COURT OF APPEALS
DECISION
DATED AND FILED

September 6, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

No. 99-2037

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

S.J.A.J.,

PLAINTIFF-RESPONDENT-CROSS-APPELLANT,

V.

FIRST THINGS FIRST, LTD. AND FRONTIER INSURANCE COMPANY,

DEFENDANTS-APPELLANTS-CROSS-RESPONDENTS,

THE TRAVELERS INSURANCE,

DEFENDANT-RESPONDENT,

DAVID B. HATCH, CHICAGO INSURANCE COMPANY, AETNA LIFE INSURANCE COMPANY AND BLUE CROSS & BLUE SHIELD UNITED OF WISCONSIN,

DEFENDANTS.

APPEAL and CROSS-APPEAL from a judgment and an order of the circuit court for Eau Claire County: EUGENE D. HARRINGTON, Judge. *Affirmed in part; reversed in part.*

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

¶1 HOOVER, P.J. First Things First, Ltd., and its insurer, Frontier Insurance Company, (collectively, FTF) appeal the judgment following a jury trial and postverdict motions. The jury found that Dr. David Hatch breached his duties as a therapist by having a sexual, social and business relationship with S.J.A.J. (S.J.). The trial court imposed vicarious liability upon FTF for Dr. David Hatch's breach of his duties as a therapist by having a sexual, social, and business relationship with S.J. The court also assessed actual attorney fees under WIS. STAT. § 51.61[1] and reallocated S.J.'s negligence to FTF and Hatch. It also found that FTF negligently supervised Hatch. FTF claims that it cannot be vicariously liable for Hatch's acts. In that regard, it contends that Hatch was an independent contractor, he was acting outside the scope of his contract as a matter of law, and FTF did not owe S.J. a nondelegable duty to provide risk-free counseling. FTF also contends that actual attorney fees are not recoverable because S.J.A.J is not a patient as defined by § 51.61. Finally, FTF asserts that S.J. was negligent and that WIS. STAT. § 895.70 does not prohibit considering her negligence in connection with the clinic's.

¶2 We conclude that FTF is not vicariously liable for Hatch's acts. Hatch, an independent contractor, was acting outside the scope of his contract as a

[1] The relevant portions of WIS. STAT. § 51.61 are set forth later in the text. All references to the Wisconsin Statutes are to the 1997-98 version.

matter of law, and FTF does not owe S.J. a nondelegable duty to protect her from a therapist's sexual contact. We determine that WIS. STAT. § 51.61, the patient's bill of rights, does not apply because S.J. was not a patient. Thus, attorney fees were not awardable. We uphold the circuit court's decision not to assess contributory negligence against S.J. because WIS. STAT. § 895.70(2)(a) removes her consent as an issue. Accordingly, we reverse the trial court's judgment holding FTF vicariously liable for Hatch's actions and its award of actual attorney fees; however, we affirm its decision to reallocate S.J.'s negligence to FTF and Hatch.

¶3 S.J. cross-appeals the trial court's order denying her motion for additur. She requests that we grant her a new trial on the issue of damages. S.J. contends that the trial court improperly submitted the question of her contributory negligence to the jury, which resulted in the devaluation of her claim. She also claims that she should have been permitted to introduce evidence that her divorce resulted from the defendants' negligence and caused her further mental and emotional harm.

¶4 We reject S.J.'s presumption that the jury ignored the trial court's instruction and discounted her damages because of her negligence. Moreover, her attempt to introduce evidence that her divorce caused additional damages was in effect a request that the court permit the jury to award damages for "wrongful divorce," a cause of action that our courts have declined to recognize. Accordingly, we affirm the trial court's decisions challenged in the cross-appeal.

BACKGROUND

¶5 S.J. has been treated intermittently for mental health disorders for over twenty years. In 1992, when she began her most recent treatment, she was

thirty-one, married and had three children. She was initially treated with medications with some success. In April 1993, however, she was hospitalized after taking an overdose of medicine. She was admitted to a hospital under a WIS. STAT. ch. 51 emergency detention, but was released the following day. S.J. told her treating physician that she would obtain counseling from Hatch because she felt more comfortable with him. She had learned of Hatch when he practiced in Menomonie, and he had previously counseled her son.

¶6 Hatch was a Ph.D. state-licensed psychologist. His license had been suspended from October 1992 through March 1993 for engaging in an improper relationship with a female client he was counseling.[2] His license was eventually reinstated, conditioned upon undergoing psychotherapy with a counselor approved by the Psychology Examining Board and successfully completing additional

[2] Hatch's disciplinary problems apparently arose from his failure to deal with the "transference phenomenon." In ***L.L. v. Medical Protective Co.***, 122 Wis. 2d 455, 362 N.W.2d 174 (Ct. App. 1984), this court previously discussed the "transference phenomenon," which "is the emotional reaction which the patient in therapy has toward the therapist." ***Id.*** at 461. We noted:

> The patient in therapy "unconsciously attributes to the psychiatrist or analyst those feelings which he may have repressed towards his own parents. … [I]t is through the creation, experiencing and resolution of these feelings that [the patient] becomes well. Inappropriate emotions, both hostile and loving, directed toward the physician are recognized by the psychiatrist as constituting ... the transference. The psychiatrist looks for manifestations of the transference, and is prepared to handle it as it develops."
>
> The development of the transference "may be coincident with an identification with the therapist whereby the patient learns to think, style and model himself after the therapist." This gives the patient "a model to steer by and emulate"—something strong and healthy the patient may hold onto while in a state of search. The patient "develop[s] extreme emotional dependence on the therapist."

