COURT OF APPEALS
DECISION
DATED AND FILED

December 7, 1999

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.

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No. 99-0450

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

CHRISTOPHER B.,

PLAINTIFF-APPELLANT,

V.

TIMOTHY L. SCHOENECK, BECKY SCHOENECK AND ABC INSURANCE COMPANY,

DEFENDANTS,

ST. PAUL LUTHERAN CHURCH AND SCHOOL, CHURCH MUTUAL INSURANCE COMPANY, ROY H. ROSE AND KATHLEEN A. MALLOW,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Brown County: WILLIAM C. GRIESBACH, Judge. *Affirmed.*

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

¶1 PER CURIAM. Christopher B. appeals a judgment dismissing his negligent supervision claim against St. Paul Lutheran Church and School (the church) and Church Mutual Insurance Company. The jury returned a verdict in favor of Christopher on his sexual battery claim against Timothy Schoeneck, a former minister at the church. At the close of Christopher's case against the church, however, the trial court dismissed his negligent supervision claim on the grounds that the First Amendment barred the claim and that Christopher failed to prove that the church had any supervisory power over its pastors.

¶2 Christopher argues that the trial court erroneously concluded that his proof was insufficient and that the First Amendment bars his claim. For purposes of this appeal, we assume that the First Amendment does not bar his claim.[1] Although we agree with the trial court's conclusion that, viewed in the light most favorable to Christopher, the record fails to support a negligent supervision claim, we do so for different reasons. We conclude that the record fails to indicate that Christopher suffered any harm after the church allegedly received notice that Schoeneck presented a risk of harm. Because the record fails to provide any support for the causation element, we affirm the judgment dismissing the negligent supervision claim against the church.

[1] The First Amendment prohibits excessive governmental entanglement with religious practices. *See* ***L.L.N. v. Clauder***, 209 Wis.2d 674, 686-87, 563 N.W.2d 434, 440 (1997). We are, however, free to apply "neutral principles" of state law to religious organizations without implicating the First Amendment. *See* ***id***. Because we assume that the First Amendment is not a bar to Christopher's claim, we do not address the constitutional issue presented.

FACTS

¶3 The underlying facts are essentially undisputed. Schoeneck testified that after he graduated from a Lutheran seminary in 1988, he received a divine call to be assigned as an associate pastor at the church. When he came to work at the church, he received from the church a two-page description of his duties as "youth and outreach pastor." Schoeneck received a paycheck and health insurance from the church and lived in a home provided by the church directly adjacent to the church building. He testified that for tax purposes, he was considered a "self-employed minister of the gospel." However, he also testified that he had no doubt in his mind that his employer was the church.

¶4 The church had a second associate pastor, Roy Rose, who reviewed Schoeneck's duties with him when he started. Schoeneck testified that he and Rose were considered equals and that Rose did not have any ability to supervise him. He further testified that the congregation has no ability to supervise how he conducts his ministry. Because Schoeneck was a "full fledged pastor" there was no one to supervise him.

¶5 In the fall of 1991, a member of the congregation asked Schoeneck to contact Christopher, who was fourteen years old, and his mother, a single parent. Christopher and his mother had recently moved to the area and did not attend the church. His mother had expressed concern over her son's adjustment to the move. Schoeneck intended to talk to Christopher "and find out what his problems were and eventually wanted to share the gospel with him."

¶6 Schoeneck initially met with Christopher in the church office two or three times a week and eventually in Schoeneck's home. Schoeneck invited Christopher to dine with him, his wife and child. Schoeneck began to help

Christopher with his studies until very late in the evening and, in the winter, Christopher began to spend the night in the Schoenecks' guest room. Eventually, Christopher began living in the Schoenecks' home. Schoeneck testified that on occasions he gave Christopher non-sexual back massages. Because his wife was a light sleeper and his snoring woke her, he started sleeping on the guest room bed with Christopher. The massages evolved to sexual contact, and Schoeneck admitted that he had sexual contact with Christopher on four or five occasions in his home sometime between January and August 1992. Schoeneck asked Christopher not to tell anyone, and Christopher testified that until three and one-half years later, he never did.

