COURT OF APPEALS
DECISION
DATED AND FILED

March 10, 1998

Marilyn L. Graves
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* § 808.10 and RULE 809.62, STATS.

No. 96-0329

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

MIRIAM T., JARED T., JR. AND JOHNNY T.,

PLAINTIFFS-APPELLANTS,

V.

CHURCH MUTUAL INSURANCE COMPANY AND GRACE PENTECOSTAL CHURCH, INC.,

DEFENDANTS-RESPONDENTS,

HOWARD L. BRACY AND PENTECOSTAL ASSEMBLIES OF THE WORLD,

DEFENDANTS.

APPEAL from an order of the circuit court for Milwaukee County: JACQUELINE D. SCHELLINGER, Judge. *Affirmed.*

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

PER CURIAM. Miriam T., Jared T., Jr., and Johnny T. (collectively, "the appellants") appeal from the trial court order which dismissed their complaint against Church Mutual Insurance Company, and Grace Pentecostal Church, Incorporated (collectively, "the respondents"), and which found that no insurance coverage exists as to the defendant, Howard L. Bracy. The appellants argue that the trial court erred when it dismissed their claims against the respondents in reliance upon ***Pritzlaff v. Archdiocese of Milwaukee***, 194 Wis.2d 302, 533 N.W.2d 780 (1995), because the First Amendment bars neither their negligent supervision claim nor their respondeat superior claim. We conclude that: (1) the First Amendment bars the appellants' negligent supervision claim; and (2) the appellants' respondeat superior claim fails because, as a matter of law, Bracy's initiations of sexual contact with Miriam were clearly acts outside the scope of Bracy's employment. Because of these conclusions, the insurance coverage issue is moot. Therefore, we affirm.

I. BACKGROUND.

During the time in which Miriam was a member of, and Bracy was the pastor of, Grace Pentecostal Church, Miriam went to Bracy for marriage counseling. According to Miriam, during the course of providing such marriage counseling services, Bracy made sexual contact with her on numerous occasions causing her mental and/or emotional injury. On January 26, 1995, Miriam filed a complaint against Bracy, which was later amended, alleging that he provided negligent marriage counseling services and that he violated the sexual exploitation by therapist statute, § 895.70, STATS. The amended complaint also named the respondents as defendants. The parties and the trial court have interpreted the complaint to state a negligent supervision claim, as well as a respondeat superior claim, against the respondents.

Bracy filed motions to dismiss and for summary judgment, and the respondents filed a motion to dismiss, which incorporated by reference Bracy's pleadings, affidavits and brief. The trial court denied Bracy's motions. The court, however, granted the respondents' motion, and entered an order dismissing the appellants' claims against the respondents. The appellants now appeal that order.

II. ANALYSIS.

A. Standard of review.

The circuit court's order stated that it was granting the respondents' motion to dismiss. The respondents' motion, however, incorporated by reference matters outside of the pleadings which the trial court did not specifically exclude. Therefore, we treat the motion as one for summary judgment. *See* § 802.06(2)(b), STATS.[1]

Our review of a trial court's grant of summary judgment is *de novo*. ***Green Spring Farms v. Kersten***, 136 Wis.2d 304, 315-16, 401 N.W.2d 816, 820 (1987). We use the same summary judgment methodology as the trial court. ***Id***. That methodology has been described in many cases, *see, e.g.,* ***Grams v. Boss***, 97 Wis.2d 332, 338-39, 294 N.W.2d 473, 476-77 (1980), and need not be repeated here. Summary judgment must be granted if the evidentiary material demonstrates "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." RULE 802.08(2), STATS.

[1] The appellants have presented us with the summary judgment methodology in their brief in chief, and the respondents have not contested the appellants' statement of the standard of review. Thus, our conclusion is consistent with the parties' characterizations of the standard of review.

