COURT OF APPEALS DECISION DATED AND FILED

August 8, 2000

Cornelia G. Clark
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* WIS. STAT. § 808.10 and RULE 809.62.

No. 99-3039

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

JANICE KOSCHKEE,

PLAINTIFF-APPELLANT,

V.

EDWARD A/K/A TED SEAVER AND COUNSELING CENTER OF MILWAUKEE, INC.,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Brown County: SUE E. BISCHEL, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Janice Koschkee appeals a summary judgment dismissing her action against the Counseling Center of Milwaukee, Inc. (CCM). Koschkee claims that Edward Seaver, a CCM employee, had sexual contact with

her. The trial court found there was no issue of material fact showing: (1) that CCM negligently supervised Seaver, or (2) that Seaver acted within the scope of his employment. We affirm the circuit court's grant of summary judgment.

BACKGROUND

¶2 Seaver was the executive director of CCM, a non-profit corporation that provides counseling services. CCM and the Fox Valley Hospital had an arrangement where Seaver would perform counseling services for hospital patients under the supervision of a hospital licensed therapist. Fox Valley paid CCM for Seaver's services, and CCM in turn paid Seaver. Seaver began providing counseling services to the hospital in 1989. Koschkee first met Seaver in 1990 during a hospital stay. As a patient, Koschkee participated in group counseling sessions performed by Seaver at the hospital.

¶3 In the fall of 1991, Seaver established a support group outside of the hospital. According to Seaver, he reported the formation of the group to CCM's program director. At the support group meetings, Seaver performed "psychodramas" without having a licensed therapist present. Koschkee and other Fox Valley patients were members of the group. The group sessions ended in early 1992. Koschkee and Seaver did not meet again until April 1993 when Seaver interviewed Koschkee in connection with a paper he was writing for his masters degree program.

¶4 In June of 1993, Koschkee filed a complaint with the authorities at the hospital alleging that Seaver had sexual contact with her at the group counseling sessions at the hospital, at the out-of-hospital support group meetings, and at the interview in April of 1993. Koschkee subsequently filed suit against

Seaver and CCM. The trial court granted CCM's motion for summary judgment and this appeal followed.

STANDARD OF REVIEW

¶5 Whether summary judgment was appropriately granted presents a question of law that we review independently of the circuit court. *See* ***Fortier v. Flambeau Plastics Co.***, 164 Wis. 2d 639, 651-52, 476 N.W.2d 593 (Ct. App. 1991). When reviewing summary judgments, we utilize the same analysis as the circuit court and must apply the standards set forth in WIS. STAT. § 802.08(2).[1] *See* ***Schultz v. Industrial Coils***, 125 Wis. 2d 520, 521, 373 N.W.2d 74 (Ct. App. 1985). In general, "summary judgment is proper where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." ***Kenefick v. Hitchcock***, 187 Wis. 2d 218, 224, 522 N.W.2d 261 (Ct. App. 1994).

NEGLIGENT SUPERVISION

¶6 When the trial court granted summary judgment, the tort of negligent supervision had not yet been explicitly recognized in Wisconsin. In ***L.L.N. v. Clauder,*** 209 Wis. 2d 674, 699, 563 N.W.2d 434 (1997), however, the court stated that if such a claim did exist, it would require proof that the employer "knew or should have known that its employee would subject a third party to an unreasonable risk of harm." Here, after examining the pleadings and proofs, the trial court concluded that there was no showing that CCM knew or should have known that Seaver presented a risk of sexual contact to a patient.

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

¶7 After the trial court granted summary judgment, our supreme court recognized the tort of negligent supervision in ***Miller v. Wal-Mart Stores, Inc.,*** 219 Wis. 2d 250, 580 N.W.2d 233 (1998). The court in ***Miller*** first observed that the general elements of negligence require proof of a duty of care, a breach of that duty, a causal connection between the conduct and the injury, and damages. *See **id.*** at 260. As to cause, the issue is whether the employer's failure to exercise due care was a cause-in-fact of the wrongful act of the employee that in turn caused the plaintiff's injury. *See **id.*** at 261. "In other words, there must be a nexus between the negligent hiring, training, or supervision and the act of the employee." ***Id.*** at 262.

¶8 This nexus involves two questions. The first question is whether the employee's wrongful act caused the plaintiff's injury. The second is whether the employer's negligence was a cause of the employee's wrongful act. *See **id***. "[T]he negligence of the employer must be connected to the act of the employee." ***Id***. "[I]f the wrongful act of the employee was a cause-in-fact of the plaintiff's injury, then the trier of fact must further determine if the failure of the employer to exercise due care in the ... supervision of the employee was a cause-in-fact of the act of the employee which caused the injury." ***Id***. at 262-63.