Id. (citations omitted).

continuing education in the area of professional boundaries. To resume counseling, his practice also had to be supervised by a board-approved psychologist. These conditions on his license were removed in March 1995.

¶7 FTF is an outpatient mental health clinic located in Eau Claire. In March 1993, Hatch contacted one of FTF's owners about a counseling position. After discussions, Hatch and FTF agreed to associate, subject to Hatch obtaining his own malpractice insurance. After he obtained insurance, they entered into a written agreement providing that Hatch would be an independent contractor. He agreed to accept clients seeking services through FTF on a contractual basis in return for a percentage of all fees collected for the services he provided.

¶8 In November 1993, S.J. started counseling with Hatch at FTF. The counseling continued for over a year without incident or anything that S.J. felt was inappropriate. By mid-May 1995, however, Hatch and S.J. were involved in a sexual and social relationship. They also developed a business interest together, the purpose of which was to start their own counseling clinic.

¶9 In September 1995, after learning that Hatch and S.J. had lunch together, the principals at FTF examined S.J.'s charts and Hatch's billing and scheduling records. They met with Hatch and sent him a memo ordering him to terminate his counseling with S.J. and to avoid any contact with her outside of the clinic. S.J.'s last counseling session with Hatch was November 1, 1995.

¶10 On December 5, 1995, FTF wrote a letter suspending Hatch effective that date because of its concern that he had failed to provide reports that he had promised at the September meeting and because of additional disclosures about Hatch's relationship with S.J. The letter terminated Hatch's relationship with FTF. Additionally, on December 8, 1995, at the behest of FTF, Hatch wrote

S.J. informing her that he should have no further contact with her and that additional contact could be harmful to all involved.

¶11 Despite the letter, Hatch and S.J. continued to see each other. Approximately two months later, in February 1996, their sexual relationship escalated into sexual intercourse. They continued to see one another through mid-May of 1996, at which time the relationship ended. Shortly thereafter, S.J. reported her involvement with Hatch to the police. Hatch was criminally prosecuted and convicted of sexual exploitation by a therapist. S.J. subsequently was divorced from her husband.

¶12 S.J. filed this civil action against Hatch, FTF and their respective insurers alleging that she sustained injuries as a result of Hatch's improper relationship with her. In particular, she claims that FTF failed to properly supervise Hatch and was also negligent with respect to other professional standards.

¶13 Following a two-week trial, the jury determined that Hatch's breach of his duty to S.J. was a cause of damage to her. It found that FTF was not negligent in its hiring of Hatch, but was negligent in supervising him and that its negligence was a cause of Hatch's conduct.[3] The jury also determined that S.J.'s own negligence was a cause of her injuries. It apportioned 80% causal negligence to Hatch, 10% to FTF and 10% to S.J. The jury determined that S.J.'s

[3] During the jury instruction conference, the trial court determined that FTF had a nondelegable duty to exercise "due care in the selection and supervision of its staff, whether they be employees [or] independent contractors …." It indicated that FTF would be free to argue its negligence, causation and damages. The court permitted the issue of negligent hiring and supervision to go to the jury under this theory. FTF does not contest on appeal its liability for negligent supervision of Hatch; accordingly, we do not address that issue.

compensatory damages totaled $107,000 and also awarded her punitive damages against Hatch totaling $100,000.

¶14 S.J. filed a number of motions following the jury's verdict. She requested that the court (1) change the jury's answer finding her negligent from "Yes" to "No," (2) reallocate her negligence to FTF, and (3) grant her an additur. S.J. sought judgment notwithstanding the verdict against FTF and its insurer for all compensatory damages awarded her on the grounds that FTF owed her a nondelegable duty and was therefore vicariously liable for Hatch's conduct. She also pursued an award of actual attorney fees pursuant to WIS. STAT. § 51.61(7)(a)[4] and asked that they be assessed jointly and severally against Hatch and FTF.

