**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**July 30, 2004**

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 Nos. 03-1416**

**03-1417**

**Cir. Ct. Nos. 02CV011791, 02CV011792, 02CV011793, 02CV011794, 02CV011795 03CV002219,03CV002220, 03CV002221, 03CV002222, 03CV002223**

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

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**NO. 03-1416**
CIR. CT. NOS. 02CV011791
02CV011792
02CV011793
02CV011794
02CV011795

**JOHN DOE 67C, JANE DOE 67E, JONATHAN GILLESPIE, JOHN DOE 67D, AND JIM GILLESPIE,**

**PLAINTIFFS-APPELLANTS,**

**V.**

**ARCHDIOCESE OF MILWAUKEE, ST. JOHN THE EVANGELIST CHURCH, ALIAS INSURANCE COMPANY #1, AND ALIAS INSURANCE COMPANY #2,**

**DEFENDANTS-RESPONDENTS.**

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**NO. 03-1417**
CIR. CT. NOS. 03CV002219
03CV002220
03CV002221
03CV002222
03CV002223

**JOHN DOE 67A, JAMES AHLER, JOHN DOE 67F,**

**GREGORY HUDON, AND JOHN DOE 67B,**

**PLAINTIFFS-APPELLANTS,**

**V.**

**ARCHDIOCESE OF MILWAUKEE, ST. JOHN THE EVANGELIST CHURCH, ALIAS INSURANCE COMPANY #1, AND ALIAS INSURANCE COMPANY #2,**

**DEFENDANTS-RESPONDENTS.**

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APPEAL from orders of the circuit court for Milwaukee County: MICHAEL D. GOULEE, Judge. *Affirmed.*

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

¶1 FINE, J. This is a consolidated appeal from orders dismissing complaints against the Archdiocese of Milwaukee and St. John the Evangelist Church.[1] Appellants alleged that they were victims of sexual abuse by a now-deceased priest, George Nuedling, and that the Archdiocese and the Church did nothing to prevent that abuse although, according to the complaints, the Archdiocese and the Church knew or should have known what Nuedling was doing to them and others. The claims, denominated as sounding in negligent supervision, fraud, and breach of fiduciary duty, were dismissed by the trial court on the ground that they were time-barred. Appellants concede that unless tolled by the "discovery rule" the applicable statutes of limitations bar their claims. According to the appellants' brief on this appeal, the only issue presented on this

[1] All appellants other than John Doe 67F have voluntarily dismissed their appeals.

appeal is whether the "discovery rule" applies. The trial court held that it did not. On our *de novo* review, *see* ***Heinritz v. Lawrence Univ.***, 194 Wis. 2d 606, 610, 535 N.W.2d 81, 83 (Ct. App. 1995), we affirm because governing decisions by the Wisconsin Supreme Court require it.

¶2 Under Wisconsin law, a statute of limitations is tolled until a plaintiff either discovers his or her injuries and their cause or, in the exercise of reasonable diligence, should have discovered those injuries and cause. ***Hansen v. A.H. Robins Co.***, 113 Wis. 2d 550, 560, 335 N.W.2d 578, 583 (1983); ***Borello v. U.S. Oil Co.***, 130 Wis. 2d 397, 411, 388 N.W.2d 140, 146 (1986). "The reasonable-diligence test is an objective one." ***Hegarty v. Beauchaine***, 2001 WI App 300, ¶84, 249 Wis. 2d 142, 189, 638 N.W.2d 355, 378 (Fine, J., concurring in part and dissenting in part, writing opinion for the court on this issue, *see* ¶¶2, 79); *see also* ***Carlson v. Pepin County***, 167 Wis. 2d 345, 353, 481 N.W.2d 498, 501 (Ct. App. 1992). "Embedded in the duty to exercise reasonable diligence is the duty to inquire." ***Hegarty***, 2001 WI App 300, ¶85, 249 Wis. 2d at 190, 638 N.W.2d at 378.

