COURT OF APPEALS
DECISION
DATED AND FILED

June 19, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-1357

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

ROBERT M. AND SUSAN R. STRZELEC,

PLAINTIFFS-APPELLANTS,

V.

CITY OF FRANKLIN, WISCONSIN, A MUNICIPAL CORPORATION, JOHN M. BENNETT AND JAMES AND KODY CONTI,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Milwaukee County: CHARLES F. KAHN, JR., Judge. *Affirmed in part; reversed in part; and cause remanded for further proceedings.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

¶1 FINE, J. Robert M. and Susan R. Strzelec appeal from the trial court's grant of summary judgment in favor of the City of Franklin and its city

engineer, John M. Bennett, and James and Kody Conti. We affirm in part, reverse in part, and remand for further proceedings.

¶2 The Strzelecs live on property in the City of Franklin. The Contis live next door. The Strzelecs claim that Mark and Diane Origers, who owned the next-door property before the Contis bought it, unlawfully interfered with the free drainage of water from the Strzelecs' property to their property by filling in a swale (a groove in the land through which water flows) and, despite repeated requests that the City and the Contis do something about it, and efforts by the City to help, water still ponds on part of the Strzelec property.

¶3 In September of 1997, the Strzelecs brought this action asserting the following claims: that the City and Bennett were negligent; that the City and Bennett violated their civil rights under 42 U.S.C. § 1983 by depriving them due process of law under the Fourteenth Amendment to the United States Constitution and under Article I, section 1 of the Wisconsin Constitution; that the City took their property by "inverse condemnation"; and that the Contis permitted a nuisance because they, as alleged in the Strzelecs' complaint, "unreasonably and intentionally impeded or otherwise interfered with the free flow of surface, runoff water from the Strzelec Property onto their property, thereby unreasonably invading the Strzelecs' interest in the use and enjoyment of their property." The Strzelecs also contend that the members of the City's council unlawfully recused themselves from an appeal brought by Origers from a March 1991 order issued by Bennett in connection with the ponding problem, and that the council unlawfully refused to hire a special counsel in connection with that appeal. The council ultimately heard the appeal and upheld Bennett's order. The Strzelecs sought injunctive relief, actual damages against all the defendants, punitive damages

against Bennett in his individual capacity, and attorney's fees under 42 U.S.C. § 1988.

¶4 Summary judgment is used to determine whether there are any disputed facts that require a trial, and, if not, whether a party is entitled to judgment as a matter of law. WIS. STAT. RULE 802.08(2); ***U.S. Oil Co. v. Midwest Auto Care Servs., Inc.***, 150 Wis. 2d 80, 86, 440 N.W.2d 825, 827 (Ct. App. 1989). Our review of a trial court's grant of summary judgment is *de novo*. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816, 820 (1987). In order to survive summary judgment, the party with the burden of proof on an element in the case must establish that there is at least a genuine issue of fact on that element by submitting evidentiary material "set[ting] forth specific facts," WIS. STAT. RULE 802.08(3), material to that element. ***Transportation Ins. Co. v. Hunzinger Constr. Co.***, 179 Wis. 2d 281, 290-292, 507 N.W.2d 136, 139, 140 (Ct. App. 1993). On this review, we determine whether—accepting as true the Strzelecs' allegations of fact—the defendants are entitled to judgment as a matter of law. *See* ***Pinter v. American Family Mut. Ins. Co.***, 2000 WI 75, ¶4, 236 Wis. 2d 137, 141, 613 N.W.2d 110, 111. The Strzelecs' assertions in their complaint are scattershot attacks on the defendants, and we address those they have preserved by arguing them in their appellate briefs. *See* ***Reiman Assocs. v. R/A Advertising***, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292, 294 n.1 (Ct. App. 1981) (issues not briefed are deemed abandoned).

A. *The Strzelecs' Claims Against the Municipal Defendants.*

1. *The Strzelecs' Negligence Claims Against the Municipal Defendants.*

¶5 Before discussing the Strzelecs' assertions of negligence against the City and Bennett, we believe it is helpful to first set out the applicable law when municipal defendants are sought to be held liable for negligence. WISCONSIN STAT. § 893.80(4), as material here, provides:

> No suit may be brought against any ... political corporation, governmental subdivision or any agency thereof ... or against its officers, officials, agents or employes [*sic*] for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions.