¶15 The court ruled that the issue of S.J.'s negligence should not have been submitted to the jury. Although it reallocated her negligence to Hatch and FTF, the court declined to grant additur. The court also held that FTF owed S.J. a nondelegable duty under: (1) WIS. STAT. § 51.61 to treat her with dignity and respect; (2) WIS. ADMIN. CODE § HSS 94.24(2) to supervise its staff to ensure the client is treated with dignity and respect and ensure physical safety; (3) contractual obligations to exercise "good faith" and "due care" by treating clients with dignity

[4] WISCONSIN STAT. § 51.61(7)(a) provides:

> Any patient whose rights are protected under this section who suffers damage as the result of the unlawful denial or violation of any of these rights may bring an action against the person, including the state or any political subdivision thereof, which unlawfully denies or violates the right in question. The individual may recover any damages as may be proved, together with exemplary damages of not less than $100 for each violation and such costs and reasonable actual attorney fees as they may be incurred.

and respect; and (4) the common law, because counseling has special inherent risks. The court determined that those duties were violated and held FTF vicariously liable for Hatch's negligence. Finally, the court concluded that S.J. was entitled to actual attorney fees and costs under WIS. STAT. § 51.61, which it later found to be $166,060.01.

ANALYSIS

1. VICARIOUS LIABILITY

¶16 FTF contends that the court improperly concluded that it is vicariously liable for Hatch's actions. It first claims that Hatch was an independent contractor and therefore his actions may not be imputed to it. It also asserts that even if Hatch were an employee, it would not be liable for his acts as a matter of law because he acted outside the scope of his employment. Finally, FTF argues that it owes S.J. no nondelegable duty. We agree.

¶17 Whether it is appropriate to impute Hatch's actions to FTF raises the issue of the nature of their relationship. Generally, a master is vicariously liable for a servant's acts, *see* ***Heims v. Hanke***, 5 Wis. 2d 465, 468, 93 N.W.2d 455 (1958), *overruled on other grounds by* ***Butzow v. Wausau Mem'l Hosp.***, 51 Wis. 2d 281, 187 N.W.2d 349 (1971), while an independent contractor's tort liability may not be imputed to the employer. *See* ***Snider v. NSP***, 81 Wis. 2d 224, 232, 260 N.W.2d 260 (1977).

A. Relationship Between Hatch and FTF

¶18 Whether an individual is an independent contractor or servant is normally a question of fact for the jury. *See* ***Kettner v. Wausau Ins. Cos.***, 191 Wis. 2d 723, 737, 530 N.W.2d 399 (Ct. App. 1995). The parties did not ask to

have the jury determine whether Hatch was an independent contractor or servant. They indicated to the court that there were no factual issues surrounding Hatch's status and requested the court to make the determination as a matter of law. The court did not explicitly decide that issue, but implicitly determined that Hatch was an independent contractor.[5] We will review the issue as one of law. *See* ***State v. Kevin L.C.***, 216 Wis. 2d 166, 172-73, 576 N.W.2d 62 (Ct. App. 1997) (we review the application of a legal standard to undisputed facts without deference to the trial court).

> In determining whether a master-servant relationship exists, the dominant factor is the right to control. Several other factors may also be taken into account, including the place of work, the time of the employment, the method of payment, the nature of the business or occupation, which party furnishes the instrumentalities or tools, the intent of the parties to the contract, and the right of summary discharge of employees.

Kettner, 191 Wis. 2d at 737 (citations omitted).

¶19 We concur with the trial court's determination that Hatch was an independent contractor. The contract provided he was an independent contractor and he considered himself one. Hatch performed therapy in addition to his work with clients at FTF. He also determined what psychotherapy was appropriate for the clients he was treating. He did not view FTF as having considerable control over his practice. Hatch set his own hours within those hours that the clinic was staffed, and had no taxes withheld from his payments from FTF, receiving a 1099 tax form from FTF.

[5] In imposing vicarious liability upon FTF, the trial court noted the general rule that a principal is not liable for the conduct of an agent, and the exception to that rule when the principal has a nondelegable duty to a third person. Because this rule applies only to independent contractors, the court implicitly determined that Hatch was an independent contractor.

¶20 Because Hatch was an independent contractor, his negligence generally would not be imputed to FTF. Absent an exception, FTF is not vicariously liable for Hatch's conduct.

¶21 Moreover, even if Hatch were a servant of FTF, the general rule of vicarious liability under respondeat superior would not apply as a matter of law because Hatch was not acting within the scope of his contract. In ***L.L.N. v. Clauder***, 203 Wis. 2d 570, 576, 552 N.W.2d 879 (Ct. App. 1996), *rev'd on other grounds by* ***L.L.N. v. Clauder***, 209 Wis. 2d 674, 563 N.W.2d 434 (1997), we said:

> 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. An employee's or agent's conduct is not within the scope of employment if it is either different in kind from that authorized by the master, or if it is too little actuated by a purpose to serve the employer or if it is motivated entirely by the employee's own purposes. Thus, if the employee steps aside from the prosecution of the employer's business to accomplish an independent purpose of his or her own, the employee is acting outside the scope of his or her employment.

Id. at 589 (citations omitted). Further, the employee's intent must be considered when determining whether his or her conduct was within the scope of employment. *See* ***Block v. Gomez***, 201 Wis. 2d 795, 806, 549 N.W.2d 783 (Ct. App. 1996).

