STATE OF MICHIGAN

COURT OF APPEALS

JULIE GILLMORE,

Plaintiff-Appellee,

v

VILLAGE OF CLARKSTON,

Defendant/Third-Party Plaintiff-Appellee,

and

STEPHEN HUDSON,

Third-Party-Defendant-Appellant.

UNPUBLISHED
January 18, 2002

No. 223037
Oakland Circuit Court
LC No. 96-518411-NO

Before: Saad, P.J., and Bandstra, C.J., and Whitbeck, J.

PER CURIAM.

Third-party defendant, Stephen Hudson, appeals as of right from the trial court's order of judgment in favor of third-party plaintiff Village of Clarkston. We reverse and remand.

I. Facts and Procedural History

Plaintiff, Julie Gillmore, sued the Village of Clarkston for injuries she sustained on October 31, 1994, when she tripped over or stepped into a hole in the sidewalk in front of Hudson's house. Clarkston then brought a third-party claim for indemnification against Hudson, alleging that he caused the sidewalk damage while renovating his house. The case proceeded to trial in June 1998 and a jury returned verdicts in favor of Gillmore on her claim against Clarkston and in favor of Hudson with respect to Clarkston's third-party claim against him. Clarkston moved for a new trial on its third-party indemnification claim and the trial court granted its motion. The second jury returned a verdict in favor of Clarkston and against Hudson, and Hudson now appeals.

II. Analysis

Hudson argues, and we agree, that the trial court abused its discretion in granting Clarkston's motion for new trial. In its motion, Clarkston argued that the jury's verdict was

against the great weight of the evidence. The parties do not dispute that a municipality is responsible for maintaining public sidewalks in reasonable repair when they are adjacent to public roads. MCL 691.1402; *Hatch v Grand Haven Twp*, 461 Mich 457, 461-463; 606 NW2d 633 (2000). Further, a landowner has no duty to repair and maintain an abutting public sidewalk. *Bivens v Grand Rapids*, 443 Mich 391, 395; 505 NW2d 239 (1993). However, liability may be imposed if a landowner has caused a physical intrusion upon the sidewalk or done an act that created a dangerous condition or increased the hazard of an existing condition. *Ward v Frank's Nursery & Crafts, Inc*, 186 Mich App 120, 132-133; 463 NW2d 442 (1990).

"In deciding a motion for a new trial, the trial court's function is to determine whether the overwhelming weight of the evidence favors the losing party." *Morinelli v Provident Life and Accident Ins Co*, 242 Mich App 255, 261; 617 NW2d 777 (2000). This Court reviews the trial court's decision on a motion for new trial for an abuse of discretion. *Id*. A trial court may not substitute its judgment for that of the jury, and the "verdict should not be set aside if there is competent evidence to support it." *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 194; 600 NW2d 129 (1999). Further, the credibility of witnesses is a question for the jury and the trial court cannot disturb the jury's evaluations of credibility absent exceptional circumstances.[1] *People v Lemmon*, 456 Mich 625, 643-644, 647; 576 NW2d 129 (1998). On appeal,

> This Court gives substantial deference to the conclusion of a trial court that a verdict was not against the great weight of the evidence. However, less deference is afforded a determination that the verdict was against the great weight of the evidence. [*Severn v Sperry Corp*, 212 Mich App 406, 412-413; 538 NW2d 50 (1995).]

Clarkston's position in its third party claim was that Hudson created the hazardous hole by driving a heavy truck over the sidewalk, sometimes while towing a full trailer. Hudson argued that, if a sidewalk defect existed at the time Gillmore tripped and fell, he did not create it. During the first trial, Julie Gillmore testified that, on October 31, 1994, she "stepped on a piece of sidewalk and twisted [her] leg," and that her foot "went into a crevice," but she did not look at the condition of the sidewalk until November 11. Hudson admitted he regularly drove his truck with a one-ton load capacity over the sidewalk while renovating the house. Hudson could not recall if he began renovations weeks or days before the incident, but he specifically denied causing the crack and testified he did not see a crack in the sidewalk before October 31.