A. Negligent supervision claim.

The trial court, applying ***Pritzlaff v. Archdiocese of Milwaukee***, 194 Wis.2d 302, 533 N.W.2d 780 (1995), dismissed the appellants' negligent supervision claim on the ground that it violated the First Amendment. The appellants argue that the trial court erred because the First Amendment does not bar their claim. We agree with the trial court, and conclude that, under the rule announced in ***Pritzlaff***, and reaffirmed in ***L.L.N. v. Clauder***, 209 Wis.2d 674, 563 N.W.2d 434 (1997), the appellants' negligent supervision claim is barred by the First Amendment.

We first note that the Wisconsin Supreme Court has not yet recognized the existence of a claim of negligent supervision in Wisconsin. *See* ***Clauder***, 209 Wis.2d at 685, 563 N.W.2d at 439. However, for the purposes of this case, we assume that such a claim exists, without deciding the issue. *See* ***id.*** (assuming, without deciding, that a claim for negligent supervision exists). Since the supreme court has not explicitly recognized the existence of a claim for negligent supervision in Wisconsin, the court has looked to other jurisdictions to determine the elements of the claim. *See* ***id.*** at 698, 563 N.W.2d at 445. After doing so, the supreme court has stated that, "an employer is liable for negligent supervision only if it knew or should have known that its employee would subject a third party to an unreasonable risk of harm." ***Id.*** at 699, 563 N.W.2d at 445 (citing ***Moses v. Diocese of Colorado***, 863 P.2d 310, 329 (Colo. 1993)).

In ***Pritzlaff***, the supreme court considered facts very similar to the facts of this case, and found that the First Amendment barred the plaintiff's negligent supervision claim against a religious organization. In that case, the plaintiff, Ms. Pritzlaff, alleged that Father Donovan used his position as a priest to

coerce her into having a sexual relationship with him. ***Pritzlaff***, 194 Wis.2d at 308-09, 533 N.W.2d at 782. Pritzlaff filed a complaint against the Archdiocese of Milwaukee, Father Donovan's employer, in which she alleged claims of negligent hiring, retaining, supervision, and training, and in which she claimed that the Archdiocese knew or should have known that Donovan had a sexual problem. ***Id***. at 309-10, 533 N.W.2d at 783. The supreme court, however, concluded that Pritzlaff's claims of negligent hiring, retaining, training and supervision were barred by the First Amendment. ***Id***. at 307, 533 N.W.2d at 782.

In reaching its decision, the supreme court distinguished Pritzlaff's claims of negligent hiring and retention, from her claims of negligent supervision and training. The court stated that, "[t]o establish a claim for negligent hiring or retention, Ms. Pritzlaff would have to establish that the Archdiocese was negligent in hiring or retaining Fr. Donovan because he was incompetent or otherwise unfit." ***Id.*** at 326, 533 N.W.2d at 790 (citing ***Midwest Knitting Mills, Inc. v. U.S.***, 950 F.2d 1295, 1298 (7th Cir. 1991)). The court found, however, that the First Amendment barred any such claim because it "prevents the courts of this state from determining what makes one competent to serve as a Catholic priest since such a determination would require interpretation of church canons and internal church policies and practices." ***Id.***

In contrast, the court stated that "inquiry into the training and supervision of clergy is a closer issue than inquiry into hiring and retention practices because under some limited circumstances such questions might be able to be decided without determining questions of church law and policies …." ***Id***. at 328, 533 N.W.2d at 791. The court, however, stated that "under most if not all circumstances" negligent supervision claims are prohibited by the First Amendment. ***Id***. The court then found that, under the facts of that case, Pritzlaff's

tort of negligent training or supervision was barred because "it would require an inquiry into church laws, practices and policies." ***Id***. at 330, 533 N.W.2d at 791. The court supported its conclusion by adopting the position of another court that:

> [A]ny inquiry into the policies and practices of the church Defendants in … supervising their clergy raises … problems of entanglement … which might involve the court in making sensitive judgments about the propriety of the church Defendant's supervision in light of their religious beliefs…. The traditional denominations each have their own intricate principles of governance, as to which the state has no right of visitation. Church governance is founded in scripture, modified by reformers over almost two millennia.
>
> ….
>
> It would therefore also be inappropriate and unconstitutional for this Court to determine after the fact that the ecclesiastical authorities negligently supervised … the defendant Bishop. Any award of damages would have a chilling effect leading indirectly to state control over the future conduct of affairs of a religious denomination, a result violative of the text and history of the establishment clause.