¶7 Schoeneck testified that during a regular weekly meeting with Rose, "I believe I told him that Chris was—and I—were sleeping in the same bed." Schoeneck recalled that Rose "told me to be careful" and did not inquire further. Schoeneck did not recall when this conversation took place. Schoeneck further testified that sometime after the sexual contact occurred, Christopher's mother inquired about the sleeping arrangements and Schoeneck assured her that nothing inappropriate occurred. On cross-examination, Schoeneck testified:

> Q … So some months after this inappropriate touching occurred and she had already allowed her son to come back on weekends, that that's when she asked you about sleeping in the same bed?
>
> A Correct.
>
> Q And you assured her nothing inappropriate occurred; isn't that right?
>
> A That's correct.
>
> Q And is it about that same time that you had that conversation with Pastor Rose you talked about earlier [on direct examination]?
>
> A I don't recall the time line for that.

> Q You assured Pastor Rose that nothing inappropriate was going on when you slept in the bed with [Christopher]; is that right?
>
> A That's correct.

Schoeneck testified that no inappropriate touching occurred after Christopher stopped living at his home, even though Christopher visited and occasionally spent the night.

¶8 Christopher's mother testified that she could not recall the dates that Christopher lived in the Schoenecks' home. She remembered that he stayed there "[s]omewhere between three and six months that I can recall." She testified that when Christopher was living at the Schoenecks' home, Christopher assured her that nothing inappropriate was going on with respect to sleeping arrangements and she believed him. At some point, Christopher accidentally disclosed that they were sleeping together and his mother called the church to discuss the matter with Schoeneck. Because she could not reach him, she told the church secretary that the two were sleeping in the same bed. The church secretary was shocked. However, based on Christopher's assurances that no inappropriate conduct occurred despite the unusual sleeping arrangements, she permitted Christopher to continue to live with the Schoenecks until sometime later when she felt that Schoeneck was interfering with her parental role.

¶9 Christopher's mother never talked to Pastor Rose about her concerns. She did not know of the assaults until 1996. In 1996, Schoeneck was convicted of sexual assault of Christopher and resigned his position with the church.

¶10 The church secretary testified that she recalled receiving a call from Christopher's mother regarding her concerns with the sleeping arrangements but

does not remember when the call occurred. She testified that both associate pastors are her supervisors and, when she received the call, she discussed it with Schoeneck. Schoeneck responded that Christopher had a nightmare and that he had gone in to try to calm him down so as not to wake the baby. He told her he just lay on top of the covers. Based upon his explanation, she did not think it was criminal conduct and did not relate anything to Rose.

¶11 Rose testified that he knew that Schoeneck and Christopher had a close relationship and that the boy had moved in with Schoeneck and his family. He felt he had no reason to object because Schoeneck was helping the boy with the mother's approval. Rose's characterization of Schoeneck as the most popular person in the congregation was not disputed. Rose testified that he did not learn of the sexual abuse until March 6, 1996. He did not recall any conversation regarding sleeping arrangements, other than one in 1989 or 1990, when Schoeneck mentioned that another child for whom he was babysitting jumped into his bed during a thunderstorm. Rose advised Schoeneck to be careful that people did not get the wrong idea. Rose testified he had no recollection that Schoeneck told him anything about sleeping with Christopher and that if he had any reason to believe sexual activity was taking place, he would have reported it to authorities at once. He in fact did so in 1996.[2]

¶12 Rose also testified that the pastors monitor themselves and no one supervises his everyday activities, and that his performance is based on his studies, training, background and practical experience as well as the Bible. He testified

[2] In 1996, another boy reported to Rose that Schoeneck had indecently touched him. Rose testified that the law requires that he report the incident to the authorities immediately and that Rose did so. Within a matter of days, he talked to Schoeneck, who confessed and resigned.

that the church's constitution and bylaws reflect a procedure for removal of a pastor involving a vote by the men of the congregation. Because Schoeneck admitted the assaults within ten days after Rose learned of them and he resigned, the church did not go through a removal process.

¶13 At the close of Christopher's case, the church moved to dismiss Christopher's negligent supervision claim. In granting the motion, the trial court concluded that Christopher had failed to establish that the church had any supervisory authority over its pastors. The court concluded that without the authority and the power to supervise, there can be no claim of negligent supervision. The court also concluded that the First Amendment barred Christopher's claim because the issues in the case would require an evaluation of and entanglement with religious practices. After the court dismissed the action against the church, the case proceeded to judgment against Schoeneck. The jury awarded Christopher $129,612.82 in damages on his sexual battery claim against Schoeneck. Christopher appeals the judgment dismissing the negligent supervision claim against the church.