Under this provision, "[p]ublic officers or employees" as well as their employing entities "enjoy immunity from liability for injuries resulting from the performance of any discretionary act within the scope of their governmental employment." ***Kierstyn v. Racine Unified Sch Dist.***, 228 Wis. 2d 81, 88, 596 N.W.2d 417, 421 (1999). Immunity does not apply if the act or omission on which a claim for liability is predicated is ministerial rather than discretionary. ***Ottinger v. Pinel***, 215 Wis. 2d 266, 273, 572 N.W.2d 519, 521 (Ct. App. 1997). Immunity also does not apply if the act complained of is "malicious, willful and intentional." ***Kierstyn***, 228 Wis. 2d 90 n.8, 596 N.W.2d at 422 n.8 (quoted source omitted). Additionally, "it is the nature of the specific act upon which liability is based, as opposed to the categorization of the general duties of a public officer, which is determinative of whether an officer is immune from liability." ***C.L. v. Olson***, 143 Wis. 2d 701, 716, 422 N.W.2d 614, 619 (1988).

¶6 A governmental employee's duty must have certain attributes before that duty will be considered to be ministerial rather than discretionary:

> "A public officer's duty is ministerial only when it 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."

Kierstyn, 228 Wis. 2d at 91, 596 N.W.2d at 422 (quoted source omitted). Stated another way, there is no liability if the act or omission results from an "exercise of judgment." ***Willow Creek Ranch, L.L.C. v. Town of Shelby***, 2000 WI 56, ¶ 25, 235 Wis. 2d 409, 425, 611 N.W.2d 693, 700. This is true even when the governmental function is building or property inspection. Thus, the seminal building-inspector case, ***Coffey v. City of Milwaukee***, 74 Wis. 2d 526, 534, 247 N.W.2d 132, 136–137 (1976), explained why the inspector's failure to detect the faulty sprinkler systems, which he was required to inspect, was not within the ambit of governmental immunity: "There is no discretion to inspect or not inspect. Violations exist or do not exist according to the dictates of the regulations governing the inspection, and not according to the discretion of the inspector." With these principles in mind, we turn to the Strzelecs' allegations of negligence against the City and Bennett.[1]

¶7 The crux of the Strzelecs' negligence claim against the municipal defendants is that the City and Bennett did not effectively monitor the landscaping and filling work done by the Origers, and that this led to the ponding on the Strzelecs' land. But the Strzelecs point to nothing in the ordinances they claim were violated by the City and Bennett, Franklin Ordinances §§ 12.15 and 13.14,

[1] The City and Bennett assert that at least some of the Strzelecs' claims are barred by the statute of limitations. They did not, however, assert this defense as required by WIS. STAT. RULES 802.02(3) and 802.06(2)(a), and, although they did file a motion before the trial court to amend their answer to assert the statute of limitations as a defense, the trial court never ruled on that motion, which the Strzelecs opposed. Accordingly, the defense was waived. *See* ***Anderson v. City of Milwaukee***, 208 Wis. 2d 18, 34–35, 559 N.W.2d 563, 570 (1997).

that so circumscribed the duties and obligations of city personnel as to the "time, mode and occasion for its performance with such certainty that nothing remain[ed] for judgment or discretion." ***Kierstyn***, 228 Wis. 2d at 91, 596 N.W.2d at 422. Indeed, the Strzelecs concede as much in their appellate brief:

> Each of the City's enforcement responses (or non-responses) to the Origers' violations, when viewed in isolation, could arguably be characterized as discretionary. However, the City's inexcusable pattern of missteps, omissions, and delays, when viewed in their totality, is certainly telling and literally worked to undermine the very objectives of the "landing filling" and drainage structure ordinances.

(Ordinance citations and appendix references omitted.) But negligence and a bad result does not abrogate the governmental immunity conferred by WIS. STAT. § 893.80(4). ***Kimps v. Hill,*** 200 Wis. 2d 1, 11, 546 N.W.2d 151, 156 (1996) ("Just because a jury can find that certain conduct was negligent does not transform that conduct into a breach of a ministerial duty."). Rather, the duty imposed upon the governmental employee must mandate specific steps before that duty can be considered to be ministerial. ***Id.***, 200 Wis. 2d at 15, 546 N.W.2d at 158 (professor's duty to provide safe equipment, and safety officer's duty to investigate accidents did not impose ministerial duty on either in the way to carry out their responsibilities). Thus, for example, although prison guards have an absolute duty to prevent their prisoners from escaping, how the guards try to do that is vested in their discretion. ***Ottinger***, 215 Wis. 2d at 276, 572 N.W.2d at 522. Similarly, although the safe-place statute requires jail facilities to be safe, how to comply with that mandatory duty is within the jailor's discretion. ***Spencer v. County of Brown,*** 215 Wis. 2d 641, 652, 573 N.W.2d 222, 226-227 (Ct. App. 1997). At the most, the Strzelecs' negligence claim against the City and Bennett is based on a retrospective, result-colored analysis of how they contend the

governmental discretion should have been exercised. Section 893.80(4) bars that claim.