¶22 Normally, the scope-of-employment issue is presented to the jury because it entails factual questions regarding an employee's intent and purpose. *See* ***id.*** at 804. The issue was never submitted to the jury here. Both parties request that we determine the applicability of respondeat superior, presumably as a matter of law. For a court to rule as a matter of law that an employee's conduct

fell outside the scope of employment, the evidence presented must support only that conclusion. *See* ***id.*** at 805. Our review is de novo. *See* ***id.***

¶23 There is no evidence that Hatch's sexual, social or business relationship with S.J. was motivated by a desire to serve FTF. He acknowledged that his sexual, social and business relations with S.J. were not for the benefit of FTF and that his sexual contact with S.J. was not therapy. Moreover, it is undisputed that Hatch knew that using his office as a therapist to initiate a sexual relationship with S.J. was forbidden. FTF's policies expressly forbade such conduct. Civil and criminal law provisions prohibit it, *see* WIS. STAT. §§ 895.70 and 940.225; his license forbade it, *see* WIS. ADMIN. CODE § PSY 5.01; and he had previously been disciplined by the board for similar conduct. We have held on several occasions that a counselor's actions in fostering a sexual relationship with a patient are beyond the scope of employment. We therefore conclude, as did the courts in ***L.L.N.,*** 203 Wis. 2d at 576, and ***Block***, 201 Wis. 2d at 798-99, that as a matter of law, the counselor's actions initiating a sexual relationship were outside the scope of his employment.

¶24 Thus, under the general rules of respondeat superior and independent contractor, Hatch's acts may not be imputed to FTF. S.J. nevertheless contends that several exceptions to these general rules apply to impose vicarious liability upon FTF. The exceptions under both doctrines are essentially the same. Therefore, we will examine the exceptions in the context of the independent contractor relationship.

B. Exceptions

1. Nondelegable duty

¶25 One exception to the general rule of nonliability for the acts of independent contractors is that "an employer of an independent contractor is vicariously liable for the tortious conduct of the independent contractor if the duty cannot be delegated to the independent contractor." ***Brooks v. Hayes***, 133 Wis. 2d 228, 233, 395 N.W.2d 167 (1986). A nondelegable duty may be imposed by statute, contract, franchise or charter, or common law. *See* ***Majorowicz v. Allied Mut. Ins. Co.***, 212 Wis. 2d 513, 526, 569 N.W.2d 472 (Ct. App. 1997) (citing ***Brooks***, 133 Wis. 2d at 247). The nondelegable duty exception is based on the theory that certain of the principal's responsibilities are so important that the principal should not be permitted to bargain away the risks of performance. *See* ***id.*** S.J. contends that FTF owed her a nondelegable duty flowing from statute, license, contract, and common law. We examine each in turn.

a. Under Statute

i. WISCONSIN STAT. § 895.70

¶26 S.J. claims that "FTF had a duty under §895.70, Wis. Stats. to provide psychotherapy without sexual contact …." She claims that FTF impermissibly delegated this responsibility to Hatch. We disagree.

¶27 S.J. ignores both the clear statutory language and our case law. WISCONSIN STAT. § 895.70 imposes a duty only upon a therapist to provide psychotherapy without sexual contact. Section 895.70(2) provides in pertinent part:

> Any person who suffers, directly or indirectly, a physical, mental or emotional injury caused by, resulting from or arising out of sexual contact with a therapist who is rendering or has rendered to that person psychotherapy, counseling or other assessment or treatment of or involving any mental or emotional illness, symptom or condition *has a civil cause of action against the psychotherapist* for all damages resulting from, arising out of or caused by that sexual contact. (Emphasis added.)

As the supreme court said in ***L.L.N.***, "[t]he language of the statute plainly grants the injured party a cause of action "*against the [] therapist*. It says nothing about employer responsibility for the offending acts." ***Id.*** at 594. Therefore, FTF owed no duty to S.J. under § 895.70.

ii. WISCONSIN STAT. § 51.61

¶28 S.J. next claims that FTF had a nondelegable duty to treat her with dignity and respect under WIS. STAT. § 51.61(1).[6] Section 51.61(1), however, does not apply. In ***Sherry v. Salvo***, 205 Wis. 2d 14, 26, 555 N.W.2d 402 (Ct. App. 1996), we summarized when a person is a patient under § 51.61(1):[7]

[6] Among the rights granted patients by the patient's bill of rights is the right to be treated with dignity and respect by all employees and providers of health care. See WIS. STAT. § 51.61(1)(x).

[7] WISCONSIN STAT. § 51.61(1) defines a "patient" as:

> [A]ny individual who is receiving services for mental illness, developmental disabilities, alcoholism or drug dependency, including any individual who is admitted to a treatment facility in accordance with this chapter or ch. 48 or 55 or who is detained, committed or placed under this chapter or ch. 48, 55, 971, 975 or 980, or who is transferred to a treatment facility under s. 51.35 (3) or 51.37 or who is receiving care or treatment for those conditions through the department or a county department under s. 51.42 or 51.437 or in a private treatment facility. "Patient" does not include persons committed under ch. 975 who are transferred to or residing in any state prison listed under s. 302.01. In private hospitals and in public general hospitals, "patient" includes any individual who is admitted for

(continued)

> Section 51.61(1), STATS., by its terms, defines "patient" in two contexts: (1) those persons admitted or committed to, or detained at, facilities engaged in providing treatment for mental illness or substance abuse; and (2) persons admitted to general hospitals for such treatment.