STANDARD OF REVIEW

¶14 In a jury trial, § 805.14(1), STATS., governs the standard to be applied to a motion challenging the sufficiency of evidence at the close of plaintiff's case:

> No motion challenging the sufficiency of the evidence as a matter of law to support a verdict, or an answer in a verdict, shall be granted unless the court is satisfied that, considering all credible evidence and reasonable inferences therefrom in the light most favorable to the party against whom the motion is made, there is no credible evidence to sustain a finding in favor of such party.

This standard applies both to the trial court and to the appellate court. *See* ***Weiss v. United Fire & Cas. Co***., 197 Wis.2d 365, 388-89, 541 N.W.2d 753, 761 (1995). If, in the light most favorable to the plaintiff, there is any evidence, other than mere conjecture or incredible evidence, to sustain the plaintiff's cause of action, then the motion to dismiss should be denied. ***Foss v. Town of Kronenwetter***, 87 Wis.2d 91, 97, 273 N.W.2d 801, 804 (Ct. App. 1978). Although we may disagree with the trial court's legal reasoning, we may affirm on different grounds if it reached the correct result. *See* ***Negus v. Madison Gas & Elec. Co.***, 112 Wis.2d 52, 61, 331 N.W.2d 658, 663-64 (Ct. App. 1983).

NEGLIGENT SUPERVISION CLAIM

¶15 Before we attempt to determine whether the evidence is sufficient to support a negligent supervision claim, we must first identify its required elements. In ***L.L.N. v. Clauder***, 209 Wis.2d 674, 563 N.W.2d 434 (1997), in the context of a negligent supervision claim arising out of clergy misconduct, our supreme court explained that "liability does not result solely because of the relationship of the employer and employee, but instead because of the independent negligence of the employer." ***Id***. at 699 n.21, 563 N.W.2d at 445 n.21.[3] It quoted RESTATEMENT (SECOND) OF AGENCY § 213 (1957):

> A person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless:
>
> ….
>
> (c) in the supervision of the activity ….

[3] Although Wisconsin at the time had not yet expressly recognized a claim for negligent supervision, ***L.L.N.*** assumed, without deciding, that the claim existed for purposes of the appeal. ***Id***. at 684, 563 N.W.2d at 439. The supreme court explicitly recognized a claim for negligent supervision in ***Miller v. Wal-Mart Stores***, 219 Wis.2d 250, 580 N.W.2d 233 (1998).

Id. at 698-99, 563 N.W.2d at 445. It also relied on cmt. d to § 213, which provides:

> Liability results … not because of the relation of the parties, but because the employer antecedently had reason to believe that an undue risk of harm would exist because of the employment. The employer is subject to liability only for such harm as is within the risk. If, therefore, the risk exists because of the quality of the employee, there is liability only to the extent that the harm is caused by the quality of the employee which the employer had reason to suppose would be likely to cause harm.

Id. at 699, 563 N.W.2d at 445.

¶16 The court held 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***. The court explained that although agency principles determine the relationship between the employer and the employee, a claim for negligent supervision is not based on agency law, but rather "a special application of the general rules stated in the Restatement of Torts." ***Id***. at 698 n.21, 563 N.W.2d at 445 n.21.

¶17 ***Miller v. Wal-Mart Stores***, 219 Wis.2d 250, 580 N.W.2d 233 (1998), was the first Wisconsin case to expressly recognize a negligent supervision claim in an employer-employee relationship.[4] It observed that the general elements of the negligence require proof of a duty of care, a breach of the duty, a causal connection between the conduct and the injury, and damages. *See* ***id***. at 260, 580 N.W.2d at 238. In addressing the duty of care in the context of a

[4] Christopher does not pursue any claim based upon negligent hiring, retention or training. Therefore we limit our analysis to a negligent supervision claim.

negligent supervision claim, ***Miller*** states: "A defendant's duty is established when it can be said that it was foreseeable that his act or omission to act may cause harm to someone.'" ***Id***. (citation omitted). ***Miller*** concluded that "it is foreseeable that failing to properly train or supervise any employee, but especially a loss prevention associate, would subject shoppers to unreasonable risk, injury or damage." ***Id***. at 261, 580 N.W.2d at 238. It concluded that if Wal-Mart failed to properly hire, train, or supervise its employees, it breaches its duty to shoppers at its store. *See* ***id***.