2. *Initial Recusal by the Franklin City Council From a Hearing on the Appeal by the Origers.*

¶8 In March of 1991, Bennett issued an order to the Origers directing them to fix the problem that led to the ponding on the Strzelecs' land. The Origers appealed that order to the city council. All of the council members recused themselves from the appeal. Following a writ of mandamus issued to the city council by a circuit court judge at the Strzelecs' request, the council heard the appeal and affirmed Bennett's order. The Strzelecs contend that the initial recusal by the council members violated a ministerial duty, but do not explain how they were damaged by the initial recusal, and damages is an essential element of a tort claim. ***Anderson v. Green Bay & Western RR***., 99 Wis. 2d 514, 516, 299 N.W.2d 615, 617 (Ct. App. 1980). Accordingly, they have not established on this appeal why summary judgment in connection with this aspect of their complaint against the municipal defendants should not have been granted.

3. *Failure by City Council to Appoint a Special Prosecutor.*

¶9 In an undeveloped argument, the Strzelecs also complain that once the council decided to hear the appeal from Bennett's March 1991 order by the Origers, the council's failure to hire a special prosecutor to assist the council at that hearing was not only the breach of a ministerial duty but also, using their word, "may" have been within the "willful and intentional" exception to government immunity under WIS. STAT. § 893.80(4). The decision by a legislative body acting in a quasi-judicial capacity to retain or not to retain special counsel, however, is, on its face, something that appears to be vested within the

discretion of that body. *See* ***Oliveira v. City of Milwaukee***, 2001 WI 27, ¶42, 242 Wis. 2d 1, ___, 624 N.W.2d 117, 126 (generally, municipal legislative bodies control their own procedures). The Strzelecs do not explain, beyond their use of conclusory words framing their argument, why it is not. We will not consider such amorphous arguments. *See* ***Barakat v. Department of Health & Soc. Servs.***, 191 Wis. 2d 769, 786, 530 N.W.2d 392, 398 (Ct. App. 1995). Moreover, the Strzelecs do not explain how or why the council owed them a duty to hire a special counsel, or how they were damaged by the decision not to hire one. *See* ***Anderson***, 99 Wis. 2d at 516, 299 N.W.2d at 617 (tort claim requires proof of duty, breach of that duty, and damages resulting from the breach). Accordingly, they have not established on this appeal why summary judgment in connection with this aspect of their complaint against the municipal defendants should not have been granted.

4. *The Alleged Negligent Design by, and Execution of that Design by, the City of the Excavation to Relieve the Ponding on the Strzelecs' Property.*

¶10 After the Origers did not successfully alleviate the water problems on the Strzelecs' property, the City undertook to do so. The Strzelecs' claim that this was done negligently. As with their contentions in connection with the City's alleged negligent overseeing of the Origers' landscaping and filling work, the Strzelecs do not point to anything—either in the city ordinances or anywhere else—that so circumscribed the duties and obligations of city personnel as to the "time, mode and occasion for its performance with such certainty that nothing remain[ed] for judgment or discretion." ***Kierstyn***, 228 Wis. 2d at 91, 596 N.W.2d at 422. Here again, their own argument in their brief on this appeal exposes their contentions' lack of merit:

> If nothing else, the "elimination of ponding on the Strzelecs' property" requirement was clear and positive. It was an objective specification readily obtainable from an engineering and construction standpoint. While the City may therefore have been able to reasonably exercise its discretion in regard to many aspects of the design of the swale, it could not ignore the "elimination of ponding" condition unless it wanted to willfully and intentionally flout its own order.

As we explained in part A. 1., above, "negligence and a bad result does not abrogate the governmental immunity conferred by WIS. STAT. § 893.80(4)."[2] Accordingly, they have not established on this appeal why summary judgment in connection with this aspect of their complaint against the municipal defendants should not have been granted.

