SECOND DIVISION
May 31, 2011

No. 1-10-0602

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

MARILYN HANLEY,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	No. 07 L 254
	)	
THE CITY OF CHICAGO, a municipal corporation,	)	Honorable
	)	Cheryl A. Starks,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE KARNEZIS delivered the judgment of the court.
Justices Connors and Harris concurred in the judgment.

HELD: The trial court's grant of plaintiff's posttrial motion for a new trial is reversed. The court did not err in allowing defendant to present its affirmative defense of discretionary immunity and, even if the defense should not have been presented, plaintiff suffered no prejudice from the defense.

ORDER

Defendant the City of Chicago appeals from an order of the circuit court granting plaintiff Marilyn Hanley's motion for a new trial. The court determined it erred in allowing the City to present discretionary immunity as an affirmative defense. It held a previous decision by this court established the law of the case and precluded the

defense. The City argues on appeal that (1) the court did not err in allowing it to assert the discretionary immunity affirmative defense; and (2) plaintiff was not prejudiced by the City's assertion of the discretionary immunity affirmative defense. We reverse.

Background

In 1996, plaintiff was injured when she stepped into a pothole while crossing the street at a crosswalk. She filed a personal injury complaint against the City alleging the City's negligence in repairing the pothole and maintaining the crosswalk caused her injuries. The City moved for summary judgment arguing, in relevant part, that it was immune from liability pursuant to section 2-201 of the Local Governmental and Governmental Employees Tort Immunity Act (745 ILCS 10/1-101 *et seq.* (West 2008)) (the Tort Immunity Act). Section 2-201 provides that a local public entity is immune from liability for the performance of discretionary acts or omissions, even if such were negligent or willful and wanton misconduct. *Hanley v. City of Chicago*, 343 Ill. App. 3d 49, 56 (2003); 745 ILCS 10/2-201 (West 2008). The entity is not immune from liability for the performance of ministerial acts if those acts are negligently performed. *Hanley*, 343 Ill. App. 3d at 56. Plaintiff tendered an expert to testify that the pothole was negligently repaired. The City tendered an expert testifying that the pothole was properly repaired. The court barred plaintiff's expert from testifying. It granted summary judgment to defendant, finding repair of the pothole was a discretionary act for which the City was not liable under section 2-201. Plaintiff appealed.

On appeal, in *Hanley v. City of Chicago*, 343 Ill. App. 3d 49 (2003), we reversed

and remanded for further proceedings. We held plaintiff's expert was improperly barred and discovery should be reopened. We held summary judgment was improper because there were no facts in the record regarding how the pothole repair was actually performed and, therefore, no evidence from which to make the factual determination of whether the pothole repair was ministerial or discretionary. *Hanley*, 343 Ill. App. 3d at 58. We also found summary judgment improper because there was contradictory opinion evidence regarding whether the repair was adequately performed, a material question given that the City could be liable for the negligent performance of a ministerial act. *Hanley*, 343 Ill. App. 3d at 59.

On remand, citing our *Hanley* decision as the law of the case, plaintiff moved to bar the City's affirmative defense that it was immune from liability under section 2-201. The court denied the motion and a subsequent motion by the City for summary judgment. Following additional discovery and proceedings, plaintiff voluntarily dismissed her action.

Plaintiff timely filed a new complaint against the City for the same injury on January 9, 2007. She moved to bar the City from asserting the discretionary immunity defense, arguing that our holding in *Hanley* was that the repair was a ministerial act to which section 2-201 did not apply. The court denied the motion and the case went to a jury trial. The jury found for the City and the court entered judgment on the jury verdict.

Plaintiff filed a posttrial motion requesting, in relevant part, a new trial on the basis that the court erred in allowing the City to present discretionary immunity as an

affirmative defense because this court had previously determined in *Hanley* that the City's attempt to repair the pothole was a ministerial task, meaning discretionary immunity did not apply in the case. The court granted the motion, finding the City should not have been allowed to raise section 2-201 as an affirmative defense. The City timely appealed.

Analysis

The City argues the court erred in granting plaintiff's motion for a new trial because (1) it was not error to allow the city to assert the defense of discretionary immunity and (2) plaintiff was not prejudiced by the City's assertion of the affirmative defense of discretionary immunity. We will not reverse the court's decision to grant plaintiff's motion for a new trial unless the court abused its discretion. *McClure v. Owens Corning Fiberglas Corp.*, 188 Ill. 2d 102, 132-33 (1999). A court should order a new trial only when it determines that the jury's verdict is against the manifest weight of the evidence. *McClure*, 188 Ill. 2d at 132, 720 N.E.2d at 257. A verdict is against the manifest weight of the evidence if the opposite conclusion is clearly evident or the jury's findings appear unreasonable, arbitrary, not based on the evidence or the law. *McClure*, 188 Ill. 2d at 132, 720 N.E.2d at 257. However, unless an error is shown to be prejudicial, the trial court should not substitute its judgment for that of the jury and grant a new trial. *Lagoni v. Holiday Inn Midway,* 262 Ill.App.3d 1020, 1038 (1994).

