

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 19, 2002

Cornelia G. Clark
Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 01-3429

Cir. Ct. No. 00-CV-741

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**WILLIAM PRESTWOOD, JR. AND KAREN PRESTWOOD,
INDIVIDUALLY AND AS PERSONAL REPRESENTATIVES OF
THE ESTATE OF JOHN PRESTWOOD,**

PLAINTIFFS-APPELLANTS,

v.

**BLUEBIRD SPRINGS RECREATIONAL AREA, INC., KEVIN
W. KROMKE, AND CAPITOL INDEMNITY CORPORATION,**

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for La Crosse County:
RAMONA A. GONZALEZ, Judge. *Affirmed.*

Before Vergeront, P.J., Dykman, and Lundsten, JJ.

¶1 PER CURIAM. The plaintiffs in this personal injury action appeal a judgment granting the defendants' motion for summary judgment and dismissing

the plaintiffs' complaint. The dispositive issue is whether the plaintiffs produced sufficient evidence of causation. We conclude they did not, and we affirm.

¶2 Summary judgment methodology is well established, and need not be repeated here. *See, e.g., Grams v. Boss*, 97 Wis. 2d 332, 338-39, 294 N.W.2d 473 (1980). On review, we apply the same standard the circuit court is to apply. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987).

¶3 The plaintiffs' complaint alleged that John Prestwood was at the campground of defendant Bluebird Springs, near a swimming pond area, and that he fell on a slippery and poorly lit artificial embankment and was carried into the water, where he died. According to the complaint, this area was "negligently and improperly maintained." The defendants moved for summary judgment on the ground that the cause of Prestwood's death is "pure speculation" because there were no witnesses to Prestwood's death. The court granted the motion.

¶4 It was undisputed that police reported that Prestwood's body was discovered in the pond in the early morning. Friends of Prestwood told police that Prestwood had been drinking the night before at the campground's bar, that he was intoxicated, and late in the evening he left the group. When found, Prestwood's body was fully clothed, including work boots. In addition, the autopsy report noted an abrasion on the back of Prestwood's head.

¶5 The plaintiffs argue that they produced sufficient evidence to go to trial on their claim. We disagree. The plaintiffs argue that summary judgment is precluded in this case because there is a dispute of fact about whether Prestwood was seen swimming in the pond late at night. However, even if we view this evidence in the light most favorable to Prestwood and, therefore, disregard the reports that witnesses saw him in the pond voluntarily, it does not cure the

weaknesses in the plaintiffs' case. The plaintiffs did not produce sufficient evidence on the question of causation, specifically, of how this accident occurred. Looking at the affidavits and making all reasonable inferences in favor of the plaintiffs, the plaintiffs have not offered to present evidence showing how Prestwood ended up fully clothed and drowned in the pond. The plaintiffs' theory, that Prestwood slipped on the algae-covered asphalt at the pond's edge, is pure speculation. Other possibilities can also be speculated that would not have been caused by any action or inaction of the defendants, and would be consistent with the evidence. The plaintiffs' evidence is insufficient to give a jury a reasoned basis to find cause. "Because there is no credible evidence upon which the trier of fact can base a reasoned choice between the two possible inferences, any finding of causation would be in the realm of speculation and conjecture." *Merco Distrib. Corp. v. Commercial Police Alarm Co.*, 84 Wis. 2d 455, 460, 267 N.W.2d 652 (1978).

By the Court.—Judgment affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5 (1999-2000).