5. *Allegations of Inverse Condemnation.*

¶11 Casting their contentions of municipal negligence in different clothes, the Strzelecs claim that the City's failure to successfully abate the ponding on the Strzelecs' property is inverse condemnation for which compensation is due. We disagree.

¶12 Inverse condemnation in Wisconsin permits a landowner to recover when government restricts or prohibits an owner's use of his or her property but has not exercised its condemnation power. ***Koskey v. Town of Bergen***, 2000 WI App 140, ¶1 n.1, 237 Wis. 2d 284, 285 n.1, 614 N.W.2d 845, 845 n.1 ("Inverse condemnation is a procedure where a property owner petitions the

[2] The Strzelecs make much of the municipal defendants' contentions that they were not negligent, and argue that, based on those contentions, there are genuine issues of fact for trial as to whether the municipal defendants were negligent that preclude the grant of summary judgment. As we have explained in the main body of this opinion, however, we are assuming for our analysis of the legal issues presented by this appeal that all of the allegations of fact made by the Strzelecs are true.

circuit court to institute condemnation proceedings."); WIS. STAT. § 32.10 (establishing procedure). The law elsewhere is similar: "Inverse condemnation is a short-hand description of the manner in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted." ***Agins v. City of Tiburon,*** 447 U.S. 255, 257 n.1 (1980).

¶13 There is no "taking," however, that triggers the right to condemnation damages unless the restriction on the use of property is by governmental action. *See* ***State ex rel. Madison Landfills, Inc. v. Dane County***, 183 Wis. 2d 282, 291, 515 N.W.2d 322, 326 (Ct. App. 1994) (denial of rezoning petition not a "taking"); ***Loretto v. Teleprompter Manhattan CATV Corp.***, 458 U.S. 419, 426 (1982) ("permanent physical occupation authorized by government is a taking") (law that permitted cable companies to run lines on private property without owner's consent). Stated another way, "there must be some action by the government specifically directed toward the plaintiff's property that has the effect of limiting the use of the property." ***Charles Murphy, M.D., P.C. v. City of Detroit***, 506 N.W.2d 5, 7 (Mich. Ct. App. 1993) (owners of supermarket complex could not recover inverse-condemnation damages against city which, by condemning surrounding homes, deprived shopping center of most of its customer base).

¶14 The Strzelecs recognize the need to have government action responsible for a "taking" before condemnation damages may be awarded by its contention in its brief that what the City did with respect to the ponding on their land "constitutes government action." (Capitalization omitted.) But, as with their claims that the municipal defendants' actions in connection with the ponding on their land were violations of ministerial duties, the Strzelecs have not pointed to anything but failed attempts by the municipal defendants to rectify the situation—

they have not alleged that the municipal defendants caused the ponding. Thus, they argue in their appellate brief that the City was "the only entity empowered to see that the illegal swale obstruction was removed on the neighbor's property and that the ponding on the Strzelec' property was eliminated." (Capitalization omitted.) That may be, but the City did not cause the ponding problem. The Strzelecs have cited to us no case—from any jurisdiction—and we have found none, where negligent failure to fix a problem caused by a private party has supplied the basis for an inverse-condemnation claim. Accordingly, they have not established on this appeal why summary judgment in connection with this aspect of their complaint against the municipal defendants should not have been granted.

6. *Deprivation of Civil Rights*

¶15 Changing the garb of their complaint against the municipal defendants once again, the Strzelecs also invoke the Fourteenth Amendment to the United States Constitution and a post-civil war civil rights act, 42 U.S.C. § 1983, in support of their contention that the failure by the municipal defendants to fix—or see to it that others fix—the ponding problem on their property is actionable.[3]

[3] 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

They claim that the municipal defendants deprived them of their substantive right to due process by "denying them the enjoyment" of their rights to property.[4] The talismanic invocation of the magic words "due process" does not save their claim against the municipal defendants.

¶16 As we have seen, the basis for the Strzelecs' claim that the municipal defendants are liable for the ponding on their land is that the municipal defendants failed to either force the owners of the neighboring property to remedy the situation or remedy the situation themselves. And, as we have also seen, the ponding itself was caused not by the municipal defendants (or even the Contis) but, rather, by the persons who owned the neighboring property before the Contis bought it. Nothing in either the language or history of the due process clause imposes upon a state or municipality "to protect the life, liberty, and property of its citizens against invasion by private actors." ***DeShaney v. Winnebago Dept. of Social Servs.***, 489 U.S. 189, 195 (1989).