Law of the Case Doctrine

The City argues the trial court erred in granting plaintiff's motion for a new trial on

the basis that the court improperly allowed the City to plead discretionary immunity under section 2-201 as an affirmative defense. The court held that it

> "agree[d] with plaintiff that the repair of the pothole was ministerial as the appellate court previously determined. Thus, a question of fact existed as to whether the pothole was repaired negligently. If so, then there is no immunity under 2-201. Based on the decision in *Hanley*, the court should have been [*sic*] applied the 'law of the case' doctrine. *** Because the plaintiff was prejudiced by the court's ruling allowing the City to plead as an affirmative defense, [*sic*] discretionary immunity under Section 2-201, the plaintiff was prejudiced, denied a fair trial, and is therefore entitled to a new trial on all the issues.""

" 'Generally, the law of the case doctrine bars relitigation of an issue previously decided in the same case.' " *Long v. Elborno*, 397 Ill.App.3d 982, 989 (2010) (quoting *Krautsack v. Anderson*, 223 Ill.2d 541, 552 (2006). When a court decides an issue, its "unreversed decision on that question of law or fact settles the question for all subsequent stages of the suit." *Miller v. Lockport Realty Group, Inc.*, 377 Ill. App. 3d 369, 374 (2007). *Hanley* not having been reversed, any questions we decided in *Hanley* settled those questions for the duration of any subsequent proceedings in that case.

However, plaintiff voluntarily dismissed her action following our remand in *Hanley* and then refiled her complaint sometime later. When, as here, all causes of action in a complaint are dismissed voluntarily, that case is terminated in its entirety and all final

orders become immediately appealable. *Long*, 397 Ill. App. 3d at 989. Plaintiff's refiling of the cause of action that she had previously voluntarily dismissed is not a continuation of the previous action but rather an entirely new action. *Long*, 397 Ill. App. 3d at 989-90. Accordingly, the law of the case doctrine is inapplicable here because plaintiff's refiling her complaint was not a continuation of the old action, the action to which *Hanley* applied, but rather the commencement of an entirely new action. *Long*, 397 Ill. App. 3d at 990 (citing *Hudson v. City of Chicago*, 228 Ill.2d 462, 469 (2008)). The doctrine could not, therefore, operate to bar litigation in the refiled case of any issue decided in *Hanley.* It could not provide the basis for plaintiff's assertion that the court erred in allowing the City to present the discretionary immunity defense. The court erred in granting a new trial on that basis.[1]

Even though *Hanley* is not the law of the case here, any legal holdings in *Hanley*

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[1] In *Pekin Insurance Co. v. Pulte Home Corp.*, 344 Ill. App. 3d 64 (2003), the court held that the law of the case doctrine did apply to a refiled cause of action. *Pekin Insurance Co.,* 344 Ill. App. 3d at 66. However, the circumstances in *Pekin* are so peculiar that they are distinguishable from the case at bar. In *Pekin*, an appeal was pending when the underlying complaint was voluntarily dismissed and subsequently refiled. The appellant, an insurer, did not, however, dismiss the appeal and the court issued an unpublished order holding that the insurer had waived its right to contest its duty to defend. In the refiled case, the trial court found for the insurer, finding it had no duty to defend. On appeal from the refiled case, the insurer, now the appellee, argued the decision in the first appeal had no bearing on the subsequent appeal. The court dismissed this argument. It found the insurer's failure to dismiss the first appeal when it learned the underlying case had been voluntarily dismissed belied its argument that the voluntary dismissal terminated the insurer's obligations under the policy and that there was no need for the appellate court to issue a ruling in the first appeal. To paraphrase the *Pekin* court, the facts in *Pekin* are of such "procedural complexity" (*Pekin Insurance Co.,* 344 Ill. App. 3d at 66) that they have little bearing on the matter here.

are necessarily relevant because they are judicial precedent which lower courts are bound to follow under the principle of *stare decisis*. *Glass v. Pitler,* 276 Ill. App. 3d 344, 353 (1995). However, contrary to plaintiff's assertion and the trial court's finding, we did not hold in *Hanley* that repairing a pothole is a ministerial task. We clearly held that, although repairs are generally considered ministerial, whether they are, in fact, ministerial is entirely dependent on the facts of each case . *Hanley*, 343 Ill. App. 3d at 56-58. Indeed, we remanded the case because the facts were insufficient to make the discretionary versus ministerial determination. The precedent for which *Hanley* stands is that the determination of whether a repair is ministerial or discretionary depends on the facts of the case. We did not decide that all pothole repairs are ministerial and our holding, therefore, did not invalidate the City's affirmative defense. The court's grant of a new trial on this basis was unwarranted.

Lack of Prejudice

The City also argues that, even if the court erred in allowing it to present its section 2-201 affirmative defense, it was still error to order a new trial because plaintiff cannot show that she suffered any prejudice from the ruling allowing the defense. The City asserts there was no prejudice to plaintiff because the jury instructions effectively nullified its section 2-201 affirmative defense and there were multiple grounds separate and apart from discretionary immunity which supported the jury's verdict.

"Reviewing courts are not concerned that parties receive an error-free trial; rather, our concern is that plaintiffs receive a fair trial, one free of substantial prejudice."