Id. at 329, 533 N.W.2d at 791 (quoting ***Schmidt v. Bishop***, 779 F. Supp. 321, 332 (S.D.N.Y. 1991)).

In ***Clauder***, the supreme court reaffirmed ***Pritzlaff'***s conclusion that negligent supervision claims against a church body are "prohibited by the First Amendment under most if not all circumstances." *See* ***Clauder,*** 209 Wis.2d at 690-91, 563 N.W.2d at 442. In ***Clauder***, the facts were very similar to those in ***Pritzlaff*** and those in the instant case. The plaintiff, L.L.N., alleged that Father Clauder, a priest assigned as a hospital chaplain by the Roman Catholic Diocese of Madison, Inc., abused his position as chaplain to engage her in a sexual relationship. ***Id.*** at 677, 563 N.W.2d at 436. L.L.N. filed suit against the Diocese, claiming that the Diocese negligently supervised Father Clauder, because it knew

or should have known that Father Clauder posed a risk of abusing his position as a hospital chaplain to sexually exploit patients whom he counseled. ***Id.*** at 681-82, 563 N.W.2d at 438. The trial court granted summary judgment to the Diocese on the grounds that L.L.N.'s negligent supervision claim was barred by the First Amendment. ***Id***. at 682, 563 N.W.2d at 438. The court of appeals reversed the trial court, and concluded that L.L.N.'s claim presented "one of the 'limited circumstances'" which the supreme court had alluded to in ***Pritzlaff***, "in which a court might be able to inquire into a negligent supervision claim without fostering an impermissible entanglement in church policy, law and governance …." ***L.L.N. v. Clauder,*** 203 Wis.2d 570, 582, 552 N.W.2d 879, 885 (Ct. App. 1996). The supreme court, however, reversed the court of appeals and concluded that L.L.N.'s negligent supervision claim was barred by the First Amendment because, as a matter of law, a court would not be able to apply neutral principles of law in deciding the claim. *See* ***Clauder***, 209 Wis.2d at 697-98, 563 N.W.2d at 445.

In reversing, the supreme court reaffirmed and further explained ***Pritzlaff's*** holding that negligent supervision claims against religious organizations are "prohibited by the First Amendment under most if not all circumstances." *See* ***id.*** at 690-91, 563 N.W.2d at 442. The court approved of the ***Pritzlaff*** court's reasoning, and added two other explanations for its rule. First, the court noted that some religious organizations, like the Roman Catholic Church, have "internal disciplinary procedures that are influenced by a religious belief in reconciliation and mercy." ***Id.*** at 689, 563 N.W.2d at 441. The court then stated that:

> [D]ue 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 690, 563 N.W.2d at 441. Second, the court concluded that "negligent supervision claims would require a court to formulate a 'reasonable cleric' standard, which would vary depending on the cleric involved, i.e., reasonable Presbyterian pastor standard, reasonable Catholic archbishop standard, and so on." ***Id.*** at 690, 563 N.W.2d at 441-42. The court explained, however, that, "[o]ur pluralistic society dislikes having its neutral jurists place themselves in the role of a 'reasonable chief rabbi,' 'reasonable bishop,' etc., because of the degree of involvement that must accompany such decisional framework for the civil tort judge." ***Id.*** at 690, 563 N.W.2d at 442 (quoting James T. O'Reilly and Joan M. Strasser, *Clergy Sexual Misconduct: Confronting the Difficult Constitutional & Institutional Liability Issues*, 7 ST. THOMAS L. REV. 31, 46 (1994)). The court then concluded that the plaintiff had failed to sufficiently distinguish her case from ***Pritzlaff***, and found that her negligent supervision claim was barred by the First Amendment.[2] ***Id***. at 691-98, 563 N.W.2d at 442-45.

