STATE OF MICHIGAN

COURT OF APPEALS

JAMES R. MCINTYRE,

Plaintiff-Appellee,

v

TUSCOLA COUNTY ROAD COMMISSION,

Defendant-Appellant.

UNPUBLISHED
October 19, 2023

Nos. 362015; 362025
Tuscola Circuit Court
LC No. 21-031534-CH

Before: K. F. KELLY, P.J., and JANSEN and CAMERON, JJ.

PER CURIAM.

These are consolidated cases.[1] In both appeals, defendant, Tuscola County Road Commission, appeals the trial court's order denying its second motion for summary disposition under MCR 2.116(C)(7) (governmental immunity). In Docket No. 362015, the appeal is by right and concerns only the portion of the trial court's order addressing governmental immunity. In Docket No. 362025, the appeal is by leave granted[2] and challenges the trial court's ruling on other grounds. Collectively, defendant argues that it was entitled to summary disposition because it conclusively established that a particular road, Oakhurst Park Drive, was a presumptive "highway by user" under MCL 221.20, which immunized it from the claims of plaintiff, James McIntyre, to quiet title. We reverse and remand for entry of summary disposition in defendant's favor.

[1] *McIntyre v Tuscola Co Rd Comm*, unpublished order of the Court of Appeals, entered January 4, 2023 (Docket No. 362025).

[2] *McIntyre v Tuscola Co Rd Comm*, unpublished order of the Court of Appeals, entered January 4, 2023 (Docket No. 362025).

I. BACKGROUND

This case involves a road, Oakhurst Park Drive, located in the Oak Hurst Park Subdivision.[3] The subdivision is bordered on its east side by Garner Road and on its south side by Allen Road. Oakhurst Park Drive runs northward from the intersection of Allen Road along the subdivision's western border until it curves east, runs along the subdivision's northern border, and intersects with Garner Road. All three roads are dirt roads. Plaintiff owns property within this subdivision, which he purchased in 2006. Plaintiff's property abuts the intersection of Oakhurst Park Drive and Garner Road on the northeastern side of the subdivision. Plaintiff filed this action to quiet title, alleging that defendant had increasingly widened Oakhurst Park Drive from its originally platted width of 10 feet such that it was encroaching onto plaintiff's property. Plaintiff had constructed a wall to act as a barrier against further encroachment.

During discovery and under MCR 2.312, defendant filed and sent to plaintiff's counsel a request for admissions. The lower court file contains a proof of service providing that the request for admissions was sent by first-class mail and e-mail to plaintiff's counsel. Defendant included a total of 11 requests for admission concerning various aspects of Oakhurst Park Drive's location and history over many decades. Plaintiff failed to file any response, objection, or motion related to the request for admissions.

Approximately three months after the request for admissions was filed and sent to plaintiff's counsel, defendant moved for summary disposition under MCR 2.116(C)(7), arguing that plaintiff's failure to respond to the request for admissions meant that each matter within the request was a judicial admission. Based on these judicial admissions, defendant contended that it had conclusively established Oakhurst Park Drive as a presumptive highway by user, that plaintiff had failed to rebut this presumption, and that defendant was entitled to immunity from plaintiff's claims.

Once the motion had been filed, plaintiff's counsel e-mailed defendant's counsel a copy of his responses to the request for admissions along with a statement explaining that he did not recall seeing the request for admissions and had been unaware of it until defendant moved for summary disposition.

In his brief opposing summary disposition, plaintiff countered that Oakhurst Park Drive had been established by Oak Hurst Park Subdivision's plat, thereby precluding application of the highway-by-user statute. Plaintiff argued that defendant was essentially attempting to revise the plat, which could only be done via the Land Division Act, MCL 560.101 *et seq*., and not by the highway-by-user statute. Alternatively, plaintiff contended that, even if defendant had established a presumption that Oakhurst Park Drive was a highway by user, plaintiff had rebutted the presumption because Oakhurst Park Drive had been established by the plat and set to a width of no more than 10 feet. Plaintiff requested summary disposition under MCR 2.116(I)(2). Plaintiff

[3] We will follow defendant's lead in spelling the names for these locations. "Oakhurst" is one word when referring to the road but two words, "Oak Hurst," when referring to the subdivision.

further argued that, at the very least, there was a question of fact regarding when Oakhurst Park Drive was established as a highway by user and how wide it was.

