

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 13, 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. 98-0073

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

CHRISTINE MORDEN,

**PLAINTIFF-RESPONDENT-CROSS-
APPELLANT,**

THOMAS MORDEN,

PLAINTIFF-RESPONDENT,

**CITY OF MILWAUKEE, WISCONSIN HEALTH
ORGANIZATION AND COMPCARE,**

PLAINTIFFS,

v.

CONTINENTAL AG,

**DEFENDANT-APPELLANT-CROSS-
RESPONDENT,**

MR. P'S IDEAL TIRES CORPORATION,

DEFENDANT.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Milwaukee County: FRANCIS T. WASIELEWSKI, Judge. *Reversed.*

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

PER CURIAM. Continental AG appeals, and Christine and Thomas Morden cross-appeal, from a judgment entered in favor of the Mordens on their negligence claim against Continental. Continental argues, among other things, that the evidence is insufficient to sustain the jury's finding that Continental was negligent. We agree, and we reverse the judgment. We, therefore, do not reach the other issues raised in the appeal and the cross-appeal. *See Gross v. Hoffman*, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (if a decision on one point disposes of an appeal, the appellate court will not decide the other issues raised).

BACKGROUND

In March of 1991, Christine Morden was driving the family vehicle, which had two rear snow tires that were designed by Continental, and manufactured by it in 1979. After driving over a bump in the road, Christine Morden lost control of the vehicle, and it rolled over. Christine Morden was seriously injured in the accident.

The Mordens sued Continental, claiming that the snow tires blew-out as the vehicle went over the bump, and caused the roll-over accident. The jury found that Continental was negligent in the design or manufacture of the snow tires, and that Continental's negligence caused the tires to blow-out, resulting in the roll-over accident. The jury also found that Christine Morden was negligent in

the operation of her vehicle at the time the tires blew-out, and that her negligence was a contributing cause of the accident.¹

DISCUSSION

Continental argues that the evidence is insufficient to sustain the jury's finding that Continental was negligent in the design or manufacture of the snow tires. Specifically, Continental argues that there is no evidence to support a finding that Continental failed to exercise ordinary care in designing and manufacturing the tires, and that proof of a safer alternative design for the tires is insufficient to establish that Continental breached its duty to exercise ordinary care. We agree.

We will not overturn a verdict unless, after considering all credible evidence, and all reasonable inferences that can be drawn from the evidence, in the light most favorable to the verdict, there is no credible evidence to sustain the challenged finding. See *Kuklinski v. Rodriguez*, 203 Wis.2d 324, 331, 552 N.W.2d 869, 872 (Ct. App. 1996); § 805.14(1), STATS. A jury may not, however, base its findings on conjecture and speculation. See *Oesterle v. Couch*, 10 Wis.2d 293, 296–297, 102 N.W.2d 763, 765 (1960); *Rodenkirch v. Johnson*, 9 Wis.2d 245, 248, 101 N.W.2d 83, 85 (1960).

“The elements in a cause of action for negligence are: (1) a duty of care on the part of the defendant; (2) a breach of that duty; (3) a causal connection between the conduct and the injury; and (4) an actual loss or damage as a result of

¹ The Mordens also claimed that the snow tires were defective, and sought to hold Continental strictly liable in tort. It is undisputed, however, that the jury returned a defective verdict on the strict liability claim, and that this appeal is limited to the Mordens' negligence claim.

the injury.” See *Transportation Ins. Co. v. Hunzinger Constr. Co.*, 179 Wis.2d 281, 293, 507 N.W.2d 136, 140 (Ct. App. 1993) (quoted source omitted). “A defendant’s duty is established when it can be said that it was foreseeable that his act or omission to act may cause harm to someone.” *Rockweit v. Senecal*, 197 Wis.2d 409, 420, 541 N.W.2d 742, 747 (1995). “Each individual is held, at the very least, to a standard of ordinary care in all activities.” *Id.*, 197 Wis.2d at 419, 541 N.W.2d at 747 (quoted source omitted). A defendant breaches the duty to exercise ordinary care when “he does an act or omits a precaution under circumstances in which a person of ordinary intelligence and prudence ought reasonably to foresee that such act or omission will subject him or his property, or the person or property of another, to an unreasonable risk of injury or damage.” *Id.*, 197 Wis.2d at 424, 541 N.W.2d at 749 (quoted source omitted). “[M]erely because a product or an operation is not as safe as possible, because there are better methods of manufacture or performing an operation does not lead to the conclusion that the method employed was undertaken with a lack of ordinary care.” *Locicero v. Interpace Corp.*, 83 Wis.2d 876, 890, 266 N.W.2d 423, 430 (1978); see also *Greiten v. La Dow*, 70 Wis.2d 589, 602, 235 N.W.2d 677, 685 (1975). “[G]enerally, one is negligent in selecting the more dangerous route only when he knows or should know it to be unsafe.” *Locicero*, 83 Wis.2d at 890, 266 N.W.2d at 430 (quoted source omitted). We conclude that the Mordens failed to present any evidence that Continental knew or should have known that the design or manufacture of the failed tires was unsafe.