In the instant case, the appellants have not presented this court with any relevant facts distinguishing their case from ***Pritzlaff***, or any persuasive reasons why this case constitutes one of the "limited circumstances" under which a negligent supervision claim may be asserted successfully against a religious

[2] The court went on to find that two specific issues in the case, whether Clauder had violated his vow of celibacy, and whether knowledge of one of Clauder's fellow priests could be imputed to the Diocese, required a court to consider church law, policies, or practices in violation of the First Amendment. ***L.L.N. v. Clauder***, 290 Wis.2d 697-98, 563 N.W.2d 434, 444-45 (1997). These specific issues, however, were merely additional reasons why the plaintiff's negligent supervision claim was barred by the First Amendment, since the court stated that they "only *further* establish[ed] that a court would be required to interpret ecclesiastical law in order to decide L.L.N.'s negligent supervision claim." ***Id.*** at 693, 563 N.W.2d at 443 (emphasis added).

organization. Therefore, we conclude that, because negligent supervision claims are "prohibited by the First Amendment under most if not all circumstances," and for the reasons enunciated by the supreme court in ***Pritzlaff*** and ***Clauder***, the appellants negligent supervision claim is barred by the First Amendment.

B. Respondeat superior claim.

We conclude that the trial court correctly granted summary judgment with respect to the appellants' respondeat superior claim because, as a matter of law, Bracy's initiations of sexual contact with Miriam were outside the scope of his employment.

"Under the doctrine of *respondeat superior* an employer can be held vicariously liable for the negligent acts of his [or her] 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, 568 (1980). In ***Clauder***, 203 Wis.2d at 589, 552 N.W.2d at 888, *reversed in part*, ***L.L.N. v. Clauder***, 209 Wis.2d 674, 563 N.W.2d 434 (1997), this court held that "Clauder, a priest/counselor who, in the course of a counseling relationship, initiated sexual contact with a client, was, as a matter of law, acting outside the scope of his employment by the Diocese." The facts of this case are indistinguishable. Bracy, like Clauder, undisputedly knew that using his office as a pastor and as a marital counselor to initiate sexual contact with Miriam was conduct forbidden by Grace. Thus, we conclude that Bracy's conduct, as a matter of law, constituted acts outside the scope of his employment,

and that the trial court properly granted summary judgment with respect to this claim.[3]

C. Coverage issue.

In its order, the trial court stated that "the motion of the defendant, Church Mutual Insurance Company, to declare no insurance coverage exists as to the defendant, Howard L. Bracy, and to declare there is no duty to defend and indemnify said defendant, is granted." The appellants seem to interpret this order as a declaration that Grace Pentecostal Church's insurance policy does not provide coverage to the church for any liability the church might incur, on either a negligent supervision or respondeat superior theory, as a result of Bracy's acts. It appears that this characterization is inaccurate, and that the trial court's order actually amounts only to a declaration that Grace's insurance policy provides no coverage to Bracy for any liability that Bracy might incur as a result of his own acts. In any event, whether the church had insurance coverage for its own liability related to Bracy's acts, arising under either a negligent supervision or a respondeat superior theory, is a moot issue given our conclusion that the trial court correctly dismissed both of these claims against the respondents. Thus, we decline to address this issue. *See* ***Gross v. Hoffman***, 227 Wis.2d 296, 300, 277 N.W. 663, 665 (1938) (court of appeals need not consider issues in an appeal disposed of by decision on other issues).

[3] The appellants also claim that the trial court erred in granting summary judgment on this claim because the respondents could be vicariously liable under RESTATEMENT (SECOND) OF AGENCY § 219(2)(d). The identical claim was made and rejected by this court in ***Clauder***; thus, we reject the claim in this case. *See* ***L.L.N. v. Clauder***, 203 Wis.2d 570, 590-92, 552 N.W.2d 879, 888-89 (Ct. App. 1996), *reversed in part*, ***L.L.N. v. Clauder***, 209 Wis.2d 674, 563 N.W.2d 434 (1997).

By the Court.—Order affirmed.

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