¶9 Koschkee argues that the circuit court should be reversed since ***Miller*** has supplanted ***Clauder***. Curiously, even though ***Clauder*** was decided only thirteen months before ***Miller***, ***Miller*** does not even mention ***Clauder***. Nevertheless, we conclude it is not necessary to decide the continuing vitality of ***Clauder***. Restricting our analysis to ***Miller***, the circuit court's ruling is correct based on this record.

¶10 Since the employer's negligence must be connected to the employee's conduct, the focus is on whether there is proof that negligent supervision caused Seaver's actions of sexual assault. CCM prohibited its employees from engaging in any sexual contact with current or former clients. All staff was made aware of the policy. A manual given to all staff states the policy. Seaver had been employed as CCM's executive director since 1978. He was trained for this position and had full knowledge of CCM's policy. In addition, before Koschkee's claims surfaced, no allegations of inappropriate sexual behavior had ever been made against Seaver and CCM had no reason to suspect he presented a risk to anyone. There is simply no evidence in this record to prove CCM's liability. There was nothing more that CCM could reasonably have been expected to do. We therefore conclude that no nexus exists between any negligent hiring, training, or supervision of Seaver and his actions of sexual assault. *See* ***Miller***, 219 Wis. 2d at 262.

¶11 Much of Koschkee's appellate argument deals with conduct and harm other than the claims of sexual contact. For example, she claims Seaver, in the unsupervised therapy sessions, caused flashbacks to which she had adverse psychological reactions. She is critical of Seaver's threats regarding another rehospitalization and his criticism of her other therapists. However, Koschkee's amended complaint claims CCM was negligent only with respect to the sexual contact. We, like the circuit court, therefore, restrict our analysis to the record.

VICARIOUS LIABILITY

¶12 Next, Koschkee argues that the trial court improperly found that Seaver's alleged sexual contact removed their entire relationship from the scope of Seaver's employment with CCM. We disagree.

¶13 "Under the doctrine of *respondeat superior* an employer can be held vicariously liable for the negligent acts of … employees while they are acting within the scope of their employment." ***Shannon v. City of Milwaukee***, 94 Wis. 2d 364, 370, 289 N.W.2d 564 (1980). Employees act within the scope of their employment as long as they are, at a minimum, "partially actuated by a purpose to serve the employer." ***Olson v. Connerly***, 156 Wis. 2d 488, 499, 457 N.W.2d 479 (1990). "[I]f the employee fully steps aside from conducting the employer's business to procure a predominately personal benefit, the conduct falls outside the scope of employment." ***Block v. Gomez***, 201 Wis. 2d 795, 806, 549 N.W.2d 783 (Ct. App. 1996).

¶14 In ***Block***, the plaintiff was involved in a sexual relationship with her drug abuse counselor that occurred during her treatment. The plaintiff sought to hold the clinic vicariously liable for the counselor's actions. The court held that he was acting outside the scope of his employment because the employee knew that his employer forbade such conduct. *See **id***. at 807. The employee undisputedly stepped aside from the Clinic's business to procure a purely personal benefit. *See **id***.

¶15 CCM argues that since it undisputedly forbade any sexual contact or sexual relationships with clients, Seaver's alleged sexual contact with Koschkee was outside the scope of his employment.[2] We agree and reject Koschkee's

[2] Before the trial court, CCM argued it was not vicariously liable because of the borrowed servant doctrine and also raised a statute of limitations defense on all of Koschkee's claims. The court did not address the borrowed servant doctrine, since it found Seaver had acted outside the scope of his employment. It did not address the statute of limitations defense because Koschkee did not have the opportunity to brief the issues or address the merits of CCM's arguments. For those same reasons, we also do not address these issues.

argument that Seaver's actions were partially actuated by a purpose to serve the employer.

¶16 As in ***Block***, Seaver allegedly initiated sexual contact with Koschkee with full knowledge that CCM forbade such conduct. Seaver testified that he was "real clear" regarding CCM's policy and that the prohibition against sexual relationships with patients was in a manual given to employees. Seaver was aware of CCM's prohibition of sexual contact and therefore could only have been pursuing his own interests by engaging in this behavior. Seaver stepped aside from CCM's business to procure a purely personal relationship with Koschkee. It is Seaver's intent that determines whether his conduct was within the scope of his employment. *See* ***id.*** at 807. Even if CCM had knowledge of the support group meetings, the acts took place outside the support group setting. Under the facts presented, Seaver could not therefore have been motivated by a purpose to serve his employer by engaging in sexual contact with Koschkee. As the circuit court observed, "no matter how the alleged facts are viewed it can only be concluded from them that Seaver's actions had only one purpose: to get Plaintiff to go to his hotel room in order to induce her to have sexual contact with him."

¶17 The circuit court properly concluded from the evidence presented that Seaver's conduct was not partially actuated by a purpose to serve the employer and that Seaver's wrongful actions, as a matter of law, fell outside the scope of his employment.

By the Court.—Order affirmed.

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