COURT OF APPEALS
DECISION
DATED AND FILED

October 7, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 95-3606

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

D.C., J.G., L.H. AND D.V.,

PLAINTIFFS-APPELLANTS,

V.

CATHOLIC DIOCESE OF GREEN BAY,
FATHER THOMAS STOCKER,
ST. BONIFACE, ROBERT THOMPSON AND
ST. FRANCIS XAVIER CATHEDRAL,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Brown County: RICHARD G. GREENWOOD, Judge. *Affirmed.*

Before Cane, P.J., Myse and Hoover, JJ.

HOOVER, J. D.C., J.G., L.H. and D.V. allege that Father Thomas Stocker and Father Robert Thompson sexually assaulted them when they were minors. The incidents are claimed to have occurred between 1963 and 1967. This

suit, filed May 3, 1994, arises from these assaults. Stocker perpetrated most of the incidents. Thompson is said to have observed and encouraged the assaults and engaged in sexual misconduct with one of the appellants. He is also accused of failing to notify his superiors or the police of Stocker's malefactions. The appellants consider the Catholic Diocese of Green Bay, St. Boniface and St. Francis Xavier Cathedral to be liable vicariously and under the doctrines of apparent authority and respondeat superior. They also contend that the institutional defendants were negligent in hiring, training, retaining and supervising the priests.[1] The appellants claim to have had no awareness or comprehension of the nature of the psychological injury the assaults caused, the cause of the injury or the defendants' part in that cause. They contend that they recently became aware that the assaults caused severe and painful psychological injuries and extreme emotional distress, which in turn have resulted in, inter alia, pain, suffering and humiliation.

The defendants successfully pursued summary judgment. The circuit court concluded that the claims were time barred and that the First Amendment shielded the institutional defendants from liability. We agree that the

[1] The Wisconsin Supreme Court has not expressly recognized a cause of action for negligent hiring, training and supervision. ***L.L.N. v. Clauder***, 209 Wis.2d 674, 685, 563 N.W.2d 434, 439 (1997); ***Pritzlaff v. Archdiocese of Milwaukee***, 194 Wis.2d 302, 325, 533 N.W.2d 780, 789 (1995).

appellants' claims are barred by the applicable statute of limitations and therefore affirm.[2]

The facts are undisputed for appeal purposes. They demonstrate the appellants were the victims of a variety of intentional, nonconsensual sexual assaults when they were minors. D.V.'s deposition states that he remembers considering Stocker's conduct "bizarre," wrong, abnormal and so upsetting as to cause him to almost vomit. He was uncomfortable with Stocker's advances and tried to resist. On one occasion, Stocker so upset him that he opened the door of the priest's moving car and threatened to jump out.

D.V. further stated that he felt unpleasant about the unnatural and "distasteful" things Stocker did to him. Indeed, approximately twelve years ago, or some eighteen years after the assault,[3] the typically even-tempered D.V. became "upset" and "pissed off" when he unexpectedly encountered Stocker in a fast food restaurant. He vociferously accused Stocker of having molested him, stating that the priest "belong[ed] in jail." When he demanded that Stocker leave the

[2] The statute of limitations issue is dispositive, and we therefore do not give lengthy consideration to the other issues addressed by the trial court. However, we note as to the appellants' theories of vicarious liability, apparent authority and respondeat superior, that there are no summary judgment proofs that would suggest that the institutional defendants knew of the assaults or that they occurred within the scope of the priests' legitimate authority or employment. The direct negligence claims fail under ***Pritzlaff v. Archdiocese of Milwaukee***, 194 Wis.2d 302, 326-30, 533 N.W.2d 780, 790-91 (1995), and ***L.L.N. v. Clauder,*** 209 Wis.2d 674, 687, 563 N.W.2d 434, 440 (1997), holding that if indeed such causes of action are recognized under Wisconsin law, the "entanglement doctrine" of the First Amendment nonetheless bars these claims. Under this doctrine, courts are prohibited from interpreting the church law, policies or practices that would come under consideration in determining the plaintiffs' negligence claims. ***Id***. The ***Pritzlaff*** analysis was recently applied with approval to a situation factually similar to the one at hand, involving adult plaintiffs who were molested by priests when they were children. *See* ***John BBB Doe v. Archdiocese of Milwaukee***, 211 Wis.2d 312, 565 N.W.2d 94 (1995), discussed at length below.

[3] At the approximate age of 32 or 33.

restaurant, the priest complied. D.V. was sufficiently affected by the assault that he discussed it with the woman he eventually married and with his mother.

D.C.'s deposition states that he remembers being victimized eight times in a several-year period when he was between thirteen and fifteen years old. He knew at the time of the assaults that what Stocker was doing was wrong and has remained angry with him since the incidents occurred. He indicated that it is uncomfortable, troubling, very, very disruptive and even painful to recall the incidents. The emotions he associates with the events are fear, shame, disgust and anger.

