COURT OF APPEALS
DECISION
DATED AND FILED

June 2, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 96-3662

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

NOEL MCCHRISTIAN,

PLAINTIFF-APPELLANT,

V.

TRANSPORTATION INSURANCE COMPANY,
A FOREIGN CORPORATION AND
PAYNE & DOLAN, INC.,
A DOMESTIC CORPORATION,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Milwaukee County: MICHAEL D. GUOLEE, Judge. *Affirmed.*

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

WEDEMEYER, P.J. Noel McChristian appeals from a summary judgment dismissing his negligence action against Payne & Dolan, Inc., a road surface excavating firm. McChristian claims the trial court erred: (1) in

concluding there were no material issues of fact as to any negligence on the part of Payne & Dolan; and (2) in failing to apply the doctrine of *res ipsa loquitur*. Because there were no genuine issues of material fact as to Payne & Dolan's causal negligence, and because McChristian failed to establish the elements necessary for the application of the doctrine of *res ipsa loquitur*, we affirm.

I. BACKGROUND

On May 26, 1993, McChristian was jogging across West Clybourn Street near North 31st Street in the City of Milwaukee when the street collapsed causing him to fall into an open space or void beneath the road surface whereby he sustained physical and mental injuries. Two years earlier, in the summer of 1991, Payne & Dolan, as a road paver-subcontractor, had removed up to one and one-half inches of road surface in the same area of West Clybourn Street in preparation for another paving contractor to resurface the street. McChristian filed a negligence action against Payne & Dolan alleging that, in connection with this road construction work, the roadway was so defectively and dangerously repaired that Payne & Dolan should have known that the condition of the roadway constituted a danger to the pedestrian public and particularly to him. McChristian produced no expert liability witness to support his claim of negligence against Payne & Dolan.

Payne & Dolan moved for summary judgment. The trial court granted the motion holding that there were no genuine issues of material fact as to the causal negligence of Payne & Dolan; that McChristian failed to name a liability expert to support his claim of negligence against Payne & Dolan; and that, because of the absence of necessary elements, McChristian could not rely on

the doctrine of *res ipsa loquitur* to establish an inference of negligence against Payne & Dolan. McChristian now appeals from the judgment.

II. DISCUSSION

A. STANDARD OF REVIEW

In reviewing a summary judgment, we are required to follow the same methodology as required of a trial court. The summary judgment rubrics are all too familiar to the parties and readers and thus we eschew needless repetition. *See* ***Green Spring Farms v. Kersten***, 136 Wis.2d 304, 315, 401 N.W.2d 816, 820 (1987), and ***Messner v. Briggs & Stratton Corp.***, 120 Wis.2d 127, 131, 353 N.W.2d 363, 365 (Ct. App. 1984).

B. ANALYSIS

When alleging a cause of action in negligence, a plaintiff is required to establish a breach of a duty of care on the part of the object of the lawsuit. To prevail in his claim of negligence, McChristian must demonstrate that Payne & Dolan was negligent in its paving work on West Clybourn Street, that is, Payne & Dolan failed to use the degree of care that a reasonable contractor, under the circumstances, would exercise. *See* ***La Chance v. Thermogas Co.***, 120 Wis.2d 569, 574, 357 N.W.2d 1, 3 (Ct. App. 1984).

McChristian first claims issues of material fact existed as to whether Payne & Dolan was negligent and as to whether its conduct caused or contributed to the accident. He argues that the existence of these disputed material facts preclude summary judgment. In essence, McChristian argues that Payne & Dolan's removal of up to one and one-half inches of road surface from West Clybourn Street in the summer of 1991 created a reasonable inference that it

negligently contributed to the weakening of the road structure. The error in this reasoning, however, is the absence of any documents filed or testimony taken of any evidentiary facts creating a dispute as to the sufficiency of Payne & Dolan's work on the road resurfacing project. There is no evidence that Payne & Dolan's grinding activities fell below the degree of care exercised by reasonable construction contractors under the same or similar circumstances. *See* ***id.*** In the absence of such evidence, McChristian's claim fails.

Richard Schmidt, Jr., Payne & Dolan's project manager for the job, averred that the company, as a subcontractor, was to grind the road surface and apply a tack coat to the surface of the concrete in accordance with the plans and specifications of the City of Milwaukee. Other subcontractors were hired by the general contractor, D.C. Burbach, Inc., to apply the asphalt pavement and to landscape areas affected by the resurfacing. Payne & Dolan performed its work on the project consistent with the customs and standards of the construction industry. The contents of Schmidt's affidavit remain uncontroverted. For this reason, the trial court properly concluded that there were no genuine issues of material fact as to Payne & Dolan's negligence.