¶18 In addition to proof of a duty and breach of the duty, the third element is a causal connection between the breach and the injury. *See* ***id***. at 260, 580 N.W.2d at 238.

> "Legal cause in negligence actions is made up of two components, cause-in-fact and 'proximate cause,' or policy considerations." Regarding cause-in-fact, the test is whether the negligence was a substantial factor in producing the injury. "[T]here can be more than one substantial factor contributing to the same result and thus more than one cause-in-fact." If reasonable people could differ on whether the defendant's negligence was a cause-in-fact of the plaintiff's injuries, the question is one for the jury. The determination of cause-in-fact is a question for the court only if reasonable people could not disagree.

Id. at 261-62, 580 N.W.2d at 238 (citations omitted).

¶19 In a claim for negligent supervision, the causal question 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 262, 580 N.W.2d at 238. "In other words, there must be a nexus between the negligent hiring, training, or supervision and the act of the employee." ***Id***. This requires two questions with respect to causation. *See* ***id***.

¶20 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, 580 N.W.2d at 239.

¶21 Christopher's argument focuses on the nature of Schoeneck's relationship with the church. He argues that: "It was sufficient for the court to recognize that an employer/employee relationship existed" and "[a]n employer can be held vicariously liable for the negligent acts of its employees while those employees are acting within the scope of their employment." These arguments would support a claim of vicarious liability.[5]

¶22 Christopher does not argue that he advanced this theory at trial and, on appeal, frames his issue as a theory of liability based upon a negligent supervision. We decline to abandon our neutrality in an attempt to develop Christopher's vicarious liability arguments. *See* ***State v. Gulrud***, 140 Wis.2d 721, 730, 412 N.W.2d 139, 142 (Ct. App. 1987). Accordingly, we apply the principles

[5] ***L.L.N.*** contrasted a negligent supervision claim with an agency theory of vicarious liability, sometimes referred to as *respondeat superior*. *See* ***id***. at 698-99 n.21, 563 N.W.2d at 445 n.21. This theory provides that an employer may be held vicariously liable for an employee's tort only when the tort is committed within the course and scope of employment. Because it is difficult to prove that illicit sexual activity is within the course and scope of one's employment, this theory has often been rejected. *See* ***Block v. Gomez***, 201 Wis.2d 795, 804-07, 549 N.W.2d 783, 787-88 (Ct. App. 1996); *see also* Joseph B. Conder, J.D., Annotation *Liability of Church or Religious Society for Sexual Misconduct of Clergy*, 5 A.L.R.5th 530, 538-41 (1992); *see also* ***Gibson v. Brewer***, 952 S.W.2d 239, 246 (Mo. 1997) ("sexual misconduct [is] not within the scope of employment of a priest and [is] in fact forbidden.")

articulated in ***Miller*** and ***L.L.N.*** to determine whether the facts of record, viewed in the light most favorable to Christopher, would support a tort claim of negligent supervision against the church.

ANALYSIS

¶23 Viewed in the light most favorable to Christopher, we first conclude that the jury could infer that Schoeneck was an employee of the church.[6] Based upon this employer-employee relationship, the church may be "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." ***L.L.N.***, 209 Wis.2d at 699, 563 N.W.2d at 445. Here, there is no suggestion that at any point prior to Christopher's relationship with Schoeneck, the church had any reason to suppose that Schoeneck had any quality that would be likely to cause harm. It is undisputed that Schoeneck was an extremely popular and trusted person in the congregation. Christopher does not claim that before he was assaulted, Schoeneck, who was married and lived with his wife and child, had given the church any reason to believe he presented a risk of harm.

¶24 Christopher essentially argues, however, that once he began his relationship with Schoeneck, the church had notice that Schoeneck presented a risk of harm. Christopher relies on two episodes: First, he points to the telephone conversation between his mother and the church secretary regarding Christopher's sleeping arrangements at Schoeneck's home. Second, he relies on Schoeneck's

[6] Although the record may raise competing inferences, neither party contends that Schoeneck may be an independent contractor. For purposes of this appeal, we assume he is an employee of the church.

testimony that he "believed" he told Rose of the sleeping arrangements at a regular weekly meeting and Rose told him to "be careful."[7]

¶25 For purposes of our analysis, we will assume a jury could infer that these two incidents gave the church notice that Schoeneck presented a risk of harm. It is undisputed that the church did not supervise Schoeneck. Accordingly, the church would be liable if the employee's wrongful act was a cause-in-fact of the plaintiff's injury and the employer's failure to exercise due care in supervising the employee was a cause-in-fact of the employee's act that caused the injury. *See* ***Miller***, 219 Wis.2d at 262-63, 580 N.W.2d at 238-39. There is no dispute that Schoeneck's wrongful act caused Christopher's injury. The question is whether the church's failure to supervise Schoeneck, once it had notice of the risk of harm, was a cause of Schoeneck's wrongful acts.