In his response brief, plaintiff did not address defendant's arguments concerning judicial admissions. It was not until the motion hearing that plaintiff's counsel stated on the record that he had not received the request and was unaware of it until defendant moved for summary disposition. Apart from this general explanation, plaintiff's counsel did not ask or move the trial court to take any further action.

The trial court denied defendant's motion for summary disposition. After reviewing the applicable standards of review for MCR 2.116(C)(7), the arguments presented by both parties, and the applicable law surrounding MCL 221.20, the trial court summarily stated: "In this case, the presumptive dedication of Oakhurst Park Drive is not thus far conclusively established, since at least a question of fact exists as to the defined line and width of Oakhurst Park Drive." The trial court did not address defendant's arguments concerning judicial admissions. Defendant now appeals, arguing that the judicial admissions conclusively established Oakhurst Park Drive as a presumptive highway by user, that plaintiff failed to rebut this presumption, and that defendant was immune from plaintiff's claims.

II. ANALYSIS

A. STANDARD OF REVIEW

We review "de novo a trial court's decision on a motion for summary disposition, as well as questions of statutory interpretation and the construction and application of court rules." *Dextrom v Wexford Co*, 287 Mich App 406, 416; 789 NW2d 211 (2010). A motion is properly granted under MCR 2.116(C)(7) when "[e]ntry of judgment, dismissal of the action, or other relief is appropriate because of . . . immunity granted by law . . . ." As this Court has previously explained,

> [i]n reviewing a motion under MCR 2.116(C)(7), this Court accepts as true the plaintiff's well-pleaded allegations, construing them in the plaintiff's favor. We must consider affidavits, pleadings, depositions, admissions, and documentary evidence filed or submitted by the parties when determining whether a genuine issue of material fact exists. [*Hanley v Mazda Motor Corp*, 239 Mich App 596, 600; 609 NW2d 203 (2000) (citation omitted).]

The plaintiff's allegations are accepted only if not contradicted by documentary evidence. *Pierce v Lansing*, 265 Mich App 174, 177; 694 NW2d 65 (2005). "If no facts are in dispute, or if reasonable minds could not differ regarding the legal effect of the facts, the question whether the claim is barred by governmental immunity is an issue of law," which we review de novo. *Id.*

B. JUDICIAL ADMISSIONS

Defendant argues that the trial court erred by not considering its argument regarding judicial admissions. Defendant contends that plaintiff's failure to respond to the request for

admissions or to otherwise follow MCR 2.312 conclusively established Oakhurst Park Drive as a presumptive highway by user. We agree.

The same principles for statutory interpretation and application apply to court rules. *Haliw v Sterling Hts*, 471 Mich 700, 704; 691 NW2d 753 (2005). "When interpreting a statute, we must ascertain the Legislature's intent," which is accomplished "by giving the words selected by the Legislature their plain and ordinary meanings, and by enforcing the statute as written." *Griffin v Griffin*, 323 Mich App 110, 120; 916 NW2d 292 (2018) (quotation marks and citation omitted). If a statute is unambiguous, it must be applied as written. *McQueer v Perfect Fence Co*, 502 Mich 276, 286; 971 NW2d 584 (2018). We may not read something into the statute "that is not within the manifest intent of the Legislature as derived from the words of the statute itself." *Id*. (quotation marks and citation omitted). A statute must be read as a whole, *Bush v Shabahang*, 484 Mich 156, 167; 772 NW2d 272 (2009), and we "must give effect to every word, phrase, and clause in a statute and avoid an interpretation that would render any part of the statute surplusage or nugatory," *State Farm Fire & Cas Co v Old Republic Ins Co*, 466 Mich 142, 146; 644 NW2d 715 (2002).

MCR 2.312 governs requests for admission. MCR 2.312(B)(1) provides that the failure to answer such requests constitutes an admission:

> 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*. Unless the court orders a shorter time a defendant may serve an answer or objection within 42 days after being served with the summons and complaint. [Emphasis added.]

MCR 2.312(D)(1) governs the effects of an admission as well as the process for withdrawing an admission:

> A matter admitted under this rule is conclusively established *unless the court on motion permits withdrawal or amendment of an admission*. *For good cause* the court may allow a party to amend or withdraw an admission. The court may condition amendment or withdrawal of the admission on terms that are just. [Emphasis added.]

