COURT OF APPEALS
DECISION
DATED AND FILED

December 27, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP741 **Cir. Ct. No. 2011CV3573**

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

BRIAN E. DAVIS,

PLAINTIFF-APPELLANT,

V.

CITY OF MILWAUKEE,

DEFENDANT-RESPONDENT,

MILWAUKEE METROPOLITAN SEWERAGE DISTRICT,

DEFENDANT.

APPEAL from a judgment of the circuit court for Milwaukee County: KEVIN E. MARTENS, Judge. *Affirmed*.

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 KESSLER, J. Brian E. Davis, *pro se*, appeals from a judgment of the circuit court dismissing Davis's claims against the City of Milwaukee (the City) and the Milwaukee Metropolitan Sewerage District (MMSD) after both defendants moved for a directed verdict during a jury trial. Davis brought an action against the City and MMSD (collectively, the defendants)[1] after multiple raw sewage floods occurred in the basement of a rental property he owned. Because Davis never produced any evidence of what the defendants did that caused the basement floods, we conclude that a directed verdict in favor of the defendants was proper.

BACKGROUND

¶2 On March 17, 2011, Davis, *pro se*, commenced an action against the City and MMSD, alleging that four sewage backups occurring between July 2008 and July 2010 at the residential property located at 3938 North 54th Street, Milwaukee, resulted from the defendants' negligence. Specifically, Davis alleged that the multiple floods were (1) government takings under the federal and state constitutions; (2) a result of the defendants' negligence; and (3) a private nuisance. Davis also invoked the doctrine of *res ipsa loquitur*. Davis alleged that as a result of the defendants' conduct, he was forced to declare the property untenantable, release a long-term tenant, and allow foreclosure on the property.

¶3 Following discovery, Davis filed a motion for summary judgment in which he argued that the only possible explanation for the multiple floods was

[1] Only the City filed a brief in opposition to Davis's appellate brief-in-chief. However, because Davis litigated against the City and MMSD collectively, and because both defendants actively participated in the litigation, we refer to the City and MMSD collectively as "the defendants" where necessary.

"that the raw sewage originated from the public sewer system." The trial court denied the motion.[2]

¶4 The parties submitted their witness lists. Davis, still proceeding *pro se*, submitted four names: (1) Sheilah Green, the former tenant of the property; (2) Kevin Shafer, the executive director of MMSD; (3) Lauri Rollings, the former staff attorney for MMSD; and (4) Jeffrey Polenske, the city engineer for the City of Milwaukee. In a letter addressed to MMSD, Davis rejected the possibility of providing expert witnesses, stating that that the doctrine of *res ipsa loquitur* was applicable, as "there is no one else who could repeatedly fill a homeowner's basement with raw sewage." (Bolding and underling omitted.)

¶5 The case eventually proceeded to a jury trial. Davis, now represented by counsel, called four witnesses: himself, Green, Shafer, and Polenske.[3] As relevant to the issues on appeal, we discuss only the testimonies of Davis, Shafer, and Polenske.

¶6 Davis testified that he purchased the property at issue in 1993. He had no recollection of any sewer backups on the property between 1993 and 2008. Davis testified that before a new tenant would move into the property, he generally "rodded out" the sewer lateral that connected the property to the sewer system. Although Davis could not recall specifically whether he rodded out the lateral in 2002 prior to Green's tenancy, Green's lease stated that "[t]oilet, waste and sewer drains are open and running clear[,]"—a statement Davis included in

[2] The order issued by the trial court states an address different from 3938 North 54th Street. Because the complaint and the appellate briefs refer to the property at issue as the one located at 3938 North 54th Street, we do the same.

[3] Rollings did not testify.

his lease agreements because of his practice of rodding out the lateral before signing a new tenant.

¶7 Davis testified in detail as to the damage caused to the basement by the multiple backups, but stated that he never requested the City health department inspect the property for health and safety concerns, nor did the City ever order the home to be razed. Rather, Davis thought that the home was not inhabitable based on his own observations, his fear of harboring bacteria and viruses, and his experience in the real estate industry.

¶8 Davis also testified, confirming a response to an interrogatory, that his position was not that the City was negligent in failing to maintain its sewers, but rather, he wanted the City to take remedial and preventative measures to prevent sewage deposits in residential homes.

