COURT OF APPEALS
DECISION
DATED AND FILED

October 5, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 04-0834-FT **Cir. Ct. No. 02-CV-53**

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

WILLARD LEAF AND MARY LEAF,

PLAINTIFFS-APPELLANTS,

V.

VILLAGE OF LAKE NEBAGAMON AND WAUSAU INSURANCE COMPANIES,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Douglas County: GEORGE GLONEK, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Willard and Mary Leaf appeal a judgment, entered upon a jury's verdict, that the Village of Lake Nebagamon lacked actual or

constructive notice of a defect in drainage culverts.[1] The Leafs contend the court erroneously allowed a "surprise" witness to testify and erroneously denied their motion for a new trial based on newly discovered evidence. We reject the Leafs' arguments and affirm the judgment.

Background

¶2 The Leafs own property in the Village. On the western edge of this property is a creek that flows into Lake Nebagamon. Upstream from the property, the creek passes under First Street through a culvert. Downstream, the creek drains into the lake through a culvert under Waterfront Drive.

¶3 In the spring of 2001, there was a quick thaw and around April 22, there was a hard rain. The Waterfront Drive culvert could not handle the runoff and the rainwater, and both the drive and the culvert were washed out. The next day, the First Street culvert became blocked either by a tree or by dirt and debris. Eventually, water covered First Street, washing out the road and flooding the Leafs' property downstream. The structures on the property were a complete loss. The Leafs sued the Village on a theory of negligent maintenance of the drainage system.

¶4 The trial was set for December 2, 2003. On November 26, the day before Thanksgiving, the Village notified the Leafs that it intended to call Terry Hendrick, who would testify that he saw the culvert become obstructed because of an embankment collapse and not a tree as the Village had previously maintained.

[1] This is an expedited appeal under WIS. STAT. RULE 809.17. All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

On the day of trial, the Leafs filed a motion in limine to exclude "surprise" witness Hendrick, but the circuit court denied the motion. The evening of December 2 was the first time the Leafs interviewed Hendrick. On December 3, before trial resumed, the Leafs again sought to have Hendrick excluded and the trial court again denied their motion.

¶5 A jury ultimately concluded that the Village had no notice of any problems with the culverts and it therefore never had to resolve the causation question. Following the trial, the Leafs moved for a new trial on the grounds of newly discovered evidence because it was not until after trial that their expert was able to evaluate Hendrick's testimony. The court denied the motion. The Leafs appeal.

Discussion

¶6 The decision to admit or exclude evidence is largely a matter for the circuit court's discretion. ***Martindale v. Ripp***, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698. The court properly exercises its discretion when it examines the relevant facts, applies a proper legal standard, and, using a demonstrated rational process, reaches a reasonable conclusion. ***Id.***

Surprise Witness

¶7 WISCONSIN STAT. § 904.03[2] allows the court to exclude otherwise relevant evidence on the grounds of prejudice, confusion, or waste of time.

[2] WISCONSIN STAT. § 904.03 states: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

"Surprise is not listed as a specific ground for exclusion of evidence." ***State v. O'Connor***, 77 Wis. 2d 261, 287, 252 N.W.2d 671 (1977). Instead, when a "surprise" witness is called by a party, the proper exercise of discretion requires the trial court to determine: (1) if the surprised party had reason to believe the witness would be called and (2) whether the unfair surprise outweighs the probative value of the testimony. ***Johnson v. Seipel***, 152 Wis. 2d 636, 652, 449 N.W.2d 66 (Ct. App. 1989). A continuance will generally be a more appropriate remedy than exclusion. ***O'Connor***, 77 Wis. 2d at 287-88. Where the surprise would require an unduly long continuance, exclusion may be justified. ***Id.*** at 288.

¶8 Here, while the notice of Hendrick came well after discovery, the letter specifically stated that the Village had subpoenaed him to testify on December 3. The Leafs therefore had reason to believe Hendrick would be called.