Such admissions, which have been referred to as "judicial admissions," are distinct from "evidentiary admissions" in that, once made, they are conclusively established unless the trial court permits a party to withdraw them. *Bailey v Schaaf*, 293 Mich App 611, 621-622; 810 NW2d 641 (2011). "Thus, where a party served with a request for admissions neither answers nor objects to the request, the matters in the request are deemed admitted." *Medbury v Walsh*, 190 Mich App 554, 556; 476 NW2d 470 (1991). Moreover, "the admissions resulting from a failure to answer a request for admissions may form the basis for summary disposition." *Id*.

In *Medbury*, *id*. at 557, we held that the trial court did not abuse its discretion by granting summary disposition on the basis of the plaintiff's failure to answer the request for admissions. The plaintiff did not answer the request, nor file an objection or seek an extension. *Id*. at 555. Three months later, the defendants moved for summary disposition, and the trial court granted it

on the basis of the plaintiff's admissions. *Id*. In upholding the trial court's decision, the Court reasoned that "[t]he ruling of the trial court was justified under the circumstances of this case. Plaintiff took no action regarding defendants' request for admissions for more than three months." *Id*. at 557. Therefore, failure to respond or otherwise follow MCR 2.312 will result in admission. See also *Patel v FisherBroyles, LLP*, ___ Mich App ___, ___; ___ NW2d ___ (2022) (Docket No. 357092); slip op at 10 (stating that a party's failure to respond to a request for admissions resulted in the party's conclusively admitting to those matters contained within).

In the present case, defendant filed its request for admissions on January 3, 2022, along with a proof of service. Plaintiff failed to respond to the request for admissions within 28 days and did not request an extension. There was no argument made that service was deficient. Under such circumstances, Michigan law presumes that the request reached its destination, see *Crawford v Michigan*, 208 Mich App 117, 121-122; 527 NW2d 30 (1994), and plaintiff offered no evidence or argument to rebut this presumption. Therefore, plaintiff's failure to respond to the request for admissions had the effect of admitting each matter within the request. MCR 2.312(B)(1).

Accordingly, the only way for plaintiff to negate the effects of these admissions was to formally move the trial court to permit him to withdraw or amend his admissions. MCR 2.312(D)(1). Plaintiff failed to do so, and plaintiff's inaction *conclusively* established the admissions. *Bailey*, 293 Mich App at 621-622. See also *Medbury*, 190 Mich App at 556-557. Moreover, because plaintiff never moved the trial court or in any way invoked the procedures within MCR 2.312, he has waived any argument to the contrary, and we have no obligation to review such arguments. See *In re Huntington Estate*, 339 Mich App 8, 25-26; 981 NW2d 72 (2021) (declining to consider a party's appellate argument when the party's failure to move the probate court to withdraw or amend the admissions waived the argument).

We agree with defendant that remanding for the trial court to consider whether good cause existed would be futile because the record shows that no good cause existed. As previously discussed, the only explanation of plaintiff's counsel was that he did not receive the request for admissions; however, the proof of service presumptively established that the request reached its destination. The request was also filed with the trial court and made part of the record. Merely being "late" is not good cause, and holding otherwise would essentially render the rule and its procedures nugatory.

C. HIGHWAY BY USER

Next, defendant argues that plaintiff's judicial admissions conclusively established Oakhurst Park Drive as a highway by user. We agree.

The highway-by-user statute is contained within MCL 221.20, which provides:

> All highways regularly established in pursuance of existing laws, *all roads that shall have been used as such for 10 years or more, whether any record or other proof exists that they were ever established as highways or not*, and all roads which have been or which may hereafter be laid out and not recorded, and which shall have been used 8 years or more, *shall be deemed public highways*, subject to be altered or discontinued according to the provisions of this act. All highways that

> are or that may become such by time and use, *shall be 4 rods in width*, and where they are situated on section or quarter section lines, such lines shall be the center of such roads, and the land belonging to such roads shall be 2 rods in width on each side of such lines. [Emphasis added.]

Four rods is 66 feet. *City of Kentwood v Estate of Sommerdyke*, 458 Mich 642, 666; 581 NW2d 670 (1998). "The highway by user statute . . . treats property subject to it as impliedly dedicated to the state for public use." *Kalkaska Co Rd Comm v Nolan*, 249 Mich App 399, 401; 643 NW2d 276 (2001). There are four elements that must be met in order to establish a highway by user: "(1) a defined line, (2) that the road was used and worked on by public authorities, (3) public travel and use for ten consecutive years without interruption, and (4) open, notorious, and exclusive public use." *Id*. at 401-402. Meeting these four elements creates a rebuttable presumption that a highway by user was established. *City of Kentwood*, 458 Mich at 666.