McChristian also asserts that some action on the part of Payne & Dolan in the grinding process contributed to the weakening of the road surface or subsoil condition leading to the sinkhole or void into which he fell. In Wisconsin, to prove a cause of action for negligence, a plaintiff must establish a causal connection between the conduct and the injury. *See* ***Kehl v. Economy Fire & Cas. Co.***, 147 Wis.2d 531, 535, 433 N.W.2d 279, 280 (Ct. App. 1988). The negligence must be a substantial factor in producing the injury. *See* ***Sampson v. Laskin***, 66 Wis.2d 318, 325, 224 N.W.2d 594, 597 (1975). There may be more than one substantial causative factor. *See* ***Merco Distrib. Corp. v. Commercial Police***

Alarm Co., 84 Wis.2d 455, 459, 267 N.W.2d 652, 654-55 (1978). Speculation about the cause in fact is not to be countenanced. *See* ***id.*** at 460, 267 N.W.2d at 655.

As suggested by Payne & Dolan in its response brief, McChristian's claim can be viewed from four different perspectives: (1) Is there evidence presented that grinding one to one-and-one-half inches from the eight-to-ten inch road surface weakened the structural integrity of the road surface? (2) Is there any evidence that a road surface which is six-and-one-half to nine inches in thickness after admitted grinding is structurally unsafe or dangerous? (3) Is there any evidence that the grinding itself affected the integrity of the subsoil to such a degree as to cause the size of a hole into which McChristian fell? and, lastly, (4) Is there any evidence that the grinding process was a substantial factor in causing the road to collapse? To find the answers, we turn again to the documentary evidence. From a review of the record, the answer to each question is "No!" McChristian failed to submit any evidence that the grinding performed by Payne & Dolan weakened the road surface.

In contrast, the project engineer, Schmidt, in his affidavit, further averred that voids or sinkholes of the type occurring in this case can be caused by a number of mechanisms, including excavation, utility installations which were not properly backfilled, broken water mains, or natural causes. In the absence of any evidence reasonably assigning any factor as a cause, any causal attribution is sheer speculation not recognized in our negligence law.

McChristian's last claim of error is that the trial court failed to apply the doctrine of *res ipsa loquitur* to allow drawing an inference of negligence on the part of Payne & Dolan. He asked for the doctrine to be applied at the summary

judgment stage, rather than after all the testimony had been heard and at the instruction conference. Thus, the examination for its application is far more restricted.

Proper application of *res ipsa loquitur* necessitates fulfillment of the following three requirements: (1) either a layman is able to determine as matter of common knowledge, or an expert testifies, that the result which occurred does not ordinarily occur in the absence of negligence; (2) the agent or instrumentality causing the harm was within the exclusive control of the defendant; and (3) the evidence offered is sufficient to remove the causation question from the realm of conjecture, but not so substantial that it provides a full and complete explanation of the event. *See* ***Peplinski v. Fobe's Roofing, Inc.***, 193 Wis.2d 6, 17, 531 N.W.2d 597, 601 (1995).

To demonstrate compliance with these requirements, McChristian argues that this accident is of the type which would not occur unless there existed negligence on the part of someone in repairing the road in 1991. He further maintains that the grinding process was in the exclusive control of Payne & Dolan and was the cause of the sinkhole's development and the subsequent collapse of the road. Finally, he proposes that there is more evidence to demonstrate the road collapse was caused by Payne & Dolan's grinding activity than any other possible cause, thereby removing the cause of collapse from the realm of speculation.

Essentially, McChristian argues that whatever precedes an event is a cause and whatever follows is an effect. The summary judgment evidence, however, or the lack thereof, refutes his proposition. The record does not contain any evidentiary underpinning to support his proposed conclusion. First, there is no evidence by any source that any activity during the road resurfacing project was

negligent in nature. To the contrary, there was evidence that sinkholes or voids could be the result of natural causes not attributable to human activity. In addition, the cause of the road collapse could emanate from other types of construction or maintenance work in the general area of the roadway or its subsurface. Second, McChristian has proffered no evidence that the grinding process was a causal factor in the collapse, and no evidence showing that Payne & Dolan had exclusive control of the agent that caused harm. Third, he has produced no evidence to support his argument that the grinding process was more likely than not to cause the collapse than other suggested causes set forth in Payne & Dolan's documentation. Thus, McChristian has failed to satisfy the crucial tests of *res ipsa loquitor* and, consequently, cannot avail himself of the doctrine's evidentiary advantage.[1]

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

[1] We note that plaintiff's counsel failed to include his state bar number in his briefs as required by § 802.05, STATS. This footnote serves as a reminder to counsel of this requirement.

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SCHUDSON, J. *(concurring).* Although I believe the majority has reached the right result, I have serious misgivings about the preparation and presentation of Judge Wedemeyer's opinion. Therefore, while I concur in the conclusions, I do not join in the majority opinion.