S.J. falls into neither category. FTF was not a hospital, and S.J. was not admitted or committed to or detained at FTF; she was simply a client. Moreover, it is undisputed that S.J. was not receiving outpatient services from the state or county or voluntarily undergoing treatment at FTF in lieu of admission, commitment or detention. Because she was not a patient, WIS. STAT. § 51.61's patient's bill of rights does not apply and thus does not create or impose any duties upon FTF, much less a nondelegable duty.

b. Under License

i. WISCONSIN ADMIN. CODE § HFS 61.91

¶29 S.J. contends that because FTF was required to have a license to operate as an outpatient psychological clinic under WIS. ADMIN. CODE § HFS 61.91, it could not avoid liability by delegating performance of some of its duties to Hatch.[8] S.J. claims that when a license is required for the performance of acts, one having a license who delegates to another is subject to liability for the negligence of the other.

> the primary purpose of treatment of mental illness, developmental disability, alcoholism or drug abuse but does not include an individual who receives treatment in a hospital emergency room nor an individual who receives treatment on an outpatient basis at those hospitals, unless the individual is otherwise covered under this subsection.

[8] WISCONSIN ADMIN. CODE §§ HFS 61.91-61.98 set standards for private psychotherapy clinics receiving payment through the Wisconsin Medical Assistance Program and insurance benefits mandated by WIS. STAT. § 632.89.

¶30 She does not, however, identify the specific duties WIS. ADMIN. CODE § HFS 61.91 imposed upon FTF. Nor does S.J. establish which of those duties FTF delegated to Hatch. Finally, she does not explain why any such duty is nondelegable.[9] Her argument is, at best, underdeveloped, and we therefore decline to address it. *See* ***McEvoy v. Group Health Coop.***, 213 Wis. 2d 507, 530 n.8, 570 N.W.2d 397 (1997)

ii. WISCONSIN ADMIN. CODE § HSS 94.24

¶31 S.J. contends that WIS. ADMIN. CODE § HSS 94.24(2) created a nondelegable duty to supervise Hatch.[10] This regulation imposes no duties upon FTF because it is promulgated under the authority granted in WIS. STAT. § 51.61. As we already indicated, § 51.61 does not apply here because S.J. is not a patient, as defined in the statute.

¶32 Moreover, the trial court concluded that WIS. ADMIN. CODE § HSS 94.24 imposed a duty of supervision. FTF did not delegate to Hatch his own supervision. It retained that duty and the jury found it negligent in the

[9] Although a statute or license may impose a duty, that does not mean that the duty is nondelegable. *See* ***Pamperin v. Trinity Mem'l Hosp.***, 144 Wis. 2d 188, 213, 423 N.W.2d 848 (1988). The duty must be so important that a principal may not bargain away the risks of performance. *See* ***id.***

[10] The pertinent provisions of that section provide:

> (a) Staff shall take reasonable steps to ensure the physical safety of all patients.
>
> (b) Each patient shall be treated with respect and with recognition of the patient's dignity by all employes of the service provider and by all licensed, certified, registered or permitted providers of health care with whom the patient comes in contact.

performance thereof. S.J. does not explain why FTF's negligent supervision of Hatch is a basis for imposing vicarious liability upon FTF.[11]

c. Under Contract

¶33 The trial court determined that the unwritten contract between FTF and S.J. created a nondelegable duty on FTF's part to treat S.J. with dignity and respect.[12] In the court's view, the duty arose from the obligations of good faith and due care imposed in every contract.[13] While it may be that under the circumstances of this case, FTF had a contractual duty to treat S.J. with dignity and respect, neither S.J. nor the trial court's decision explains why this duty is nondelegable.

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[11] As noted in ***L.L.N. v. Clauder***, 209 Wis. 2d 674, 698 n.21, 563 N.W.2d 434 (1997):

> [A] claim for negligent supervision is distinct from a claim for vicarious liability, in that the former is based on tort principles and the latter is based on agency principles. More specifically, with a vicarious liability claim, an employer is alleged to be vicariously liable for a negligent act or omission committed by its employee in the scope of employment. Thus, vicarious liability is based solely on the agency relationship of a master and servant. In contrast, with a negligent supervision claim, an employer is alleged to be liable for a negligent act or omission it has committed in supervising its employee. Therefore, liability does not result solely because of the relationship of the employer and employee, but instead because of the independent negligence of the employer. (Citations omitted.)

[12] In other words, the duty the court imposed was the same as that found in WIS. STAT. § 51.61(1)(x), to treat patients with dignity and respect.

