

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 28, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 99-2194

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

WILLIAM A. WULF,

PLAINTIFF-APPELLANT,

V.

CITY OF MERRILL,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Lincoln County:
GARY L. CARLSON, Judge. *Reversed and cause remanded.*

¶1 PETERSON, J. William Wulf appeals an order granting the City of Merrill's motion for summary judgment and denying his opposing motion. He brought suit against the City seeking damages for replacing his mailbox, which was struck by the City's snowplow. The circuit court held that the City is immune from damages caused by its employee's negligent snowplow operation. This court disagrees.

¶2 Wulf lives on a rural mail delivery route. The City admits that its snowplow damaged Wulf's mailbox in January 1999, but claims that it is immune because: (1) the legislature provided municipalities immunity from activities associated with removing snow; (2) Wulf's mailbox encroached on the public right-of-way; (3) public policy dictates that municipalities should be immune from damaging mailboxes while plowing snow; and (4) municipalities are immune from damages arising out of their discretionary method of plowing snow.

¶3 This court reviews summary judgments de novo, employing the same methodology as the trial court. *See Green Spring Farms v. Kersten*, 136 Wis.2d 304, 315, 401 N.W.2d 816, 820 (1987). The circuit court's decision granting summary judgment must stand if the record demonstrates that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See* § 802.08(2), STATS. Because the summary judgment methodology has been stated in many cases, this court does not reiterate it here. *See, e.g., Caulfield v. Caulfield*, 183 Wis.2d 83, 91, 515 N.W.2d 278, 282 (Ct. App. 1994).

¶4 *Holytz v. City of Milwaukee*, 17 Wis.2d 26, 115 N.W.2d 618 (1962), abrogated municipal tort immunity. As a result, municipalities have the common law duty to conduct ministerial functions in a non-negligent manner. Both parties agree that the City's duty to clear snow from its streets is ministerial.¹ After *Holytz*, the general rule in Wisconsin "is liability—the exception is immunity"

¹ In *Frostman v. State Farm Mut. Auto. Ins. Co.*, 171 Wis.2d 138, 143, 491 N.W.2d 100, 102 (Ct. App. 1992), this court held that even if a municipality's duty of snowplowing is discretionary, the municipality is liable for negligent operation of its snowplow.

when a municipality or its officer or employee engages in tortious conduct. *Id.* at 39, 115 N.W.2d at 625.

¶5 The legislature, however, is free to provide immunity, set ceilings on damage awards or set preliminary administrative requirements that limit judicial proceedings for tort claims. *See id.* at 40, 115 N.W.2d at 625. The City contends that the legislature provided immunity in this case by adopting § 81.15, STATS., which states, in relevant part: “No action may be maintained to recover damages for injuries sustained by reason of an accumulation of snow or ice upon any bridge or highway, unless the accumulation existed for 3 weeks.”

¶6 The interpretation of a statute is a question of law that this court reviews de novo. *See State v. Setagord*, 211 Wis.2d 397, 406, 565 N.W.2d 506, 509 (1997). The purpose of statutory interpretation is to discern the intent of the legislature. *See id.* In discerning the legislature’s intent, we first consider the language of the statute. *See id.*

¶7 The language of § 81.15, STATS., is clear. Municipalities have limited immunity for damages arising out of the *accumulation* of snow or ice. The language does not suggest that municipalities are immune from damages arising out of negligent operation of machinery used to remove snow or ice.

¶8 Moreover, § 345.05(2), STATS., provides municipal liability for “[a] person suffering any damage proximately resulting from the negligent operation of a motor vehicle owned and operated by a municipality” In *Frostman v. State Farm Mut. Auto. Ins. Co.*, 171 Wis.2d 138, 142, 491 N.W.2d 100, 101 (Ct. App. 1992), this court held that § 345.05(2) renders municipalities liable for failing to exercise their duty of ordinary care while operating snowplows.

¶9 The City claims that its ordinance provides immunity for damages caused to mailboxes encroaching on the public right-of-way. MERRILL, WIS., CODE § 6-3-3, prohibits encroachments on the public right-of-way and provides immunity for any damages caused to these encroachments. However, a municipality may not establish its own immunity; only the state legislature has the authority to adopt immunity for municipal tort actions. See *Holytz*, 17 Wis.2d at 40, 115 N.W.2d at 625.

¶10 The City also argues that public policy dictates it should be immune from liability because plowing snow is an inherently hazardous activity. However, in *Frostman*, 171 Wis.2d at 143, 491 N.W.2d at 102, this court rejected a similar argument and stated that imposing liability for negligent snowplow operation would not create an undue burden on a governmental agency.

¶11 Finally, the City claims that the mailbox was damaged because of the City's discretionary decision to use a thirty-eight-inch snowplow blade, a decision for which it is entitled immunity.² Wulf's mailbox was only thirty-nine or forty inches off the ground. Wulf claims, however, that the mailbox damage was caused by the snowplow operator's driving, not by the relative height of his mailbox. This presents a factual issue that should be resolved by the trier of fact.

² Section 893.80(4), STATS., grants immunity to municipalities for discretionary, rather than ministerial acts. See *Frostman*, 171 Wis.2d at 144, 491 N.W.2d at 102.

By the Court.—Order reversed and cause remanded.

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