¶3 The nub of the appellants' contention that the "discovery rule" saves their claims is that they were under abuse-caused disabilities and also enmeshed in the aura of reverence and fear through which they were taught to view the church and its priests, and that this prevented them from contemporaneously recognizing their injuries and seeking timely redress. They also allege that both the Archdiocese and the Church conspired to cover up what the appellants charge was Nuedling's pattern of abuse. Were we writing on a clean slate, we might very well agree with appellants that they are entitled to an attempt to prove their contentions. But we are not.

¶4 First, ***Doe v. Archdiocese of Milwaukee***, 211 Wis. 2d 312, 565 N.W.2d 94 (1997), has determined for Wisconsin that the statute of limitations runs from the moment a plaintiff sustains "an intentional, non-incestuous assault by one known to the plaintiff," even a though the plaintiff might have been a child at the time. ***Id.***, 211 Wis. 2d at 344–346, 364, 565 N.W.2d at 106–107, 115. Lest there be any doubt of the expansiveness of this holding, Chief Justice Shirley S. Abrahamson's concurrence in ***Doe*** puts that doubt to rest:

> The majority opinion enunciates a broad rule of law encompassing all children: A plaintiff who while a minor was sexually assaulted by a person in a position of trust (such as a clergyperson) is, as a matter of law, irrebuttably presumed to have discovered the injury and the cause thereof at the moment of the assault, regardless of whether the plaintiff repressed all memory of the assault or the plaintiff did not know and should not have reasonably known of the injury or cause thereof.

***Id.***, 211 Wis. 2d at 367, 565 N.W.2d at 116 (footnote omitted). Any derivative liability that the Archdiocese or the Church might have as a result of what Nuedling did to the appellants "accrued at the same time that the underlying

intentional tort claims accrued, and similarly would be barred by the statute of limitations." ***Id.***, 211 Wis. 2d at 366, 565 N.W.2d at 115.[2]

¶5 Second, insofar as the appellants assert direct claims against the Archdiocese and the Church, those claims are barred as well. As noted, the reasonable-diligence test is objective; plaintiffs seeking the benefit of the discovery-tolling rule "may not ignore means of information reasonably available to them, but must in good faith apply their attention to those particulars which may be inferred to be within their reach." ***Id.***, 211 Wis. 2d at 340, 565 N.W.2d at 105. Given the pernicious pattern of abuse the appellants claim, there is no neutral-principled distinction between what we have already seen is ***Doe***'s conclusion, as a matter of law, and what those in appellants' position either knew or should have known about their abuse by priests and what they either knew or should have known or suspected about the Archdiocese's role in that abuse. Thus, the discovery-rule tolling does not save appellants' direct claims against the Archdiocese and the Church.

[2] The Dissent contends that this is *dictum*. We disagree. First, "when a court of last resort intentionally takes up, discusses, and decides a question germane to, though not necessarily decisive of, the controversy, such decision is not a *dictum* but is a judicial act of the court which it will thereafter recognize as a binding decision." ***Chase v. American Cartage Co.***, 176 Wis. 235, 238, 186 N.W. 598, 599 (1922); *see also* ***State v. Leitner***, 2002 WI 77, ¶22, 253 Wis. 2d 449, 464 n.16, 646 N.W.2d 341, 348 n.16. Second, contrary to the Dissent's conclusion that "when the supreme court decided ***Doe*** and ***Pritzlaff***, it had not yet recognized the tort of negligent supervision," ***Pritzlaff*** assumed for the purpose of its analysis that "such a cause of action exists in Wisconsin." ***Pritzlaff v. Archdiocese of Milwaukee***, 194 Wis. 2d 302, 325–326, 533 N.W.2d 780, 789 (1995), *cert. denied*, 516 U.S. 1116. So did ***L.L.N. v. Clauder***, 209 Wis. 2d 674, 686–698, 563 N.W.2d 434, 440–445 (1997), which held that the First Amendment barred the claim. No First Amendment issue, of course, was present in the case upon which the Dissent relies, ***Miller v. Wal-Mart Stores, Inc.***, 219 Wis. 2d 250, 580 N.W.2d 233 (1998). ***Miller*** is thus irrelevant to this appeal.