¶26 Christopher does not, however, identify the time frame in which the assaults or these conversations took place. Christopher does not assert, and the record fails to reveal, any factual support for a finding that he suffered sexual abuse after his mother's conversation with the church secretary. The record is devoid of any indication that any sexual contact took place after the conversation with the church secretary occurred.

¶27 Also, the record fails to indicate that Christopher suffered abuse after Schoeneck's conversation in which he "believed I told [Rose] that Chris was—and I—were sleeping in the same bed." Schoeneck was unable to recall when this

[7] Christopher seeks to impute to the church Rose's and the secretary's asserted knowledge of Schoeneck's assaultive tendencies. This can only be done if they are agents of the church. *See* ***Ivers & Pond Piano Co. v. Peckham***, 29 Wis.2d 364, 369, 139 N.W.2d 57, 59 (1966). For purposes of this opinion, we will assume that an agency relationship exists.

alleged discussion took place. Logically, it must have taken place after the two had shared a bed. There is no showing, however, that after the alleged conversations occurred, Schoeneck engaged in any sexual activity with Christopher. "[T]here must be a nexus between the negligent hiring, training, or supervision and the act of the employee." ***Miller***, 219 Wis.2d at 262, 580 N.W.2d at 239. Absent any proof that Christopher suffered harm once the church was notified of the risk, a finding that his injury was caused by the church's negligent supervision would be speculative.

¶28 It is undisputed that the church had no notice that Schoeneck presented a risk of harm before it allegedly learned that Schoeneck and Christopher shared the same bed. Christopher does not argue that there was any basis to reasonably anticipate potential problems in Schoeneck's conduct after several years of satisfactory employment. Schoeneck worked for several years without incident and was described as the most popular person in the congregation. This case, therefore, is unlike other situations, where for example the diocese had reports of the clergy member's sexual identification ambiguity, depression, and low self-esteem, and had previous exposure to the problem of sexual relationships between priest and parishioners. *See* ***Moses v. Diocese of Colorado***, 863 P.2d 310, 328-29 (Colo. 1993).

¶29 There is no basis to impose liability on the ground that the church should have anticipated Schoeneck's conduct before it occurred. There is also no showing that after the church allegedly received notice that the two shared a bed, Schoeneck engaged in assaultive behavior. The record fails to permit a reasonable inference that Schoeneck's wrongdoing was causally connected to the breach of the church's legal duty to supervise. Absent a causal connection between the employer's failure to exercise due care and the employee's wrongful act, a claim

of negligent supervision may not stand. *See* ***Miller***, 219 Wis.2d at 261-62, 264, 580 N.W.2d at 238, 239.

CONCLUSION

¶30 We assume for purposes of this opinion that the First Amendment would not bar Christopher's negligent supervision claim against the church. We also assume that the church and Schoeneck have an employer-employee relationship. In addition, we assume that the information Rose and the church secretary allegedly received regarding Schoeneck's sleeping arrangements can be imputed to the church. Nonetheless, we agree with the trial court that the record fails to support Christopher's negligent supervision claim because the facts, viewed in the light most favorable to Christopher, fall short of permitting an inference that the church had notice of the risk of harm presented by Schoeneck before that harm took place. Because the record fails to support the element of causation, the trial court correctly held that the evidence was insufficient to support the claim of negligent supervision.[8]

[8] Because we affirm the trial court on other grounds, we need not discuss the church's contention that, absent proof of the power to supervise, an employer cannot be liable for negligent supervision. We note, however, that within the context of an employer-employee relationship, the lack of a supervisor has been held to be a defense in a claim based upon *intentional* failure to supervise. *See* ***Gibson***, 952 S.W.2d at 248. That was not a claim made here.

By the Court.—Judgment affirmed.

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