¶17 ***DeShaney*** held that Winnebago County was not liable under 42 U.S.C. § 1983 and the substantive due-process right guaranteed by the United States Constitution even though that county's social services department did nothing to protect a young boy whom it suspected was a victim of child abuse, and whose safety it was supposedly monitoring, from being beaten so severely by his father that he will "spend the rest of his life confined to an institution for the profoundly retarded," even though the county knew that the boy's father had beaten the boy in the past, knew that the rules established to ensure the boy's safety were being ignored, and where the social worker, during her many visits to

[4] In a passing reference in a footnote to their brief on appeal, they also invoke Article I, § 1 of the Wisconsin Constitution, but make no separate argument based on that provision.

the "home" saw the affects of contemporaneous beatings and had "continuing suspicions that someone in the DeShaney household was physically abusing" the boy. ***Id.***, 489 U.S. at 192–193. Of course, the ponding of the Strzelecs' property, as annoying as it must be to the Strzelecs, pales to insignificance when compared to the trauma and tragedy endured by the young DeShaney boy. Yet, even in light of the horrendous—frankly, venal—disregard of the young boy's right as a human in society to safety and security, the United States Supreme Court held that whatever remedies there might be for the boy, they did not flow from the substantive due-process component of the Fourteenth Amendment:

> The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without "due process of law," but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means. Nor does history support such an expansive reading of the constitutional text.
> ...
>
> [O]ur cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual.

Id., 489 U.S. at 195–196. The Strzelecs have no § 1983 claim against the municipal defendants here for the failure of the City or Bennett to cure their ponding problem.

B. *The Strzelecs' Nuisance Claim Against the Contis.*

¶18 The Strzelecs seek injunctive relief against and damages from the Contis based on their alleged maintenance of a nuisance. They point out, and the Contis do not dispute, that a landowner may be held liable for a nuisance created by a predecessor in interest if the landowner permits to nuisance to continue. *See* ***Brown v. Milwaukee Terminal Ry Co.***, 199 Wis. 575, 590, 227 N.W. 385, 386 (1929). Moreover, a landowner may be liable for a nuisance even if the landowner is not negligent in creating or maintaining the nuisance. ***Ibid***. The trial court granted summary judgment to the Contis, holding that under the facts as it perceived them, the "inconvenience" and "disruption" to the Strzelecs caused by the ponding on their property did not rise to the level of what the law considers to be a "nuisance."

¶19 A nuisance is "an unwanted and harmful interference with the use" of land that results from "a nontrespassory invasion" of that land as a result of "an activity under [another]'s control." ***Vogel v. Grant-Lafayette Elec. Coop.***, 201 Wis. 2d 416, 423–424, 548 N.W.2d 829, 832–833 (1996) (quoted source and internal quotes omitted). As expressed in the pattern jury instruction: "A nuisance is an unreasonable (activity) (use of property) that interferes substantially with the comfortable enjoyment of the life, health, or safety of another person. To be a nuisance, an (activity) (use of property) must cause significant harm." WIS JI—CIVIL 1920. The term "significant harm" is defined by the jury instruction to mean "harm involving more than slight inconvenience or petty annoyance." ***Ibid.*** The instruction further advises a jury that an "interference is significant" "[i]f ordinary persons living in the community would regard the (activity) (use of property) in question as substantially offensive, seriously annoying, or

intolerable." ***Ibid.*** Resolution of these matters questions is generally reserved for the trier of fact. ***Vogel***, 201 Wis. 2d at 427, 548 N.W.2d at 834.

¶20 The Strzelecs produced evidentiary material that the ponding has, according to Mr. Strzelec's affidavit submitted to the trial court, destroyed "vegetation ... including trees and plantings," to a value "in the thousands of dollars." A neighbor of both the Strzelecs and the Contis submitted an affidavit that: "The ponding on the Strzelecs' Property has resulted in the destruction of much plant life." Mr. Strzelec estimated that the "diminished value" of the Strzelecs' property as a result of the ponding "is equally in the thousands of dollars (representing approximately a 5%–7% reduction in value of the property." A property owner may, of course, under Wisconsin law testify about that property's value. ***Trible v. Tower Ins.***, 43 Wis. 2d 172, 187, 168 N.W.2d 148, 156 (1969).

