COURT OF APPEALS
DECISION
DATED AND FILED

November 28, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2006AP291 **Cir. Ct. No. 2005CV8815**

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

KENNETH W. HORNBACK, DENNIS L. BOLTON, RONALD W. KUHL, DAVID W. SCHAEFFER AND GLENN M. BONN,

PLAINTIFFS-APPELLANTS,

V.

ARCHDIOCESE OF MILWAUKEE AND DIOCESE OF MADISON,

DEFENDANTS-RESPONDENTS,

COMMERCIAL UNION INSURANCE COMPANY,

INTERVENING DEFENDANT.

APPEAL from an order of the circuit court for Milwaukee County: FRANCIS T. WASIELEWSKI, Judge. *Affirmed.*

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

¶1 FINE, J. Kenneth W. Hornback, Dennis L. Bolton, Ronald W. Kuhl, David W. Schaeffer, and Glenn M. Bonn appeal an order dismissing their complaint against the Archdiocese of Milwaukee and the Diocese of Madison.[1] They claim that the trial court erred when it concluded that their claims were barred by the statute of limitations. We affirm.

I.

¶2 In October of 2005, the appellants sued the Milwaukee Archdiocese and the Madison Diocese, alleging that from 1968 to 1973, Gary T. Kazmarek, a school teacher in the Louisville, Kentucky Archdiocese, sexually abused them. The appellants claimed that the Milwaukee Archdiocese "knew or should have known of Kazmarek's propensity for sexually abusing children" because, from approximately 1964 to 1966, Kazmarek taught at a school in the Milwaukee Archdiocese where he sexually abused "more than two dozen children." According to the complaint, when the Milwaukee Archdiocese learned about the abuse, it promised the parents of the victims "that Kazmarek would be sent to a treatment center and that he would never have contact with children again." The appellants alleged that the Milwaukee Archdiocese did not contact the police or warn subsequent employers and that, "contrary to what the Archdiocese represented to the parents of Kazmarek's victims, Kazmarek was simply told to leave Milwaukee quietly."

[1] Commercial Union Insurance Company provided liability insurance to the Milwaukee Archdiocese for at least part of the time the appellants alleged that they were sexually abused. Commercial Union is not a party to this appeal.

¶3 The appellants also claimed that the Madison Diocese "knew or should have known of Kazmarek's propensity for sexually abusing children" because, after Kazmarek taught at a school in the Milwaukee Archdiocese, he taught at a school in the Madison Diocese where he sexually abused "up to ten children." The appellants alleged that, like the Milwaukee Archdiocese, when the Madison Diocese became aware of the abuse, it did not contact the police or alert subsequent employers.

¶4 The appellants contended that the Milwaukee Archdiocese and the Madison Diocese were negligent "in failing to refer Kazmarek to the police and/or taking other action to prevent Kazmarek's continuation of his pattern of sexually abusing children." According to the complaint, the Milwaukee Archdiocese's and the Madison Diocese's alleged negligence, which the appellants claimed they did not discover until October of 2002, "was a substantial factor in causing Kazmarek's sexual abuse of the" appellants.

¶5 The Milwaukee Archdiocese and the Madison Diocese moved to dismiss the complaint, asserting, among other things that the claims were barred by the applicable statute of limitations. *See* ***John BBB Doe v. Archdiocese of Milwaukee***, 211 Wis. 2d 312, 344–345, 565 N.W.2d 94, 106–107 (1997); ***Pritzlaff v. Archdiocese of Milwaukee***, 194 Wis. 2d 302, 316–317, 533 N.W.2d 780, 786 (1995). The trial court agreed and dismissed the complaint.

II.

¶6 A motion to dismiss for failure to state a claim tests the legal sufficiency of the complaint. ***John BBB Doe***, 211 Wis. 2d at 331, 565 N.W.2d at 101. "While we accept the facts pled as true for purposes of our review, we are not required to assume as true legal conclusions pled by the plaintiffs." ***Ibid.*** We

will dismiss a complaint for failure to state a claim upon which relief can be granted only if "'it is quite clear that under no conditions can the plaintiff recover.'" ***Pritzlaff***, 194 Wis. 2d at 312, 533 N.W.2d at 784 (quoted source omitted).