¶6 Additionally, negligent-supervision claims against a religious body are barred in Wisconsin by the Establishment Clause of the First Amendment. ***Pritzlaff v. Archdiocese of Milwaukee***, 194 Wis. 2d 302, 325–331, 533 N.W.2d 780, 789–792 (1995), *cert. denied*, 516 U.S. 1116; ***L.L.N. v. Clauder***, 209 Wis. 2d 674, 686–698, 563 N.W.2d 434, 440–445 (1997). Although the appellants seek to blur the boundaries by also claiming breach of duty, fraud, and cover-up, both ***Pritzlaff*** and ***Clauder*** lead, in our view, inextricably to the same result in connection with those claims as well.[3]

¶7 The Wisconsin Supreme Court has decreed that the First Amendment puts a wall of protection around action by a religious body that harms those like the appellants but, in the religious body's doctrinal schema is necessary to accommodate other principles. Thus, the following observation in ***Clauder*** has specific applicability to appellants' claims:

> In *Clergy Sexual Misconduct: Confronting the Difficult Constitutional & Institutional Liability Issues*, 7 St. Thomas L. Rev. 31 (1994), an article cited several times by the *Pritzlaff* court, James T. O'Reilly and Joan M. Strasser further elaborate on the reasons why "the measurement of duty and reasonableness needed to find negligence will inevitably entangle the civil court in the nuances of religious discipline practices." *Id.* at 39. For example, O'Reilly and Strasser state that the Roman Catholic Church has internal disciplinary procedures that are influenced by a religious belief in reconciliation and mercy. *Id.* at 36. They explain:

[3] Although the Archdiocese and the Church raised before the trial court the First Amendment as a defense to the appellants' claims, appellants have expressly decided to not brief the Amendment's impact on those claims because, they assert, the trial court decided the motion to dismiss on other grounds. It is black-letter law, however, that we are not bound by the trial court's rationale in affirming its decision. *See* ***State v. Marhal***, 172 Wis. 2d 491, 494 n.2, 493 N.W.2d 758, 760 n.2 (Ct. App. 1992).

> The reconciliation and counseling of the errant clergy person involves more than a civil employer's file reprimand or three day suspension without pay for misconduct. Mercy and forgiveness of sin may be concepts familiar to bankers but they have no place in the discipline of bank tellers. For clergy, they are interwoven in the institution's norms and practices.
>
> *Id.* at 45-46. Therefore, due to this strong belief in redemption, a bishop may determine that a wayward priest can be sufficiently reprimanded through counseling and prayer. If a court was asked to review such conduct to determine whether the bishop should have taken some other action, the court would directly entangle itself in the religious doctrines of faith, responsibility, and obedience. *Id.* at 31, 43-46; *see also Pritzlaff*, 194 Wis. 2d at 329, [533 N.W.2d at 780] (quoting *Schmidt* [*v. Bishop*], 779 F. Supp. [321,] 332 [S.D.N.Y. 1991]).

***Clauder***, 209 Wis. 2d at 689–690, 563 N.W.2d at 441 (footnote omitted). Although we may disagree with these sentiments and question whether they are consistent with First-Amendment jurisprudence, they are binding on us. *See* ***State v. Lossman***, 118 Wis. 2d 526, 533, 348 N.W.2d 159, 163 (1984) (court of appeals bound by supreme court precedent); *cf*. ***Hutto v. Davis***, 454 U.S. 370, 372–375 (1982) (judicial hierarchy requires straight-forward adherence to higher-court precedent).

¶8 Based on the foregoing, we affirm.