At trial, the Mordens presented expert testimony that the adhesion between the steel belts within the Continental snow tires degenerated, and that the cap ply that was placed around the steel belts to prevent the belts from separating was insufficient because it was spliced together at the ends. The expert testified

that the insufficient adhesion allowed the steel belts to pull apart, and that the separation of the steel belts caused the cap ply to fail at the splice, causing the blow-out that allegedly resulted in the roll-over accident. The expert opined that the cap ply should have been double-wrapped rather than single-wrapped with a splice.

The Mordens argue that Continental was aware that the snow tires had adhesion problems, and that Continental's use of a single cap ply with a splice rather than a double-wrapped cap ply was negligent. The Mordens, however, did not present any evidence in support of this argument, namely that Continental was negligent in either the manufacture or the design of the snow tires. The Mordens' expert testified that "the causes [of a loss of adhesion between steel belts] are either in the manufacturing process or in the operation of the tire." The expert offered several examples of manufacturing problems that would cause a loss of adhesion between the steel belts, but he did not opine that any one of those problems had occurred during the manufacture of the Continental snow tires.² The

² The Mordens' expert testified, in relevant part:

[T]he causes of [a loss of adhesion between the steel belts] are either in the manufacturing process or in the operation of the tire. In the manufacturing process it depends on the control of the materials involved, whether they are correctly formulated, whether they are processed properly. If they are processed too hot, what can happen is your coating, the rubber on here, if it's too hot, the material starts to cure prematurely and then when you build the tire, bond it together, it doesn't bond properly. Instead of getting the meld together, they will not meld properly and they will during the life of the tire cause separation.

Conversely, if the material, if it's a tire that's not built often, a lot of times some of the materials have been gathered. Because all the components come from different stations around the plant, if they age too long, they start to cure. Again, with the same results, lack of knitting of the two belts properly. So aging is another property. Just plain collecting dust. All these things should be covered. The materials should be covered in the manufacturing process because it gets dust on it. Anything that

(continued)

Mordens, therefore, failed to establish that Continental did anything during the manufacturing process that breached the duty of ordinary care and caused the adhesion between the steel belts to degenerate. *See Greiten*, 70 Wis.2d at 602, 235 N.W.2d at 685 (“[W]here negligence is asserted, it is necessary to prove what was done and to prove that what was done was foreseeably hazardous to someone.”). Thus, the jury could not conclude that Continental was negligent in the manufacture of the snow tires absent impermissible speculation and conjecture. *See Oesterle*, 10 Wis.2d at 296–297, 102 N.W.2d at 765.

Moreover, the Mordens did not present any evidence that Continental knew or should have known that the single cap ply design was unsafe. *See Locicero*, 83 Wis.2d at 890, 266 N.W.2d at 430. The Mordens’ expert testified that he had no evidence that anyone had ever had a problem with the type of snow tire at issue, and that he was not aware of any standard or regulation that the snow tires failed to meet. The expert merely testified that the cap ply should have been double-wrapped rather than single-wrapped.³ As noted, the existence of a safer alternative method is not sufficient to establish that a defendant was negligent in employing the method used; the plaintiff must show that the defendant knew or should have known that the method used was unsafe. *See id.*

can contaminate the surface will lead to separation problems, and then the integrity of the other components is important because you have to protect this area. The material needs to have protection of antioxidants in it, the antioxidants are chemicals that retard the influence of oxygen on rubber.

³ The Mordens assert that “[t]he problems with single wrapped caps were known.” In support of this assertion the Mordens cite the following testimony: “The splice of the Uniroyal tires, we had double wrapped caps because of the problems that we had with the single wrap cap splice. The type of splice Uniroyal used was the 93 splice. It’s not the same as the 33 splice that Continental uses.” This testimony regarding Uniroyal’s problems with a different tire design does not support a finding that Continental knew or should have known that its tire design was unsafe.

The Mordens failed to establish that Continental knew or should have known that the use of a single cap ply with a splice was unsafe. Consequently, the evidence is not sufficient to establish that Continental was negligent in the design or manufacture of the snow tires.

By the Court.—Judgment reversed.

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