¶21 This is not one of those rare cases where the facts are so clear that they are amenable to resolution on summary judgment, especially because the foci of the inquiry here are such amorphous concepts as "reasonableness," "substantially," and "significant." *See* ***Lecus v. American Mut. Ins. Co. of Boston***, 81 Wis. 2d 183, 189, 260 N.W.2d 241, 243 (1977) (summary judgment "should not be granted unless the material facts are not in dispute, [and] no competing inferences can arise."). We reverse the trial court's grant of summary judgment to the Contis.

By the Court.—Judgment affirmed in part; reversed in part; and cause remanded for further proceedings.

Publication in the official reports is not recommended.

¶22 SCHUDSON, J. *(concurring/dissenting).* I agree with the majority's affirmance of the summary judgment on the inverse condemnation and substantive due process claims. I also agree with the majority's reversal of the summary judgment on the nuisance claim. I disagree, however, with the majority's affirmance of the summary judgment on the Strzelecs' negligence claim against the City and Bennet.

¶23 The circumstances of this case are unusual—quite unlike any others considered in Wisconsin case law distinguishing discretionary and ministerial duties. Thus, I acknowledge, the majority's view might have had some merit in what could have been a close-call. Here, however, the majority fails to recognize the City's concessions confirming one of the Strzelecs' two central arguments, and thus establishing: (1) that the City and Bennet are not immune; and (2) that material factual disputes preclude summary judgment.

¶24 The majority writes that "[t]he crux of the Strzelecs' negligence claim against the municipal defendants is that the City and Bennet did not effectively monitor the landscaping and filling work done by the Origers, and that this led to the ponding" on their land. Majority at ¶7. Were that the crux, I might not disagree with the majority. It is not, however.

¶25 It is essential to recognize that the Strzelecs' negligence claim encompasses two separate areas: (1) the City's design of the plan to eliminate the ponding; and (2) the City's implementation of that plan. As I shall try to explain, the City's concessions on appeal establish that, at least with respect to the latter

area, summary judgment was improper. A brief summary of the facts related to the Strzelecs' negligence claim, most of which the majority fails to mention, is critical to an understanding of this case.

¶26 In 1986, the Origers, then the adjoining neighbors of the Strzelecs, were landscaping their property. Without obtaining the required permit, the Origers filled a swale on their property and, as a result, water that would have drained from the Strzelecs' land "ponded," allegedly causing the loss of trees and vegetation on the Strzelecs' property.

¶27 In 1987, the Strzelecs complained to the City of Franklin. In a letter dated June 28, 1988, Bennett wrote Mr. Origer, referring to and enclosing Franklin Ordinance 13.14(4), which, according to the letter, "prohibits blocking of natural drainage." Accordingly, Bennett ordered Origer to "make arrangements to provide a swale to allow for drainage as indicated on the map and *to eliminate the ponding* which has occurred on the Strzelec property." (Emphasis added.)

¶28 On December 20, 1990, the City issued its second order to the Origers. Bennett wrote the Origers advising them that the City's inspection and field survey established that their property "does show that a blockage exists." Bennett included Franklin Ordinance 12.15 which, he said, "prohibits the deliberate or negligent obstruction or filling of a drainage[]way without obtaining a permit from the City Engineer." He advised the Origers that the "path of natural drainage … has been blocked," and he ordered them to "provide a swale to allow for drainage … to *eliminate the ponding* which has occurred on the Strzelec property." (Emphasis added.)

¶29 On March 4, 1991, the City issued its third order to the Origers. Bennett wrote the Origers, again included Ordinance 12.15, and again advised that

the "path of natural drainage … has been blocked." He ordered them "to provide a swale to allow for drainage … to *eliminate the ponding* which has occurred on the Strzelec property," and to do so by May 1, 1991. (Emphasis added.) The Origers appealed the March 4 order to the City Council, but the Council voted collectively to recuse itself from the appeal. The Strzelecs then brought a mandamus action to compel the Council to hear the appeal. The Honorable Patricia S. Curley, then a circuit court judge, issued the writ of mandamus.

¶30 On February 4, 1992, the City issued its decision on the Origers' appeal. The Council found that "ponding occurs on the … Strzelec property" and "the area of ponding on the Strzelec property is located within a drainage way." The decision also concluded that "the drainage way which traverses the Strzelec and Origer properties was obstructed on the Origer property by the filling and grading activities of [the Origers]." The City, believing it could perform the work properly and cost-effectively, decided to perform the work rather than have the Origers arrange for it to be done.