*By the Court*.—Orders affirmed.

Publication in the official reports is not recommended.

¶9 SCHUDSON, J. (*dissenting*). I would certify this case to the Wisconsin Supreme Court.

¶10 The appellants, who alleged that they were sexually abused by Father Nuedling between 1960 and 1980, appeal from the summary judgment dismissing their claims against the Archdiocese and a church that employed him. They contend that the circuit court erred in concluding that the supreme court's decisions in ***Doe v. Archdiocese of Milwaukee***, 211 Wis. 2d 312, 565 N.W.2d 94 (1997), and ***Pritzlaff v. Archdiocese of Milwaukee***, 194 Wis. 2d 302, 533 N.W.2d 780 (1995), required dismissal of their action as barred by the statute of limitations. Specifically, they offer compelling arguments that ***Doe*** and ***Pritzlaff*** do not control.

¶11 The appellants' circuit court claims included negligent supervision, fraud, and breach of fiduciary duty arising from Father Nuedling's alleged sexual abuse, and from the Archdiocese's negligent and/or deliberate failure to protect them from such abuse. The appellants concede that ***Doe*** and ***Pritzlaff*** would require dismissal of their claims against Father Nuedling, individually; they maintain, however, that their action against the Archdiocese and church is viable. They contend that, under the discovery rule, their claims against the Archdiocese and the church survive because they had no knowledge of the negligence or fraud until 2002, when the Archdiocese revealed its concealment of Father Nuedling's conduct.

¶12 The appellants acknowledge that ***Doe*** includes language that could defeat their theory. ***Doe***, citing ***Pritzlaff***, stated:

> In light of our conclusion that all seven plaintiffs' claims based on intentional sexual assault are barred by the applicable statute of limitations, we need not address their claims based on *respondeat superior* and negligent employment theories. Plaintiffs' derivative causes of action against the Archdiocese and the churches occurred at the same time that the underlying intentional tort claims accrued, and similarly would be barred by the statute of limitations.

***Doe***, 211 Wis. 2d at 366. They correctly explain, however, that the language is *dictum*. And they further explain that when the supreme court decided ***Doe*** and ***Pritzlaff***, it had not yet recognized the tort of negligent supervision. Such recognition arrived the next year, however, in ***Miller v. Wal-Mart Stores, Inc.***, 219 Wis. 2d 250, 580 N.W.2d 233 (1998).

¶13 In response, the Archdiocese does not even mention ***Miller***. Simply relying on ***Doe*** and ***Pritzlaff***, it fails to counter the appellants' theory that ***Miller*** renders the ***Doe/Pritzlaff*** *dictum* meaningless. The Archdiocese suggests, however, that this court's decision in ***Joseph W. v. Catholic Diocese of Madison***, 212 Wis. 2d 925, 569 N.W.2d 795 (Ct. App. 1997), defeats the appellants' argument. But ***Joseph W.*** is distinguishable in a number of significant ways; it does not preclude the appellants' theory.

¶14 The parties rely on federal cases as well. The Archdiocese invokes ***Kelley v. Marcantonio***, 187 F.3d 192 (1st Cir. 1999); the appellants rely on ***Martinelli***, 196 F.3d 409 (2d Cir. 1999). While ***Kelley*** supports the Archdiocese's position, ***Martinelli*** is more compelling: "To hold that by concealing a fraud, or by committing a fraud in a manner that it concealed itself until such time as the party committing the fraud could plead the statute of limitations to protect it, is to

make the law which is designed to prevent fraud the means by which it is made successful and secure." ***Martinelli***, 196 F.3d at 422 (citation and internal quotation marks omitted).

¶15 The appellants have provided persuasive arguments. At the very least, we should certify this case for the determination of whether, now that the supreme court has decided ***Miller***, the appellants' claims of negligent supervision and retention, as well as their claim of fiduciary fraud, survive. Accordingly, I respectfully dissent.