COURT OF APPEALS
DECISION
DATED AND FILED

March 23, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP2689 **Cir. Ct. No. 2009SC1169**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

TIMOTHY J. NELESEN,

PLAINTIFF-APPELLANT,

V.

MIKE MICHLIG AND CITY OF APPLETON,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Outagamie County: DEE R. DYER, Judge. *Affirmed*.

¶1 PETERSON, J.[1] Timothy Nelesen appeals a summary judgment dismissing his negligence and nuisance claims against the City of Appleton and Mike Michlig, the City's forester (collectively, the City). Nelesen argues the

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

circuit court erred when it concluded the City was immune from liability for his claims. We disagree and affirm.

BACKGROUND

¶2 On June 18, 2007, Nelesen notified the City there were branches falling from City-owned trees near his property and requested the City trim them. On June 26, 2007, City arborists inspected and trimmed two trees near Nelesen's property. As part of the inspection process the arborists graded the trees; they received scores of 86 and 90 out of 100. The City received no further complaints about the trees until July 2008, when they were heavily damaged during a large storm and caused approximately $1,740 of damage to Nelesen's property. Following this storm, the City removed both trees.

¶3 Nelesen sued the City to recover his $1,000 insurance deductible, alleging the City's care of the tree that damaged his property[2] was negligent and constituted maintenance of a nuisance. The City moved for summary judgment, arguing it was immune from Nelesen's claims because they challenge an act that involves the City's discretion or judgment. The circuit court agreed and granted summary judgment in favor of the City.

DISCUSSION

¶4 Whether a circuit court properly granted summary judgment is a question of law we decide independently of the circuit court. ***Torgerson v.***

[2] The record indicates both trees near Nelesen's property were removed after the storm. In his affidavit and briefs, however, Nelesen only refers to one tree as damaging his property. Therefore, for the remainder of the opinion, we refer to "the tree," in the singular, as the focus of Nelesen's claims.

Journal/Sentinel, Inc., 210 Wis. 2d 524, 536, 563 N.W.2d 472 (1997). Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).

¶5 Our supreme court has interpreted Wisconsin's governmental immunity statute[3] as immunizing municipalities against tort liability for "any act that involves the exercise of discretion and judgment." ***Milwaukee Metro. Sewerage Dist. v. City of Milwaukee***, 2005 WI 8, ¶54, 277 Wis. 2d 635, 691 N.W.2d 658 (citations omitted). The statute, however, "affords no protection to a municipality for nondiscretionary or 'ministerial' acts." ***Id.*** "A ministerial act … involves a duty that is 'absolute certain and imperative, involving merely the performance of a specific task when the law imposes, prescribes and defines the time, mode and occasion for its performance with such certainty that nothing remains for judgment or discretion.'" ***Id.*** (citation omitted).

¶6 Nelesen argues the City had a ministerial duty to "maintain, repair, or replace the tree after receiving notice of interference with [Nelesen's] house."[4] We are perplexed by this argument because it is unclear what type of "maintenance" or "repair"—other than the trimming and inspecting the City did—

[3] WISCONSIN STAT. § 893.80(4).

[4] Nelesen also attempts to create a disputed issue of fact where there is none about the dates the City received and responded to his trimming request. The City's service request form lists the date Nelesen's request was received as June 18, 2007 and the work completed on June 26, 2008. The City's electronic records, however, list the trimming date as June 1, 2007. Accordingly, Michlig stated in his affidavit that the City received no complaints about the trees near Nelesen's property between June 1, 2007 and July 12, 2008. Michlig later explained the City's data entry procedure was to enter service dates into the electronic records as the first of the month, regardless of when service was actually completed. He submitted a supplemental affidavit clarifying the City received Nelesen's request on June 18, 2007 and completed the work on June 26, 2007. Nelesen contends this constitutes a disputed issue of material fact, but he has submitted no evidence—or even alleged—the dates were otherwise.

Nelesen is advocating was necessary. Further, it is undisputed that after the City performed this maintenance, it received no further notice of problems until the storm that damaged Nelesen's property in 2008. Accordingly, we accept the City's invitation to construe Nelesen's argument as suggesting the City should have removed the tree when it inspected it in 2007 instead of trimming it.[5]

¶7 In any event, the record does not bear out Nelesen's claim the City ever had a non-discretionary duty. Determining whether a tree should be trimmed or removed requires an arborist to exercise judgment. Indeed, the Appleton Municipal Code specifies multiple goals for the City's tree care, including "guard[ing] against dangerous conditions" as well as "promot[ing] and enhanc[ing] the beauty and general welfare of the City …." APPLETON MUNICIPAL CODE § 21-26. Here, the City's arborists evaluated the tree's health and determined it was "not [a] candidate[] for complete removal at that time." The City's decision to trim, rather than remove, the tree was discretionary.

¶8 In his reply, Nelesen contends the City's brief "myopically focus[es] on [its] alleged discretionary decision to trim [the] tree in 2007"[6] rather than addressing past incidents in which branches had fallen from the tree. While difficult to discern, this argument appears to be essentially that the tree was so unhealthy and dangerous that the City had no choice but to remove it.

[5] The City also points out that despite Nelesen's apparent contention the tree should have been removed, Nelesen himself requested the City trim the tree.

[6] We note that this statement appears to concede the City's care of the tree was discretionary.

¶9 The problem with this argument, though, is that Nelesen fails to present any concrete evidence contradicting the arborists' conclusions about the tree's health, protesting instead that their evaluation should not be believed because "the [tree's] score was determined by the same people who allowed this tree to break in the first place." The only evidence of the tree's health he offers is that branches had broken off and fallen on his property in the past—*prior* to the trimming. While this might indicate a problem with the tree, it by no means controverts or even seriously calls into doubt the arborists' assessment the tree was healthy enough to merit trimming instead of removal. Because Nelesen has provided no evidence the tree was so unhealthy removal was the only option, he has failed to show the City's care of the tree was not discretionary. The circuit court therefore properly concluded the City was immune from liability for Nelesen's claims.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.