locked between two bricks. His leg remained locked in place and he heard a loud pop and a ripping noise as he tried to continue, causing him to fall. As he pulled his leg up, he noticed several loose bricks on the ground. Other bricks in the area appeared to have grout between them.

On appeal, plaintiff argues that the trial court erred by refusing to enforce a deemed binding admission by defendant, pursuant to MCR 2.312. This Court reviews a trial court's decision regarding admissions under MCR 2.312 for an abuse of discretion. *Hilgendorf v St John Hosp & Medical Ctr Corp*, 245 Mich App 670, 688; 630 NW2d 356 (2001).

The parties agree that defendant failed to timely respond to plaintiff's requests for admissions. The trial court initially agreed that, as a result, defendant was deemed to have admitted that on the date of plaintiff's fall, "the pedestrian sidewalk and crosswalk at Woodward Avenue and Clifford Street was in disrepair." Later, however, a dispute arose concerning the effect of this admission and the trial court ruled that it would reserve any decision whether to instruct the jury on the effect of the admission until after it heard the testimony at trial. At trial, the court did not instruct the jury regarding the admission and plaintiff was required to prove all elements of his claim.

MCR 2.312(A) permits a party to serve on the opposing party requests to admit facts or the application of the law to certain facts. "Each matter as to which a request is made is deemed admitted unless, within 28 days after service of the request, or within a shorter or longer time as the court may allow, the party to whom the request is directed serves on the party requesting the admission a written answer or objection addressed to the matter." MCR 2.312(B)(1). Pursuant to MCR 2.312(D)(1), "[a] matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of an admission."

When an admission is made pursuant to MCR 2.312, the admission conclusively establishes the facts in question and the opposing party is not required to introduce evidence to prove those facts. Unlike evidentiary admissions, which are not conclusive and are always subject to contradiction or explanation, judicial admissions under MCR 2.312 are conclusive, unless allowed to be withdrawn by the court. *Radtke v Miller, Canfield, Paddock & Stone,* 453 Mich 413, 420-421; 551 NW2d 698 (1996). But judicial admissions, like evidentiary admissions, are subject to all pertinent objections regarding admissibility. *Id.*

Plaintiff's claim was predicated on MCL 691.1402(1). Pursuant to that statute, a person who sustains bodily injury may recover damages from a governmental agency that fails "to keep a highway under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel." In *Wilson v Alpena Co Rd Comm,* 474 Mich 161, 168; 713 NW2d 717 (2006), the Court explained:

> In determining what constitutes a "defect" under the act, our inquiry is again informed by the "reasonably safe and convenient for public travel" language of MCL 691.1402(1). In other words, an *imperfection* in the roadway will only rise to the level of a compensable "defect" when that imperfection is one which renders the highway not "reasonably safe and convenient for public travel," and the government agency is on notice of that fact. [Emphasis in original.]

Thus, the mere fact that a roadway is in disrepair does not entitle a plaintiff to recovery under MCL 691.1402(1). Rather, the plaintiff must prove that the defect is one that renders the roadway "not reasonably safe and convenient for public travel."

Although plaintiff argues that the trial court erred by not enforcing the admission at trial, the admission only established that the roadway was in "disrepair." Contrary to what plaintiff argues, the admission did not conclusively establish defendant's liability under MCL 691.1402(1), because the fact that the roadway may have been in "disrepair" did not establish that the roadway was not "in reasonable repair and in a condition reasonably safe and fit for travel." Even if the trial court should have instructed the jury that the fact that the roadway was

in disrepair was deemed admitted, such an admission would not have been particularly remarkable in this case considering that it was undisputed that the area was under construction. Further, in order for plaintiff to prevail, the jury would still need to determine that the roadway was not in reasonable repair and in a condition reasonably safe and fit for travel. The jury expressly considered this question and determined that the roadway was "in reasonable repair, and in a condition reasonably safe and fit for travel." Therefore, reversal is not required.

To the extent plaintiff argues that the trial court erred by delaying any decision concerning the effect of defendant's deemed admission, nothing in MCR 2.312 required the court to make its ruling before trial. Rather, pretrial rulings under MCR 2.312 are discretionary with the trial court. Plaintiff has not shown that the trial court abused its discretion by deciding to wait until it heard the evidence at trial to decide the question.

Plaintiff also argues that the trial court erred by denying his motions for a directed verdict, judgment notwithstanding the verdict, or a new trial. We disagree.

A trial court's decision on a motion for a directed verdict or judgment notwithstanding the verdict is reviewed de novo. *Merkur Steel Supply, Inc v Detroit*, 261 Mich App 116, 123; 680 NW2d 485 (2004); *Coble v Green*, 271 Mich App 382, 389; 722 NW2d 898 (2006). "In reviewing a trial court's decision on a motion for a directed verdict, an appellate court is to examine the evidence and all reasonable inferences that may be drawn from it in the light most favorable to the nonmoving party." *Clark v Kmart Corp*, 465 Mich 416, 418; 634 NW2d 347 (2001). "Only if the evidence so viewed fails to establish a claim as a matter of law should the motion be granted." *Id*. at 419. When the evidence could cause reasonable jurors to disagree, the trial court is not allowed to substitute its judgment for that of the jury. *Lamson v Martin (After Remand)*, 216 Mich App 452, 455; 549 NW2d 878 (1996). The same standard applies to motions for judgment notwithstanding the verdict. *Hamann v Ridge Tool Co*, 213 Mich App 252, 254; 539 NW2d 753 (1995). A trial court's decision on a motion for a new trial is reviewed for an abuse of discretion. *Kelly v Builders Square, Inc*, 465 Mich 29, 34; 632 NW2d 912 (2001). However, any questions of law that may arise are reviewed de novo. *Id.*

Plaintiff again relies on defendant's deemed admission that the roadway was in disrepair in support of his argument that he was entitled to a directed verdict, judgment notwithstanding the verdict, or a new trial. As previously explained, however, this admission did not establish that the roadway was not in reasonable repair and in a condition reasonably safe and fit for travel. Accordingly, the trial court did not err in denying plaintiff 's motions.

In light of our decision, it is unnecessary to address defendant's issues on cross appeal.

Affirmed.

/s/ Deborah A. Servitto
/s/ David H. Sawyer
/s/ Christopher M. Murray