[13] The trial court relied on materials contained in S.J.'s file at FTF to discern the contract provisions. Included in the material was an unsigned copy of a patient's bill of rights parroting those rights contained in WIS. STAT. § 51.61. The trial court inferred she had received a copy and that it established the contract's terms.

¶34 Although contracts impose obligations of good faith and due care, those duties are routinely delegated. It is when the contract or law surrounding the contract imposes a special duty that it may be said to be nondelegable. *See* ***Majorowicz***, 212 Wis. 2d at 526-28 (special fiduciary duty created by insurance contract warranted finding duty to defend could not be delegated to attorney hired to represent an insured). We have rejected S.J.'s contention that the law, specifically, WIS. STAT. § 51.61(1)(x), imposes a special duty because S.J. does not fall within the statutory definition of "patient." S.J. does not provide any analysis as to why under the unwritten contract, the duty to treat her with dignity and respect falls within the category of special duties that are nondelegable. We will not develop S.J.'s amorphous and unsupported arguments for her. *See* ***Barakat v. DHSS***, 191 Wis. 2d 769, 786, 530 N.W.2d 392 (Ct. App. 1995).

d. Under Common Law

¶35 The trial court concluded that there was a nondelegable duty imposed by common law. Specifically, the court cited the RESTATEMENT (SECOND) OF TORTS § 413 (1965) noting the special risks exception.[14] FTF claims that this section applies only to risks peculiar to the work to be done. The special risks noted in the comments include demolition of a building, excavation

[14] RESTATEMENT (SECOND) OF TORTS § 413 (1965) provides:

> One who employs an independent contractor to do work which the employer should recognize as likely to create, during its progress, a peculiar unreasonable risk of physical harm to others unless special precautions are taken, is subject to liability for physical harm caused to them by the absence of such precautions if the employer
>
> (a) fails to provide in the contract that the contractor shall take such precautions, or
>
> (b) fails to exercise reasonable care to provide in some other manner for the taking of such precautions.

immediately adjoining a public highway and digging a trench on a public highway. FTF contends that these all present a high risk of physical harm to a person, while therapy does not. S.J. requests we affirm the decision but does not respond to FTF's arguments. Arguments not responded to are deemed conceded. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

e. Summary

¶36 Hatch had a duty to refrain from having a sexual relationship with S.J. The relationship was forbidden by his contract with FTF, by his profession's ethical standards, and by state law. S.J. in essence requests that we impute this duty, which the law specifically assigns to Hatch, to FTF. Yet she can point to nothing which persuades us that this duty falls on a clinic as opposed to the individual therapist (or counselor). Accordingly, we reject S.J.'s contentions that FTF had a nondelegable duty subjecting it to vicarious liability for Hatch's conduct.

2. Apparent Authority

¶37 S.J. next contends that FTF may be held vicariously liable on the theory of apparent agency.[15] In support of her contention she cites RESTATEMENT (SECOND) OF AGENCY §§ 267, 307, 308, 323, and 429 (1977). We are unpersuaded.

[15] The parties dispute whether Wisconsin recognizes RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) (1958). That section provides that a master is liable for the torts of a servant acting outside the scope of his employment if "the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation." We need not resolve the parties' contention because even if a viable theory, it does not apply here.

¶38 In ***Pamperin v. Trinity Mem'l Hosp.***, 144 Wis.2d 188, 203, 423 N.W.2d 848 (1988), the supreme court announced:

> Under apparent authority, a principal may be held liable for the acts of one who reasonably appears to a third person, through acts by the principal or acts by the agent if the principal had knowledge of those acts and acquiesced in them, to be authorized to act as an agent for the principal. We have previously recognized that liability may attach under the doctrine of apparent authority. For liability to exist, three elements must be present: (1) Acts by the agent or principal justifying belief in the agency; (2) knowledge thereof by the party sought to be held; (3) reliance thereon by the plaintiff, consistent with ordinary care and prudence. (Citations omitted.)

¶39 S.J. does not explain why the various Restatement sections she cites apply here.[16] More importantly, our courts have rejected imputing the conduct of a counselor engaging in sexual relations with a client to the counselor's principal under the theory of apparent authority. The ***L.L.N.*** court stated:

> This is not a situation, however, in which a supervisor uses the "apparent authority" of the employer—the specific powers delegated by the employer—to force unwanted contact with a subordinate, as in the cited cases. Rather, it is a case in which the employee … is alleged to have sexually exploited a third party, not through use of authority delegated to him by the [employer], but through his own actions undertaken in the course of providing professional services to that party.

Id. at 592. S.J. does not explain, even if it appeared that Hatch was an employee of FTF, why she would believe that Hatch was acting on FTF's authority in having sexual contact with her. The conduct that she asks we impute to FTF is, as a

[16] Because S. J.A.J. does not articulate why these Restatement sections apply, we do not recite them.

matter of law, outside the scope of both the contract and permissible therapy. Moreover, it is undisputed that FTF was unaware of any sexual relationship between Hatch and S.J. while he was providing therapy to S.J. and took action to end their counseling relationship upon learning of their social relationship.