¶9 Shafer, a civil engineer and executive director of MMSD, testified that the public sewer system, which consists of MMSD and the local municipality, consists of a series of pipes running under local streets to a manhole drop structure that conveys the flow into the MMSD system. Shafer explained that the public sewer system can be overwhelmed by large, intense rainfalls. He opined that the basement backups in July 2008 and July 2010 were caused by intense rainstorms—a 100-year storm and a 700-year storm—which overwhelmed the public sewer system.

¶10 Polenske, the City Engineer for the City of Milwaukee, told the jury that as the head of the Infrastructure Services Division, he is familiar with the design, construction and maintenance requirements of the city streets and sewers. Polenske testified that when the sewer system gets overwhelmed, as it did in the summer of 2010, water "can't get into the pipes any longer … it has to find

another location[,]" leading to backups into homes. Polenske also stated that in addition to storms, sewer backups can also occur if a building lateral or sewer is clogged, or if a sewer main is clogged.

¶11 Both Shafer and Polenske testified about the significant interface between the City and MMSD, though both noted that the two entities also serve separate and distinct roles within the public sewer system.

¶12 At the conclusion of Davis's case, both defendants moved to dismiss the case. As relevant, both defendants argued that Davis failed to establish that either the City, MMSD, or both together, caused any of the backups.[4] Both defendants argued that the evidence strongly suggested that heavy rains overwhelmed the public sewer system. None of the evidence, they argued, established that either defendant was responsible for the backups.

¶13 The trial court granted the dismissal motions, finding that based on the facts presented, there was no legal basis for recovery on any of Davis's theories of liability.[5] This appeal follows.

DISCUSSION

¶14 Davis argues that the trial court erred in finding the doctrine of *res ipsa loquitur* inapplicable to his case. He also reiterates his claims that the

[4] The defendants also argued that Davis failed to serve them with proper notice of his claims, however that issue is not at issue on appeal.

[5] We agree with the trial court, based on the record in this case, that Davis put forth tremendous effort in litigating this matter and seemed to do so with great passion and rigor. However, passion and rigor do not change the fact that the evidence does not support Davis's claims.

flooding on his property was: (1) a taking under the federal and state constitutions; (2) negligence *per se*; and (3) a private nuisance.

I. Standard of Review.

¶15 We review a trial court's decision to grant a defendant's motion to dismiss for insufficient evidence at the close of plaintiff's case on a *de novo* basis. *See* ***American Family Mut. Ins. Co. v. Dobrzynski***, 88 Wis. 2d 617, 624, 277 N.W.2d 749 (1979). The trial court may grant a motion to dismiss for insufficient evidence at the close of plaintiff's case only if "'the court is satisfied that, considering all credible evidence in the light most favorable to the party against whom the motion is made, there is no credible evidence to sustain a finding in favor of such a party.'" ***Weiss v. United Fire & Cas. Co.***, 197 Wis. 2d 365, 388, 541 N.W.2d 753 (1995) (citation omitted). When ruling on a motion to dismiss, the trial court should consider only the proof that the plaintiff has offered before resting its case. ***Beacon Bowl, Inc. v. Wisconsin Elec. Power Co.***, 176 Wis. 2d 740, 788, 501 N.W.2d 788 (1993). Our review on appeal is the same as that conducted by the trial court. *See* ***Dobrzynski***, 88 Wis. 2d at 624.

I. *Res Ipsa Loquitur.*

¶16 Davis argues that this case is "a textbook case for res ipsa loquitur" because, in essence, four sewage backups in a two-year time span presents a permissible inference of negligence. Davis is mistaken.

¶17 The doctrine of *res ipsa loquitur* permits a factfinder to infer that negligence caused damage or injuries when the following three conditions are met:

> (a) either a layman is able to determine as a matter of common knowledge or an expert testifies that the result which occurred does not ordinarily occur in the absence of

> negligence, (b) *the agent or instrumentality causing the harm was within the exclusive control of the defendant*, and (c) 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.

Steinberg v. Arcilla, 194 Wis. 2d 759, 764, 535 N.W.2d 444 (Ct. App. 1995) (quotation marks and citation omitted; emphasis added). The supreme court considered and rejected the application of the *res ipsa loquitur* doctrine in a sewer backup claim similar to Davis's in ***Freitag v. City of Montello***, 36 Wis. 2d 409, 153 N.W.2d 505 (1967). In that case, Freitag discovered a sewage backup in her basement. ***Id.*** at 411. The backup had been caused by a temporary obstruction in the sewer main "into which the four-inch lateral servicing [Freitag's] home discharged." ***Id.*** Both the superintendent of the City's water and sewer utility and an engineer hired by the City inspected the sewer main and found it to be flowing smoothly, indicating that the obstruction had cleared. ***Id.*** An engineer hired by Freitag stated that tree roots obstructed about one-third of the diameter of the main and that objects could have accumulated over the roots, causing the backup in Freitag's basement. ***Id.*** An engineer hired by the City testified that plastic bags or children's toys discharged into the main could have caused the obstruction leading to the backup. ***Id.*** A plumber testified that the lateral had become clogged with fish heads. ***Id.*** at 411-12. After the city denied Freitag's claims for damages, she filed suit against the City of Montello alleging that the doctrine of *res ipsa loquitur* allowed for an inference that the City was negligent in its inspection and maintenance of the sewer main in the area of her home. ***Id.*** at 412-13.