¶9 In considering whether any surprise was unfair, this court considers the reasons the circuit court gave for its ruling, along with the opportunity the surprised party has had to evaluate the testimony and the extent to which the surprised party has been able to cross-examine concerning the surprise testimony. ***Jenzake v. City of Brookfield***, 108 Wis. 2d 537, 543, 322 N.W.2d 516 (Ct. App. 1982).

¶10 The circuit court said very little on the record regarding the reason for its ruling, but it did not consider Hendrick to be a surprise witness and concluded that in any event, any prejudice did not outweigh the probative value of Hendrick's testimony. We need not reverse if the ruling is ultimately correct and the record reveals a factual underpinning in support of the proper findings. ***Johnson***, 152 Wis. 2d at 653.

¶11 Here, the Leafs did not interview Hendrick until 9:30 p.m. following the first day of trial. However, the court concluded that the Village had notified the Leafs as soon as it was aware Hendrick would testify. Even with Thanksgiving on November 27, the Leafs admitted they had not attempted to contact Hendrick on November 28, 29, 30, or December 1. The court noted that there was only one "Terry Hendrick" in the residential phone listings and that the information the Village provided indicated Hendrick worked across from the courthouse. Thus, the court explicitly concluded that the Leafs failed to take advantage of a four- to five-day window to contact Hendrick and implicitly concluded that any inability to evaluate his testimony prior to trial was not caused by the Village.

¶12 In addition, although the Leafs did not have their expert evaluate Hendrick's testimony at the time of trial, they were able to cross-examine Hendrick regarding the obstruction, the timing of his observations, and to which Village officials he reported the problem. They were also able to cross-examine him regarding whether there was a tree in the culvert, consistent with the Village's initial position.

¶13 The circuit court did not err when it refused to exclude Hendrick as a witness. The Leafs were on notice that he was going to testify. While the court did not consider Hendrick a surprise witness, it noted that it did not believe the prejudice of any surprise testimony outweighed its probative value. This conclusion is supported by facts in the record indicating that any inability to evaluate Hendrick's testimony before trial or to craft a cross-examination resulted from the Leafs' failure to contact Hendrick, not the Village's timing in naming him as a witness. We also note that the Leafs never asked for a continuance, generally more appropriate than exclusion, even when the Village suggested a

continuance might be the Leafs' remedy. Instead, they opted for an all-or-nothing strategy that did not work as they had hoped.

Newly Discovered Evidence

¶14 The Leafs had their expert, Don Antczak, testify on the first day of trial regarding causation of the blockage and consequent flooding. They were unable to contact him after interviewing Hendrick on the evening of December 2 or during the day on December 3. Antczak reviewed Hendrick's testimony at some point after trial. The Leafs now contend that his opinion on Hendrick's testimony constitutes newly discovered evidence.

¶15 To be entitled to a new trial on the basis of newly discovered evidence, the court must be able to find: (1) the evidence has come to the moving party's attention after trial; (2) the moving party's failure to discover the evidence earlier did not arise from lack of diligence in seeking to discover it; (3) the evidence is material and non-cumulative; and (4) the new evidence would probably change the result. WIS. STAT. § 805.15(3).

¶16 The Leafs' claim for a new trial fails on at least the second and fourth criteria. The court concluded that the Leafs were not diligent in their attempt to contact Hendrick. They had at least four days' notice, five if Thanksgiving Day were counted. Had the Leafs made an effort to contact Hendrick before trial or had they sought a continuance, they likely would have had some idea of his testimony and would have been able to ask Antczak to evaluate it in advance of trial.

¶17 More significantly, however, the Leafs have not shown that the result would be different. *See* WIS. STAT. § 805.15(3)(d). The jury concluded that

the Village did not have notice of any problem with the culverts. It therefore never had to resolve the question of what caused the blockage and flooding, the subjects of both Antczak's opinion and Hendrick's testimony. The circuit court did not err when it declined to grant a new trial.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.