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**IN THE
COURT OF APPEALS OF INDIANA**

STARDUST DEVELOPMENT, LLC,)
)
Appellant-Plaintiff,)
)
vs.)
)
CITY OF BLOOMINGTON,)
)
Appellee-Defendant.)
)

No. 53A04-0908-CV-487

APPEAL FROM THE MONROE SMALL CLAIMS COURT
The Honorable Elizabeth A. Cure, Judge
Cause No. 53C04-0902-SC-554

June 28, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

A tree branch fell onto the plaintiff's residential property and punctured the roof. The plaintiff hired a private company to remove the branch. The plaintiff then brought this action against the City of Bloomington to recover the cost of the tree branch removal. The small claims court entered judgment in favor of the City. The court found that the plaintiff, by not initially requesting that the City remove the branch, failed to mitigate its damages. We conclude that the small claims court's findings are not sustained by the record evidence. We reverse and remand with instructions.

Facts and Procedural History

Stardust owns a residential property in Bloomington, Indiana. Several trees occupy an adjacent public right-of-way. In 2003 or 2004, a branch from one of the trees was hanging over the Stardust premises. Stardust representative Tyler Ferguson was concerned about the branch and contacted Bloomington urban forester Lee Huss. Huss inspected the tree limb but concluded it was nonhazardous. The limb was not removed. Huss also informed Ferguson that the City had "limited resources to do pruning." Tr. p. 43.

In June 2008, the branch fell onto Stardust's property during a storm and punctured the roof. Stardust quickly hired Building Associates, Inc., to remove the branch. Building Associates removed it using a crane. Stardust then notified the City and requested that it pay Building Associates's bill. The City refused, and Stardust initiated this action in small claims court.

Stardust sought damages from the City for the costs of removing the branch. Stardust did not seek damages for repairing the property itself. At trial, Huss testified that the City maintains a twenty-four-hour tree control service that would have removed the fallen branch immediately at no cost. The City would have incurred expense only if a crane were in fact necessary to take the branch down. The small claims court entered judgment in favor of the City. The court found that Stardust should have notified the City after discovering the damage. The court found that the City would have been able to remove the branch at no cost to either party. Stardust now appeals.

Discussion and Decision

The parties argue several issues which we consolidate and restate as: whether the small claims court erred in finding that Stardust failed to mitigate its damages.

Judgments from small claims actions are reviewable “as prescribed by Indiana rules and statutes.” Ind. Small Claims Rule 11(A). “On appeal of claims tried by the court without a jury . . . , the court on appeal shall not set aside the findings or judgment unless clearly erroneous” Ind. Trial Rule 52(A). In determining whether a judgment is clearly erroneous, we do not reweigh the evidence or determine the credibility of the witnesses but consider only the evidence which supports the judgment and reasonable inferences drawn therefrom. *Counciller v. Ecenbarger*, 834 N.E.2d 1018, 1021 (Ind. Ct. App. 2005). While small claims actions are “informal,” the rules of substantive law apply. S.C.R. 8(A).

“[T]he principle of mitigation of damages addresses conduct by an injured party that aggravates or increases the party’s injuries.” *Willis v. Westerfield*, 839 N.E.2d 1179,

1187 (Ind. 2006) (quoting *Deible v. Poole*, 691 N.E.2d 1313, 1315 (Ind. Ct. App. 1998), *aff'd*, 702 N.E.2d 1076, 1076 (Ind. 1998)). “Put simply, a plaintiff in a negligence action has a duty to mitigate his or her post-injury damages, and the amount of damages a plaintiff is entitled to recover is reduced by those damages which reasonable care would have prevented.” *Id.* Mitigation of damages is not an affirmative defense to liability. *Id.* Rather, failure to mitigate damages is an affirmative defense that may reduce the amount of damages a plaintiff is entitled to recover after liability has been found. *Id.*

The affirmative defense of failure to mitigate damages has two elements, and as to both the defendant bears the burden of proof by a preponderance of the evidence. *Id.* at 1188. First, the defendant must prove that the plaintiff failed to exercise reasonable care to mitigate his post-injury damages. *Id.* Second, the defendant must prove that the plaintiff’s failure to exercise reasonable care caused the plaintiff to suffer an identifiable harm not attributable to the defendant’s negligent conduct. *Id.* The defendant bears the same burden with respect to this defense that the plaintiff bears with respect to the claim for damages. *Id.* It is not enough to establish that the plaintiff acted unreasonably. *Id.* The defendant must establish resulting identifiable, quantifiable, additional injury, just as the plaintiff must prove harm resulting from the defendant’s acts. *Id.*

The small claims court found that Stardust should have given the City an opportunity to remove the tree branch before hiring Building Associates. The court also found that the City would have been able to remove the branch at no cost to either party. In other words, the court found that (1) Stardust, by hiring Building Associates to remove the tree branch instead of notifying the City’s tree removal service, failed to exercise

reasonable care to mitigate its injury and (2) its failure to do so resulted in unnecessary quantifiable monetary expense, all of which could have been avoided if it had called the City first.

We do not believe these findings are sustained by the trial evidence. As to the reasonableness of Stardust's post-injury actions, the evidence shows that the tree branch fell during a storm and that it punctured a hole in the Stardust property's roof. The City had previously informed Stardust that it had limited tree service resources. On these facts, one could not say it was unreasonable for Stardust to call a private, third party company when the branch fell down. And as for the costs that could allegedly have been avoided, Huss conceded that the City would have incurred expense if a crane were necessary to remove the branch. The City introduced no evidence that the branch could have been removed without the use of a crane. To the contrary, the evidence suggests that a crane was needed, as Building Associates in fact used one to retrieve the tree limb. One could not conclude on this record that expense would have been avoided if Stardust had enlisted the City to remove the tree branch instead of Building Associates.

The City bore the burden to prove both that Stardust failed to act reasonably and that its failure resulted in additional quantifiable injury. We find that the City introduced insufficient evidence as a matter of law to meet its burden, and the small claims court therefore erred by entering judgment in the City's favor. Accordingly, we reverse and remand with instructions that the court enter judgment in favor of Stardust for its cost incurred in removing the tree branch.

Reversed and remanded.

NAJAM, J., and BROWN, J., concur.