¶18 Ultimately, the supreme court rejected Freitag's arguments, finding the doctrine of *res ipsa loquitur* inapplicable because the sewer main was not an instrumentality completely within the control of the City with regard to the

materials that were deposited in it. ***Id.*** at 416. The court distinguished between situations within the City's control and not within the City's control by noting "[h]ad the flooding of [Freitag's] basement been caused by a defect, or break, in the sewer main we then would have an instrumentality entirely within the control of [the] defendant." ***Id.***

¶19 Similarly, Davis has not demonstrated that his claim satisfies all of the requirements necessary to invoke the *res ipsa loquitur* doctrine.

¶20 Davis has not established that any of the defendants' actions are a cause of the backup. Davis relied solely on the facts of the backups themselves. He chose not to call any expert witness who could testify that the backups in this case probably resulted from acts of the defendants' negligence. Davis's argument rests solely on the undisputed fact that the City and MMSD are each involved in providing the sewer system, but he points to nothing suggesting that they did so negligently and that the negligence probably caused the backups. Nothing in the record suggests a defect or break in any part of the sewer system, or a failure to inspect or maintain the system.

¶21 Second, Davis has not established what caused the harm, nor that the cause was within the exclusive control of the defendants. While both Shafer and Polenske testified about the significant interface between the two defendants' responsibilities, they also testified about the separate and distinct roles the City and MMSD have with respect to the sewer system. Davis points to no evidence against the City and MMSD, individually or collectively, suggesting that they caused the backups. Moreover, both Shafer and Polenske testified without contradiction that the unusually heavy rains in the summers of 2008 and 2010 could have overwhelmed the sewer system. Obviously, neither MMSD nor the

City had control over the extent of the rain storms. Polenske also identified other potential causes of backups, such as clogged laterals or clogged sewer mains. The defendants in this case have "shown more than a possibility that something other than negligence on the part of the defendant[s] caused the injury." *See* ***Beaudoin v. Watertown Mem'l Hosp.***, 32 Wis. 2d 132, 139, 145 N.W.2d 166 (1966). The trial court properly determined that Davis failed to show that the defendants had exclusive control over the cause of the backups.

¶22 Finally, the evidence offered fails to remove the causation question from the realm of speculation or conjecture. The evidence indicated that unusually heavy rains occurred at the time of the four backups. A jury could properly infer that the heavy rains alone resulted in an overload of the system, or that clogged laterals or mains might have contributed to the backups. None of those factors were shown to probably be the result of negligence by the City or MMSD. A finding to the contrary would be pure speculation. *See* ***Merco Distrib. Corp. v. Commercial Police Alarm Co., Inc.***, 84 Wis. 2d 455, 460, 267 N.W.2d 652 (1978) ("'A mere possibility of … causation is not enough; and when the matter remains one of pure speculation or conjecture or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant.'") (citation omitted).

III. The Takings Claim.

¶23 Davis argues that the sewage backups constituted a government taking of his property. In ***E-L Enterprises, Inc. v. Milwaukee Metropolitan Sewerage District***, 2010 WI 58, 326 Wis. 2d 82, 785 N.W.2d 409, the supreme court explained the constitutional bases for a takings claim:

> Article I, Section 13 of the Wisconsin Constitution provides: "The property of no person shall be taken for public use without just compensation therefor." Likewise, the Takings Clause of the Fifth Amendment of the U.S. Constitution, made applicable to the States through the Fourteenth Amendment, provides that private property shall not "be taken for public use, without just compensation." In order to trigger the "just compensation" clause under either the Wisconsin Constitution or the U.S. Constitution, there must be a "taking" of private property for public use.
>
> Under the Wisconsin Constitution, two types of governmental conduct can constitute a taking: (1) an actual physical occupation of private property or (2) a restriction that deprives an owner of all, or substantially all, of the beneficial use of his property. Similarly, under the U.S. Constitution, governmental conduct gives rise to a takings claim when there is either (1) direct government appropriation or physical invasion of private property or (2) government regulation of private property that is so onerous that its effect is tantamount to a direct appropriation. The latter category, deemed a "regulatory taking," is per se compensable under the Fifth Amendment if the regulation requires an owner to suffer a permanent physical invasion of her property or completely deprives an owner of *all* economically beneficial use of her property.