Element one was met by the admissions. Defendant requested that plaintiff "[a]dmit that Oakhurst Park Drive has been in its 'current location' since at least 1940," and "that Oakhurst Park Drive follows a defined line, as depicted on the survey drawings attached hereto as 'Exhibit B.' " Accordingly, plaintiff admitted that Oakhurst Park Drive had been in the same location since at least 1940 and that it had followed a defined line.

Element two was also met. Defendant requested that plaintiff "[a]dmit that Oakhurst Park Drive was in its 'current location' when it the [sic] Road Commission 'agreed to take over its maintenance,' " "that residents of the Oak Hurst Park Subdivision requested that the Road Commission 'take over' maintenance of Oakhurst Park Drive," "that the Road Commission agreed to 'take over' maintenance of Oakhurst Park Drive more than l0 years before the date on which the Complaint was filed," and "that the Road Commission's maintenance of Oakhurst Park Drive dates back more than ten years from the date the Complaint was filed." Accordingly, defendant established that Oakhurst Park Drive was extensively used and worked on by public authorities.

Similarly, elements three and four were met. In addition to the previously discussed admissions about maintenance for more than 10 years, defendant also requested that plaintiff "[a]dmit that public use of Oakhurst Park Drive dates back more than l0 years prior to the date the Complaint was filed." Accordingly, defendant established that it had taken over the maintenance of Oakhurst Park Drive and that the public had used the road for more than 10 years prior to the date of the complaint, thereby establishing that Oakhurst Park Drive's use and maintenance had been open, notorious, and exclusive to the public for at least 10 years.

Therefore, with all four elements conclusively met via judicial admission, there were no facts in dispute regarding whether defendant established the presumption that Oakhurst Park Drive became a highway by user in the decades following 1940. The trial court erred to the extent that it determined there was a question of fact regarding the defined line because plaintiff's judicial admissions established the defined line in its present location.

Additionally, we agree with defendant that plaintiff failed to rebut this presumption. As previously discussed, even when the four elements are established, this only creates a rebuttable presumption that a highway by user was established. *Id*. A property owner along the highway by user must show "they, or their predecessors in interest, took sufficient action during the running

of the statutory ten-year period to give notice of their intention to maintain possession and control over the disputed area." *Id*. at 666-667 (quotation marks and citation omitted). " 'Highway by user' is a term that is used to describe how the public may acquire title to a highway by a sort of prescription *where no formal dedication has ever been made*." *Cimock v Conklin*, 233 Mich App 79, 86-87; 592 NW2d 401 (1998) (quotation marks and citation omitted; emphasis added). "[A] valid dedication of land for a public purpose requires two elements: a recorded plat designating the areas for public use, evidencing a clear intent by the plat proprietor to dedicate those areas to public use, and acceptance by the proper public authority." *Kraus v Dep't of Commerce*, 451 Mich 420, 424; 547 NW2d 870 (1996).

Plaintiff contended that the Land Division Act governed this case and not the highway-by-user statute because the Oak Hurst Park Subdivision plat had formally dedicated Oakhurst Park Drive as a subdivision-controlled road. Under the Land Division Act, once a plat is created, it cannot be modified unless "the owner of a lot in the subdivision, a person of record claiming under the owner, or the governing body of the municipality in which the subdivision covered by the plat is located" files a complaint in the circuit court. MCL 560.222. However, the Land Division Act does not apply unless the party desires "to alter the plat or the dedication language of the plat to which the party has a preexisting substantive property right as the owner of the property or a person of record claiming under the owner." *Beach v Lima Twp*, 489 Mich 99, 118-119; 802 NW2d 1 (2011).

According to plaintiff, defendant was required under the Land Division Act to ask the trial court to revise the plat to allow Oakhurst Park Drive to become a highway by user; defendant had failed to do so. Moreover, plaintiff argued that, even if defendant had made such a request, defendant could not succeed because it was not a listed entity under MCL 560.222. However, it was not defendant who brought a claim against plaintiff. Plaintiff was the party seeking to quiet title, not defendant. Defendant was not seeking to have the plat modified or redrawn in any way. It merely defended itself against a lawsuit and argued that Oakhurst Park Drive became a highway by user in the decades following the dedication. Therefore, the Land Division Act is inapplicable.