Cetera v. DiFilippo, 404 Ill. App. 3d 20, 47 (2010). A new trial is necessary only when the cumulative effect of trial errors so deprives a party of a fair trial that the verdict might have been affected. *Cetera*, 404 Ill. App. 3d at 47. Assuming *arguendo* that the court erred in allowing the City to present its discretionary immunity affirmative defense, we agree that this error did not result in prejudice so substantial that it deprived plaintiff of a fair trial.

First, the jury instruction regarding the City's affirmative defense did essentially neutralize the defense. The court, over the City's objection, instructed the jury to find for the City if the City proved that the plan to repair potholes was discretionary *and* "the pothole was repaired in a reasonably safe and skillful manner." However, once the City proved the repair was discretionary, its negligence in performing the repair would be irrelevant. The City is immune for discretionary acts or omissions, no matter whether negligently or wilfully and wantonly performed. *Hanley*, 343 Ill. App. 3d at 56. Therefore, if the jury found the repair discretionary, the question of whether the pothole was repaired properly would be irrelevant. The City's negligence in performing the repair would only matter if the jury found the repair was not discretionary, *i.e.*, ministerial, because the City is liable for the performance of ministerial acts if those acts are negligently performed. *Hanley*, 343 Ill. App. 3d at 56. The instruction was inaccurate and adverse to the City.

Further, it was plaintiff's burden to prove that the repair was done improperly. The jury was instructed that, as one of the elements of plaintiff's case, she had to prove

the City "[f]ailed to properly repair a pothole on the crosswalk in a reasonably safe and skillful manner." Only if the jury found plaintiff proved this element and the four other elements of her case, was it to consider the City's affirmative defense. Assuming that the jury followed the instructions, if it found the pothole was repaired in a reasonably safe and skillful manner, *i.e.*, that plaintiff did not prove her case, it never would have reached the affirmative defense. If the jury found plaintiff did prove her case and then considered the affirmative defense, it never could find in favor of the City because its earlier finding that plaintiff proved her case necessarily meant it had found the repair *was* negligently performed. Accordingly, the instruction was inaccurate and prejudicial to the City, not plaintiff.

Second, even if the affirmative defense was improperly presented, we have no reason to assume that the jury's verdict resulted from that defense. The jury returned its verdict on Verdict Form C, finding "for the defendant City of Chicago and against the plaintiff Marilyn Hanley." Verdict Form C was the form to be completed if the jury found that (1) the plaintiff failed to prove her burden in the case[2], (2) the City proved its affirmative defense that the plan to repair potholes is discretionary and the pothole was

[2] The jury was instructed that plaintiff had the burden of proving: (1) there was a condition in the sidewalk which presented an unreasonable risk of harm to pedestrians on the property; (2) the City could reasonably expect the pedestrians would not discover or realize the danger or would fail to protect themselves against such danger; (3) the City was negligent in failing to properly repair a pothole in the crosswalk in a reasonably safe and skillful manner; (4) plaintiff was injured; and (5) the City's negligence was a proximate cause of the injury. If the jury found plaintiff failed to prove any of the propositions, it was to find for the City on Verdict Form C.

repaired in a reasonably safe and skillful manner or (3) the City did not prove its affirmative defense but plaintiff was more than 50% contributorily negligent. When, as here, there was a general verdict and more than one theory was presented by which that verdict could be reached, we will uphold the verdict if there was sufficient evidence to sustain any theory, and the losing party, having failed to request special interrogatories, cannot complain. *Witherell v. Weimer*, 118 Ill.2d 321, 329 (1987).

There is no evidence in the record regarding which of the three conclusions the jury reached in finding for the City on Verdict Form C. There is sufficient evidence in the record to sustain any of the conclusions. Plaintiff, her son and assorted opinion and occurrence witnesses testified at trial. It was for the jury to weigh the evidence, determine the credibility of witnesses, and resolve any conflicts in expert testimony and we cannot substitute our judgment for that of the jury in such determinations. *Dabros by Dabros v. Wang*, 243 Ill. App. 3d 259, 264, 611 N.E.2d 1113 (1993); *Becht v. Palac*, 317 Ill. App. 3d 1026, 1035, 740 N.E.2d 1131, 1139 (2000). There being sufficient evidence to sustain all of the theories, we must uphold the jury's verdict.

We do not agree with plaintiff that the evidence overwhelmingly established the City's liability and the only possible explanation for the jury's verdict in the City's favor was the arguably erroneous discretionary immunity defense which the jury was allowed to consider. It may well be that the jury found plaintiff proved her case and that the City's repair was ministerial and improperly performed but the jury could still find for the City if it found plaintiff was more than 50% contributorily negligent. We do not know

what happened in the jury room. There is nothing in the record to show that the opposite liability conclusion is clearly evident or that the jury's findings are unreasonable, arbitrary or not based on the evidence or the law such that the case must be remanded for a new trial. Accordingly, notwithstanding an improper presentation of the affirmative defense, the trial court erred in granting plaintiff's motion for a new trial.

For the reasons state above, we reverse the decision of the trial court granting plaintiff's motion for a new trial.

Reversed.