L.H. stated that he found Stocker's behavior "very strange and unusual." He did not enjoy being sexually abused. The episodes so bothered him that for the past thirty years L.H. has felt like a "second-class person." His memories are hurtful and distressing and have left him over the past ten or fifteen years hostile toward homosexuals.

J.G. stated that he did not enjoy the priests' sexual conduct; he knew as a sixteen- or seventeen-year-old that it was wrong and that, specifically, it was improper for a male adult to perform oral sex on him. He thinks about the incidents a lot and gets angry when he reads newspaper articles about sexual abuse.

When reviewing summary judgment, we apply the standard set forth in § 802.08(2), STATS., in the same manner as the circuit court. ***Kreinz v. NDII Secs. Corp.,*** 138 Wis.2d 204, 209, 406 N.W.2d 164, 166 (Ct. App. 1987). Summary judgment is appropriate when material facts are undisputed and inferences that may be reasonably drawn from the facts are not doubtful and lead only to one conclusion. ***Grams v. Boss***, 97 Wis.2d 332, 338, 294 N.W.2d 473, 477 (1980).

The supreme court has detailed the summary judgment procedure in numerous cases. *See, e.g.,* ***Green Spring Farms v. Kersten,*** 136 Wis.2d 304, 314-315, 401 N.W.2d 816, 820 (1987). It is well established and need not be reiterated at length. We note, however, that the court will first determine whether the complaint states a claim upon which relief may be granted. "A threshold question when reviewing a complaint is whether the complaint has been timely filed, because an otherwise sufficient claim will be dismissed if that claim is time barred." ***Pritzlaff v. Archdiocese of Milwaukee***, 194 Wis.2d 302, 312, 533 N.W.2d 780, 784 (1995). Stocker and Thompson contend that either the three-year statute of limitation for injury to a person, § 893.54, STATS., or the two-year intentional tort statute, § 893.57, STATS., could apply to this case. The other parties do not address this question, since all agree that the issue involves the date the plaintiffs discovered a claim upon which relief could be granted.

A cause of action accrues at the time a person knew or should have known of at least a relationship between the event and the injury. ***Borello v. U.S. Oil Co.***, 130 Wis.2d 397, 406-07, 388 N.W.2d 140, 145 (1986). A party has a present right to enforce a claim when the plaintiff has suffered actual damage, defined as harm that has already occurred or is reasonably certain to occur in the future. ***Hennekens v. Hoerl***, 160 Wis.2d 144, 152, 465 N.W.2d 812, 816 (1991). Ordinarily, the date one discovers a latent injury would appear to be an issue of fact, which would avoid summary judgment. In this case, however, the only proofs submitted suggesting the "date of discovery" were the psychologists' affidavits, fixing it at "1994." Without reciting the facts that allegedly precipitated the discovery, the date offered is conclusory. Evidentiary facts, not merely conclusions, must be made in an affidavit in support of a motion for summary

judgment. ***Kroske v. Anaconda Am. Brass Co***., 70 Wis.2d 632, 641, 235 N.W.2d 283, 287 (1975).

We can only conclude from the appellants' apparent inability to describe the manner of discovery that they filed their suit based on the information outlined above, information that has been available during their entire adulthood. Although the appellants attempt to portray a factual dispute,[4] the facts that provide the minimally necessary elements of their claim and the period they had access to them is not genuinely disputed.[5] They certainly knew the identity of the direct actors for years after their minority. With this information, others sharing potential liability could be identified. The brief facts above demonstrate that each recognized a significant adverse and unpleasant emotional response to their victimization. They may not have had precise knowledge of the full nature and extent of their alleged psychological injuries, or those conceivably liable, but they undisputedly knew for years that the aberrant encounters left them emotionally distressed and, by natural implication, humiliated.[6] These two elements of injury were sufficient to support a claim and were alleged in their complaint before they had obtained expert corroboration. A claimant may not delay action until the

[4] Two psychologists filed affidavits opining that the plaintiffs were not able to comprehend the nature of the abuse or their injuries until 1994. This opinion was predicated on the nature of the abuse and the plaintiffs' minority. We have not had our attention drawn to anything in the affidavits that explains what occurred in 1994 to provoke the theretofore incomprehensible elements of their claim. We know it was not the psychological evaluations themselves, since they were undertaken months after the suit was filed.

[5] The moving party has the burden to establish the absence of a genuine disputed issue as to any material fact. ***Grams v. Boss***, 97 Wis.2d 332, 338-39, 294 N.W.2d 473, 477 (1980).

[6] We deem it fair to infer that humiliation is a natural response to unwilling subjugation to morally abhorrent behavior.

extent of the injury is known; the statute of limitations runs from the time one has sufficient evidence that a wrong has been committed by an identified person. ***Pritzlaff***, 194 Wis.2d at 321, 533 N.W.2d at 787.