Hudson's neighbor, Carol Eberhardt, testified that she saw a crack suddenly appear sometime in September or October, and that, at times, she saw Hudson drive over the portion of the sidewalk that was reportedly cracked. Another neighbor, Laurie Stern, walked on the disputed portion of the sidewalk on nearly a daily basis. Stern testified that she never noticed any damage to the sidewalk, though she saw Hudson haul a trailer over some part of the

---

[1] For example, a trial court may only impose its judgment regarding credibility "if the 'testimony contradicts indisputable physical facts or laws,' '[w]here testimony is patently incredible or defies physical realities,' '[w]here a witness's testimony is material and is so inherently implausible that it could not be believed by a reasonable juror,' or where the witnesses testimony has been seriously 'impeached' and the case marked by 'uncertainties and discrepancies.'" *Lemmon, supra*, 456 Mich at 643-644 (citations omitted).

sidewalk. Finally, the former owner of Hudson's house, Ruth Yoh, testified that she regularly drove past the house after she sold it to Hudson and never saw any sidewalk damage.

David Wilcox, a construction engineer, theorized that a vehicle likely caused the sidewalk crack and he testified that Hudson's fully-loaded truck or fully-loaded trailer could have caused the damage. Wilcox further testified that the sidewalk could support a weight of 5,000 pounds, and that a truck rolling onto the sidewalk from softer ground might cause a crack. After looking at photographs taken of the sidewalk in May 1995, Wilcox estimated that the crack occurred sometime between December 15, 1994 and January 15, 1995.

As noted above, the jury returned a verdict in favor of Hudson in the first trial and found that Hudson did not "physically intrude upon the . . . sidewalk in some manner prior to October 31, 1994, which either increased an existing hazard or created a new hazard." However, in ordering a new trial, the trial court ruled that "[t]he only evidence in this Trial regarding the break in the sidewalk pointed directly to . . . Hudson." Therefore, the trial court concluded, "the overwhelming weight of the evidence was that the Third-Party Defendant, Hudson, was responsible for the hazardous condition of the sidewalk and liable for Plaintiff's injuries." The trial court then granted Clarkston's motion for new trial because the jury's verdict was against the great weight of the evidence.

We hold that the trial court abused its discretion in granting Clarkston's motion for a new trial.

Trial testimony differed regarding when the crack appeared on the sidewalk - anytime between September through January - and some witnesses never noticed a crack at all. Furthermore, in addition to this inconsistent testimony, testimony differed regarding when Hudson began his renovations and when he began driving his truck on the property. Nonetheless, because the jury returned a verdict in favor of Gillmore, it apparently rejected Hudson's claim that the concrete was not broken as of October 31, 1994. It was not inconsistent for the jury to also reject Clarkston's theory regarding the cause of the sidewalk defect. While Wilcox testified that, in his opinion, a vehicle *most likely* caused the crack, neither he nor any other witness could say with certainty how the damage occurred or that Hudson's vehicle or equipment actually caused the damage. Further, Hudson patently denied causing any sidewalk damage. Moreover, Hudson's truck had a one-ton capacity and Wilcox testified that the sidewalk could support five times as much weight. While Wilcox plausibly explained that a truck *might* cause damage while rolling across the sidewalk, the jury could have reasonably concluded that Hudson's truck simply could not have caused the significant cracking in this case.

By granting defendant's motion, the trial court essentially substituted its view of the evidence for that of the trier of fact regarding Wilcox's opinion testimony. This was improper; the weight and credibility of the witness' testimony was for the trier of fact to resolve and, though not in abundance, competent evidence supported the jury's finding. Therefore, the trial court abused its discretion in granting Clarkston's motion for new trail and the judgment for indemnification must be set aside.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Richard A. Bandstra
/s/ William C. Whitbeck