Furthermore, the plat labeled certain areas "walks" while others were labeled "roads," and Oakhurst Park Drive was labeled a "walk," not a road. This use of language suggests that the two are separate and distinct. A "walk" denotes pedestrian foot traffic, but a "road" denotes automobile traffic. To hold that these two words denote the same meaning, as plaintiff contended, is illogical. Additionally, plaintiff's counsel conceded that the plat dedication did not explicitly reference Oakhurst Park Drive by name. Accordingly, the plat established Oakhurst Park Drive as a pedestrian *walkway* and not as a plat-controlled *road*. Under such a scenario, Oakhurst Park Drive began as a plat-created walkway for pedestrians that eventually became a highway by user. The plat dedication did nothing to rebut the presumption because the plat did not establish Oakhurst Park Drive as a road. Moreover, given that the presumption was established in the decades following 1940, plaintiff's actions in 2006 could have no effect on the presumption because such actions occurred decades too late. See *City of Kentwood*, 458 Mich at 666-667 (requiring the property owner to act "during the running of the statutory ten-year period") (quotation marks and citation omitted).

D. IMMUNITY

Finally, we agree with defendant that it was entitled to summary disposition because plaintiff's action was barred by MCL 247.190.

As previously discussed, MCL 221.20 provides that "all roads that shall have been used as such for 10 years or more . . . shall be deemed public highways, subject to be *altered or discontinued* according to the provisions of this act." (Emphasis added.) Accordingly, a highway by user can only be altered or discontinued in accordance with statute. MCL 247.190 provides:

> *All public highways* for which the right of way has at any time been dedicated, given or purchased, shall be and remain a highway of the width so dedicated, given or purchased, and *no encroachments* by fences, buildings or otherwise which may have been made since the purchase, dedication or gift nor *any encroachments* which were within the limits of such right of way at the time of such purchase, dedication or gift, and *no encroachments* which may hereafter be made, *shall give the party* or parties, firm or corporation so encroaching, *any title or right to the land so encroached upon*. [Emphasis added.]

Additionally, MCL 600.5821(2), of the Revised Judicature Act of 1961, MCL 600.101 *et seq*., provides:

> (2) In an action involving the recovery or the possession of land, *including a public highway*, street, alley, easement, or other public ground, a municipal corporation, political subdivision of this state, or *county road commission* is not subject to any of the following:
>
> (a) The periods of limitations under this act.
>
> (b) Laches.
>
> (c) *A claim for adverse possession, acquiescence for the statutory period, or a prescriptive easement*. [Emphasis added.]

Highways established via the highway-by-user statute "shall be deemed public highways." MCL 221.20. The plain language of MCL 247.190 means that we cannot "distinguish between different legal theories used to assert a private claim of title or right *to a public highway*." *Haynes v Beulah*, 308 Mich App 465, 469-470; 865 NW2d 923 (2014) (emphasis added). Therefore, public highways, including those established as highways by user, cannot be encroached upon such that they give away *any* title or rights to the encroaching party. MCL 247.190; *Haynes*, 308 Mich App at 469-470. Similarly, county road commissions are not subject to claims for adverse possession, acquiescence for the statutory period, or a prescriptive easement by a landowner adjacent to the public highway. MCL 600.5821.

In the present case, plaintiff attempted to bring a claim to quiet title to portions of Oakhurst Park Drive because, according to plaintiff, he had title to those areas that defendant was encroaching upon by widening the road. However, defendant established Oakhurst Park Drive as

an unrebutted highway by user. Therefore, Oakhurst Park Drive was a public highway, and, under MCL 247.190, plaintiff could not have gained any title or legal rights to any portions of Oakhurst Park Drive. Under MCL 221.20, Oakhurst Park Drive was capable of being widened to 66 feet, which meant that the "encroachment" that plaintiff complained of was no encroachment at all. To the extent that plaintiff might argue adverse possession, acquiescence, or a prescriptive easement, such claims would be barred by MCL 600.5821(2).

III. CONCLUSION

Accordingly, there were no material facts in dispute. Through plaintiff's judicial admissions, defendant established Oakhurst Park Drive as a highway by user. Plaintiff unsuccessfully attempted to rebut this presumption through the plat's dedication. Given that Oakhurst Park Drive was a public highway, plaintiff was barred from bringing any claims for any property interest in the road. The trial court should have granted summary disposition in defendant's favor.

Reversed and remanded for the trial court to enter summary disposition in defendant's favor. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ Kathleen Jansen
/s/ Thomas C. Cameron