The appellants rely heavily on the ***Hammer v. Hammer***, 142 Wis.2d 257, 418 N.W.2d 23 (Ct. App. 1987), incest case to distinguish their situation from ***Pritzlaff***. The gravamen of their argument is that ***Hammer*** should not be applied to incest cases exclusively. Rather, they suggest that it creates a broader, more indulgent discovery rule when the plaintiff was victimized as a child by a person in a position of trust and authority. This position was recently rejected in ***John BBB Doe v. Archdiocese of Milwaukee***, 211 Wis.2d 312, 565 N.W.2d 94 (1997), wherein the supreme court embraced the analysis and holding in ***Pritzlaff.***

In ***Doe***, seven adult plaintiffs sued several priests and their archdiocese and churches, claiming they were sexually abused by the priests while they were minors. The facts, the liability and the relevant discovery-of-injury theories are sufficiently identical between the present case and ***Doe*** so as to relieve this court of specific comparison.

In ***Doe***, the plaintiffs argued that ***Pritzlaff*** should be limited to cases of sexual abuse of an adult, and not applied to abuse of children. ***Doe***, 211 Wis.2d at 345, 565 N.W.2d at 107. The supreme court held that the specialized discovery rule in ***Hammer***, codified in § 893.587, STATS., applies only to claims of incest. ***Doe***, 211 Wis.2d at 351, 565 N.W.2d at 109. "We cannot equate the sexual assaults alleged here to allegations of incest. This is so despite the plaintiffs' claims that they either failed to report the assaults or did not recognize the wrongfulness of the assaults …." ***Id.*** at 350, 565 N.W.2d at 109. Rather, the court

observed that, where there has been an intentional,[7] nonincestuous assault by one known to the plaintiff, and the plaintiff sustains actual harm when assaulted, "the causal link is established as a matter of law."[8] ***Id***. at 344, 565 N.W.2d at 106. In ***Doe***, the court observed that the plaintiffs knew the perpetrators and knew that the latter were fondling or having sexual contact with them. From this the court concluded "that these five plaintiffs[9] knew at least the identity of the responsible defendant and the nature of their injury no later than the time of the last sexual assault." ***Id***. at 340, 565 N.W.2d at 104.

The supreme court recognized that, as minors, the ***Doe*** victims may not have known how to go about addressing the wrong.[10] It believed, however, that this concern was addressed by the statutory sections that extend the time for filing an action that accrued during the plaintiff's minority.[11] Further, as in previous cases, it viewed the plaintiffs' claimed ignorance of additional harm, *i.e*., the severe emotional distress, as only creating uncertainty as to the amount of damages suffered, and not as a sufficient circumstance to toll the period of limitations. ***Id***. at 338, 565 N.W.2d at 104.

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[7] The ***Doe*** court treated the plaintiffs' claims as intentional torts without discussion, although the complaints alleged that the priests negligently misused their positions of authority. ***John BBB Doe v. Archdiocese of Milwaukee***, 211 Wis.2d 312, 319, 565 N.W.2d 94, 96 (1995).

[8] "As we recognized in ***Pritzlaff v. Archdiocese of Milwaukee***, 194 Wis.2d 302, 533 N.W.2d 780 (1995), actionable injury flows immediately from a nonconsensual, intentional sexual touching." ***John BBB Doe v. Archdiocese of Milwaukee***, 211 Wis.2d 312, 343-44, 565 N.W.2d 94, 106 (1995).

[9] Two of the seven plaintiffs received a separate analysis.

[10] One of the plaintiffs was age eight at the time of the assault. ***John BBB Doe v. Archdiocese of Milwaukee***, 211 Wis.2d 312, 339, 565 N.W.2d 94, 104 (1995).

[11] Sections 893.18 (causes of action accruing before July 1, 1980) and 893.16 (actions accruing on and after July 1, 1980), STATS.

Finally, the court concluded, "as a matter of law, that because the acts complained of were conducted intentionally, and without the consent of the minor victims, that each of the five plaintiffs discovered or, in the exercise of reasonable diligence, should have discovered that he or she was injured at the time of the assaults. *See* WIS J I--CIVIL 2010. Further, when a conscious person perceives an immediate injury, the causal link is obvious. We therefore also conclude, as a matter of law, that each of these five plaintiffs discovered or, in the exercise of reasonable diligence, should have discovered the cause of their injury at least by the time of the last incident of assault." ***Doe***, 211 Wis.2d at 342, 565 N.W.2d at 105.

Pritzlaff and ***Doe*** compel the conclusion that the claims based on intentional sexual assault are time barred. Accordingly, we need not address the claims based on respondeat superior and negligent employment theories. Appellants' derivative causes of action against the diocese and the churches accrued at the same time as the underlying assault claims and are similarly barred by the statute of limitations. ***Doe***, 211 Wis.2d at 366, 565 N.W.2d at 115. We therefore affirm the circuit court's order granting summary judgment.

By the Court.—Judgment affirmed.

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