¶31 From 1992 to 1994, in order to implement its orders to the Origers, the City undertook various remedial efforts to eliminate the ponding. According to the Strzelecs' submissions, however, the City's own surveys established that its grading plan could not have eliminated the ponding; thus, the ponding continued. Nevertheless, in an October 13, 1994 letter, the Franklin City Attorney informed the Strzelecs' lawyer that the City would "undertake no further activity on this matter as same is unwarranted."

¶32 Admittedly, a first glance seems to show the Strzelecs wading into the swamp of a municipality's discretionary conduct. After all, "a public officer's duty is ministerial only when it 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." ***Lister v. Board of Regents***, 72 Wis. 2d 282, 301, 240 N.W.2d 610 (1976). A closer look, however, reveals that the City has correctly conceded the merits of at least one of the Strzelecs' very substantial arguments.

¶33 Essentially, the Strzelecs maintain that because the City mandated, "eliminate the ponding," the City had no discretion to permit the ponding to continue. Thus, if the City negligently designed a plan such that it could never succeed in eliminating the ponding, or if the City designed a potentially successful plan but negligently implemented the plan such that it did not succeed, the City failed to enforce its orders and, therefore, violated its ministerial duty. The City's exact "mode and occasion for its performance" remained discretionary, *see* ***Lister***, 72 Wis. 2d at 301, but its obligation to "eliminate the ponding" was ministerial.

¶34 The City concedes the Strzelecs' legal premise—that a ministerial duty can arise by virtue of the City's issuance of corrective orders, under circumstances like these. The City, however, attempts to draw a distinction, contending: "If a ministerial duty arose in the City's decision to enforce the [o]rdinances and order, it arose with respect to the implementation of the plan the City developed, not with respect to the outcome, the elimination of ponding on the Strzelecs' property." Here, however, that distinction is no distinction at all. Here, "the implementation of the plan the City developed" and "the outcome" were one and the same: "eliminate the ponding."

¶35 The circuit court accepted the proposition that *implementation* of the plan to the eliminate the ponding, as distinct from *design* of the plan, was

ministerial. Also accepting that proposition, the City, in its brief to this court, concedes that if it "negligently implemented its design plan, it would not enjoy protection pursuant to section 893.80." Further, were there any doubt about what might seem a surprising concession, four pages later, the City reiterates that while "governmental immunity applies to the development of the design plan, a ministerial duty arises only in the performance of the plan." And the City, denying that it was negligent in implementing the plan, also implicitly concedes the existence of material factual disputes on that very issue—the issue on which it concedes that it does *not* have immunity under WIS. STAT. § 893.80(4).

¶36 The City's concessions are dispositive. After all, even if we accept the City's attempt to draw a distinction between "the development of the design plan" and "the performance of the plan," immunity, *according to the City*, would not apply to the latter subject, and factual disputes carry that subject beyond the reach of summary judgment. That is, *even accepting the City's distinction*, a trial issue remains: whether the City negligently implemented its plan to eliminate the ponding.

¶37 The City seems to try to wish-away the issue, asserting that the Strzelecs claim only "that the City picked an ineffective plan," that that pick "was a discretionary choice," and that *the Strzelecs "do not claim the City was negligent with respect to its performance of the plan."* (Emphasis added.) Nonsense. While the Strzelecs do argue that the City was negligent in designing the plan, they also argue that the City was negligent in implementing what the City maintains was a proper plan. Among other things, the Strzelecs challenge "Bennett's decision to refuse to perform any additional remedial work, notwithstanding his own outstanding order affirmed by the Council."

¶38 The summary judgment submissions establish that the Strzelecs have evidence to support their negligence claim. The circuit court proceedings, the circuit court's decisions, and the briefs on appeal, either explicitly or implicitly, all acknowledge material factual disputes: whether the City, after exercising its discretionary authority to issue orders to enforce its ordinances, violated its ministerial duty to "eliminate the ponding"—by negligently designing a plan that could not eliminate the ponding (an issue the City does not concede), and/or by negligently failing to implement its plan that could (the issue on which the City's concessions confirm that summary judgment was improper).

¶39 Accordingly, while concurring in most respects, on this significant issue, I respectfully dissent.