Id., ¶¶21-22. (internal citations, quoted sources, multiple sets of quotation marks and brackets omitted).

¶24 In this case, Davis alleges that raw sewage deposits constitute an "invasion [that is a] permanent and physical taking." We addressed a similar claim in ***Menick v. City of Menasha***, 200 Wis. 2d 737, 547 N.W.2d 778 (Ct. App. 1996). In that case, Lisa Menick filed a lawsuit against the City of Menasha following multiple sewer system floods that damaged her home and left a foul smell. ***Id.*** at 741-42. Menick alleged that as a result of the flooding, the City of Menasha took her property without compensation. ***Id.*** at 742. Following the test set forth by ***Loretto v. Teleprompter Manhattan CATV Corp.***, 458 U.S. 419 (1982), we concluded that the flooding in her home was not a permanent physical

occupation of Menick's property because the flooding receded and did not permanently invade her property. ***Menick***, 200 Wis. 2d at 743.

¶25 Similarly, the floods in Davis's basement all receded and the sewage was cleaned. Although Davis contends that the sewage left behind bacteria, viruses and mold that ultimately left the property untenantable and caused him serious financial harm, mere injury to a property is not the equivalent of a government taking. *See* ***Loretto***, 458 U.S. at 428. Moreover, Davis declared the home untenantable himself—he did not contact city health officials to determine whether the home could be sanitized or whether it was unfit for habitation. In accordance with the test set forth by ***Loretto***, and our holding in ***Menick***, we conclude that the sewage backups in Davis's basement did not constitute a government taking.

IV. Negligence *Per Se.*

¶26 Negligence *per se* arises from the violation of a safety statute if three requirements are met: "'(1) the harm inflicted was the type the statute was designed to prevent; (2) the person injured was within the class of persons sought to be protected; and (3) there is some expression of legislative intent that the statute become a basis for the imposition of civil liability.'" ***Totsky v. Riteway Bus Serv., Inc.***, 2000 WI 29, ¶67, 233 Wis. 2d 371, 607 N.W.2d 637 (citation omitted). "[N]egligence per se is 'a form of ordinary negligence.'" ***Id.***, ¶66 (citation omitted). "Negligence is conduct that 'falls below a standard established by the law for the protection of others against unreasonable risk of harm.'" ***Id.*** (citation omitted).

¶27 Davis contends that the City and MMSD violated multiple provisions of the Milwaukee Code of Ordinances and the Wisconsin

Administrative Code. All of the provisions cited by Davis deal in some capacity with public health concerns and/or maintenance of the public sewer system. Because Davis has not put forth any facts suggesting that the City and MMSD violated any of the ordinances or codes cited, we cannot conclude that the defendants were negligent *per se*. There is no evidence in the record that the City and MMSD engaged in conduct that fell below "'a standard established by the law for the protection'" against sewage backups. *See* ***id.*** (citation omitted).

V. Private Nuisance.

¶28 Finally, Davis argues that the backups constituted a private nuisance for which the City and MMSD are liable.

¶29 A party is liable for a private nuisance only if the party's "conduct is a legal cause of an invasion of another's interest in the private use and enjoyment of land," and the invasion is either (a) intentional and unreasonable, or (b) unintentional but otherwise actionable under the rules controlling liability for negligent conduct. ***Milwaukee Metro. Sewerage Dist. v. City of Milwaukee***, 2005 WI 8, ¶32, 277 Wis. 2d 635, 691 N.W.2d 658.

¶30 We have already explained why nothing in the record establishes a causal link between the sewage backups and any conduct by the defendants. Davis did not present expert testimony to support his theories of liability. Nothing in the record indicates that the defendants acted negligently or otherwise improperly. There is no evidence of a break in the system, no evidence that either defendant failed to maintain its respective portion of the system, and no evidence that anything other than unusually heavy rainfall caused the sewage backups. Accordingly, we cannot conclude that the backups constituted a private nuisance for which the defendants are liable.

¶31 For the foregoing reasons, we affirm.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.