¶40 No basis exists for imposing vicarious liability upon FTF for Hatch's acts. Hatch was an independent contractor and as such respondeat superior does not apply. Even if Hatch was FTF's servant, his acts were outside the scope of his employment. Furthermore S.J.'s argument that various exceptions apply is not persuasive. We therefore reverse the trial court's imposition of vicarious liability upon FTF.

2. CONTRIBUTORY NEGLIGENCE

¶41 FTF contends that the trial court erred by not allocating to S.J. the negligence the jury attributed to her. FTF claims that WIS. STAT. § 895.70 only prohibits the jury from considering the negligence of S.J. in connection with her claim against the therapist, not in connection with her claim against the clinic. We disagree.

¶42 FTF's contention requires us to interpret WIS. STAT. § 895.70, a question of law that we review de novo. *See* ***Minuteman, Inc. v. Alexander***, 147 Wis. 2d 842, 853, 434 N.W.2d 773 (1989). WISCONSIN STAT. § 895.70(2)(a) specifically provides that "[c]onsent is not an issue in an action under this section, unless the sexual contact that is the subject of the action occurred more than 6 months after the psychotherapy, counseling, assessment or treatment ended." In ***Block***, we said: "Because the legislature has expressly precluded the patient's consent from being considered as an issue, it was improper for the jury to consider whether Block's actions contributed to her injuries." ***Block***, 201 Wis. 2d at 810.

In ***Block***, as here, the clinic was found to have negligently supervised the counselor. *See* ***id.*** at 801. Thus, in ***Block*** we already determined that a clinic cannot raise contributory negligence against a client harmed by a counselor's sexual contacts. We have no authority to change or modify our previous holding. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997).

¶43 FTF next claims that even if WIS. STAT. § 895.70(2)(a) applies, the exception also applies because the sexual relationship between Hatch and S.J. continued for more than six months after counseling ended. Neither the facts nor the statute's language supports FTF's interpretation of the exception.

¶44 Because FTF never sought an instruction limiting the jury's consideration of S.J.'s negligence to sexual contact occurring more than six months after the psychotherapy ended, its argument is that if the sexual contact continues for more than six months after psychotherapy, the plaintiff's negligence is relevant to the entire period of sexual contact. The statute provides that consent is not an issue "unless the sexual contact that is the subject of the action occurred more than six months after the psychotherapy … ended." WIS. STAT. § 895.70(2)(a). Thus, if the sexual contact for which damages are sought occurred anytime within six months after psychotherapy has ended, consent is not an issue. The statute suggests that the sexual contact must first begin more than six months after the end of psychotherapy for consent to be relevant.

¶45 We need not, however, decide if the exception applies only to sexual contact first occurring more than six months after the end of psychotherapy. The sexual contact between Hatch and S.J. began while S.J. was in therapy at FTF's own offices and had escalated to coitus within four months after psychotherapy ended. FTF's own experts indicated that it was the coitus that caused S.J. the

greatest harm because she viewed herself as an adulteress. Thus, because her injury resulted from the sexual contact occurring during psychotherapy and the following six months, the statute precludes consideration of S.J.'s consent. She therefore could not be contributorily negligent, and the court properly refused to allocate negligence to her.

3. ATTORNEY FEES

¶46 The trial court awarded actual attorney fees under WIS. STAT. § 51.61(1).[17] FTF claims that this was inappropriate because § 51.61 does not apply to this case. We agree. Again, S.J. is not a patient as defined by § 51.61. Thus, that section does not apply to define the FTF's obligations to S.J. or her remedies. Accordingly, the trial court's award of actual attorney fees is reversed.

[17] WISCONSIN STAT. § 51.61(7) provides in part:

> (a) Any patient whose rights are protected under this section who suffers damage as the result of the unlawful denial or violation of any of these rights may bring an action against the person, including the state or any political subdivision thereof, which unlawfully denies or violates the right in question. The individual may recover any damages as may be proved, together with exemplary damages of not less than $100 for each violation and such costs and reasonable actual attorney fees as may be incurred.
>
> (b) Any patient whose rights are protected under this section may bring an action against any person, including the state or any political subdivision thereof, which wilfully, knowingly and unlawfully denies or violates any of his or her rights protected under this section. The patient may recover such damages as may be proved together with exemplary damages of not less than $500 nor more than $1,000 for each violation, together with costs and reasonable actual attorney fees. It is not a prerequisite to an action under this paragraph that the plaintiff suffer or be threatened with actual damages.

4. S.J.'S CROSS-APPEAL

¶47 S.J. contends that the jury did not fully compensate her for her injuries and she is therefore entitled to a new trial on the issue of damages. She claims the jury's consideration of her negligence led it to award less than her actual damages and the trial court erred by refusing to admit evidence that she sustained additional harm as a result of her divorce. In the context of this case, S.J. asserts that the court applied an improper legal standard. Whether the court applied the correct legal standard is a question of law which we review de novo. *See* ***Cook***, 208 Wis. 2d at 172.