¶7 "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." ***Ibid.*** Under the "discovery rule," a statute of limitations is tolled until a plaintiff either discovers his or her injuries or their cause or, in the exercise of reasonable diligence, should have discovered those injuries and cause. *See* ***Borello v. U.S. Oil Co.***, 130 Wis. 2d 397, 411, 388 N.W.2d 140, 146 (1986); ***Hansen v. A.H. Robins, Inc.***, 113 Wis. 2d 550, 560, 335 N.W.2d 578, 583 (1983).

¶8 The appellants concede that unless tolled by the discovery rule the applicable statute of limitations bars their negligence claim. They contend, however, that their claim is timely under the discovery rule because they did not learn the identity or the allegedly negligent conduct of the Milwaukee Archdiocese or of the Madison Diocese until October of 2002. *See* WIS. STAT. § 893.54(1) ("The following actions shall be commenced within 3 years or be barred: **(1)** An action to recover damages for injuries to the person."). Were we writing on a clean slate, we might very well agree with appellants. But we are not. This case is controlled by ***John BBB Doe***.

¶9 ***John BBB Doe*** addressed whether the discovery rule could save claims brought by the victims of intentional, non-incestuous sexual assault against the individual priests and their employers, the churches and the Milwaukee Archdiocese, after the statute of limitations had run. ***John BBB Doe*** held that, as

a matter of law, the victims knew, or in the exercise of reasonable diligence should have known, that they were injured when they were assaulted. ***Id.***, 211 Wis. 2d at 340, 342, 565 N.W.2d at 104, 105. Under ***John BBB Doe***, once the victims knew that they were injured, they had "a duty to inquire into the injury that result[ed] from [the] tortuous activity." ***Id.***, 211 Wis. 2d at 340, 565 N.W.2d at 105. ***John BBB Doe*** thus concluded that the discovery rule did not save the victims' direct claims against the priests because the statute of limitations began to run no later than the date of the last sexual assault:

> [i]n cases where there has been an intentional, non-incestuous assault by one known to the plaintiff, and the plaintiff sustains actual harm at the time of the assault, the causal link is established as a matter of law. These plaintiffs knew the individual priests, knew the acts of sexual assault took place, and knew immediately that the assaults caused them injury. We therefore conclude that these plaintiffs discovered, or in the exercise of reasonable diligence, should have discovered all the elements of their causes of action against the individual perpetrators at the time of the alleged assault(s), or by the last date of the alleged multiple assaults.

Id., 211 Wis. 2d at 344–345, 565 N.W.2d at 106–107; *see also* ***Pritzlaff***, 194 Wis. 2d at 316–317, 533 N.W.2d at 786 (cause of action against Archdiocese accrued when sexual relationship with priest ended). ***John BBB Doe*** also concluded that the discovery rule did not save the derivative claims against the churches and the Milwaukee Archdiocese because they "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.

¶10 Like the victims in ***John BBB Doe***, the appellants, as a matter of law, knew Kazmarek, knew that Kazmarek had sexually assaulted them, and knew or should have known at the time of the assaults that they had been injured. *See* ***id.***, 211 Wis. 2d at 344–345, 565 N.W.2d at 106–107. They thus had a

corresponding "duty to inquire" into the cause of their injuries no later than the date of the last sexual assault, which would have revealed the facts they now assert make the Milwaukee Archdiocese and the Madison Diocese liable. *See* ***id.***, 211 Wis. 2d at 340, 565 N.W.2d at 105 ("Plaintiffs 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."). Accordingly, their claims against the Milwaukee Archdiocese and the Madison Diocese are barred. *See* ***Pritzlaff***, 194 Wis. 2d at 312, 533 N.W.2d at 784 (statute of limitations for actions against the Archdiocese began on same date as the cause of action accrued against the individual priest).

By the Court.—Order affirmed.

Publication in the official reports is not recommended.