A. Contributory Negligence

¶48 Despite the trial court's reallocation of her negligence to Hatch and FTF, S.J. claims that the issue of her contributory negligence was inappropriately submitted to the jury and she should be granted a new trial because it caused the jury to devalue her claim.[18] We disagree.

¶49 First, S.J.'s position is based upon pure speculation. There is nothing in the record to support her surmisal that the jury discounted its damage award because it found S.J. contributorily negligent. More importantly, we will not reverse for a new trial on the issue of damages when both the jury instructions and the special verdict questions properly instructed the jury to compute its damage award regardless of its answers to the causal and comparative negligence

[18] She seems to suggest elsewhere in her brief that we should grant her additur or a new trial because the defendants used evidence of her claimed contributory negligence to argue that her damages were not as severe as she claimed. She does not, however, develop an appellate argument supporting a challenge to the trial court's additur decision. *See* ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988) (this court does not consider undeveloped arguments). Accordingly, we decline to review the additur ruling.

questions. *See* ***Block***, 201 Wis. 2d at 810-11. We presume that jurors follow their instructions. *See* ***State v. Adams***, 221 Wis. 2d 1, 12, 584 N.W.2d 695 (Ct. App. 1998). The trial court properly instructed the jury to determine the amount of damages that would compensate S.J. for her injuries without regard to her negligence. Hence, the jury has conclusively spoken on the amount of damages incurred by S.J.; "she is not entitled to another roll of the dice seeking a greater damage award." ***Block***, 201 Wis.2d at 811.

B. Evidence of Divorce

¶50 S.J. contends that she should have been permitted to introduce evidence that her divorce was caused by her illicit relationship with Hatch. She was prepared to offer lay and expert testimony to that effect. Although recognizing that she cannot recover pecuniary or economic loss resulting from her divorce, S.J. claims that she only sought to introduce "proof concerning the significant additional stress and mental anguish she suffered as a result of the divorce proceedings which flowed from her violation by and at the hands of the defendants." We disagree that such testimony is permitted.

¶51 Regardless of S.J.'s claimed reasons for seeking introduction of the evidence, it has at its base the premise that she can recover for "wrongful divorce."[19] ***Prill v. Hampton***, 154 Wis. 2d 667, 681, 453 N.W.2d 909 (Ct. App. 1990), rejects this contention:

> [S]ound public policy reasons preclude claims that a spouse's injuries caused a divorce. While we recognize that

[19] Indeed, S.J. sought to have the jury decide whether the divorce was caused by Hatch and FTF. She claimed that she would never have been divorced or gone through the ensuing custody battle and its attendant stresses. We agree with the trial court's assessment that the cause of the divorce and damages from the alienation of affections was simply "far too speculative."

> there is a strong public policy that permits injured parties to recover damages for their injuries, we also recognize countervailing public policy considerations that should bar claims for wrongful divorce.
>
> Failure of a marriage is rarely attributable to a single cause. In some instances, there may be evidence that the spouse's injuries were, in part, the cause of the marriage's failure. For the jury to properly assess the amount of damages, however, it is necessary to show both a causal relationship and the extent or degree this factor played in the failure of the marriage. Such an inquiry would open to scrutiny very personal issues, not only of the spouse claiming damages, but also of the injured spouse. This factor, along with the difficulty of the jury in determining the extent to which any single cause may have contributed to the failure of the marriage, requires that such claims be rejected.

It does not matter that she is not seeking damages for economic or pecuniary loss. She is seeking damages as a result of a "wrongful divorce," and for the policy reasons stated in ***Prill***, we do not recognize such a cause of action.

CONCLUSION

¶52 We conclude that FTF is not vicariously liable for Hatch's acts. Hatch, an independent contractor, was acting outside the scope of his contract as a matter of law and FTF does not owe S.J. a nondelegable duty to protect her from a therapist's sexual contact. We determine that WIS. STAT. § 51.61, the patient's bill of rights, does not apply because S.J. was not a patient as defined by the statute and thus attorney fees were not awardable. We uphold the circuit court's decision not to assess contributory negligence against S.J. because WIS. STAT. § 895.70(2)(a) removes her consent as an issue here. Accordingly, we reverse the trial court's decision to hold FTF vicariously liable for Hatch's actions and its award of actual attorney fees; we affirm its decision to reallocate S.J.'s negligence to FTF and Hatch.

¶53 We reject S.J.'s unadorned presumption that because the jury considered her negligence, it failed to award the entire amount of her damages despite being instructed to the contrary. Her attempt to introduce evidence that her divorce caused her additional damages was in effect a request that the court permit the jury to award damages for "wrongful divorce," a cause of action that our courts have declined to recognize. Accordingly, we affirm the trial court's decisions implicated in S.J.'s cross appeal.

By the Court.—Judgment reversed; order affirmed. No costs on appeal.

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