

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

March 11, 1997

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(1), STATS.

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-1679

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

**CLAUDE A. GAST,**

**Plaintiff-Appellant,**

**v.**

**BONNIE MARQUARDT,**

**Defendant-Respondent.**

APPEAL from an order of the circuit court for Oconto County:  
CHARLES D. HEATH, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Claude Gast appeals a trial court order that dismissed his lawsuit for a malicious prosecution. His lawsuit alleged that the child sexual assault victim had recanted and that Bonnie Marquardt had intimidated the child sexual assault victim into committing fraud and perjury. The trial court dismissed the malicious prosecution lawsuit on the ground that Gast's conviction totally undermined his malicious prosecution claim. We agree with the trial court and therefore affirm its order dismissing the lawsuit.

In general, litigants may not maintain lawsuits for malicious prosecution unless their criminal proceedings terminated in their favor. RESTATEMENT (SECOND) OF TORTS § 658, at 416 (1977). This means that evidence offered to prove innocence will not support a malicious prosecution lawsuit unless the accused has first established his innocence by the termination of the criminal proceedings in his favor. *Id. cmt. c*, at 417. In other words, if the criminal proceedings remain in an adversely terminated state, an accused may not use a malicious prosecution lawsuit to attempt to prove that his conviction resulted from fraud or perjury. *Id.* Although courts have sometimes recognized what amounts to an exception to the general rule for some fraud and perjury allegations, *see, e.g., Krieg v. Dayton-Hudson Corp.*, 104 Wis.2d 455, 311 N.W.2d 641 (1981); *Lawrence v. Cleary*, 88 Wis. 473, 60 N.W. 793 (1894), these cases represent rare and extraordinary circumstances. We are satisfied that courts retain the freedom, absent extraordinary circumstances, to permit an unreversed conviction to stand as a total bar to a malicious prosecution lawsuit, regardless of fraud and perjury allegations.

Here, Gast alleges his conviction is the result of fraud and perjury instigated by Marquardt. These assertions are mere allegations which standing alone are insufficient to demonstrate that extraordinary circumstances exist. Attached to Gast's complaint were three affidavits from Gast's family members alleging that the child victim recanted and that Marquardt had intimidated the child victim into committing perjury. Such allegations in child sexual assault cases carry little evidentiary persuasiveness. *See State v. Haseltine*, 120 Wis.2d 92, 96-97, 352 N.W.2d 673, 676 (Ct. App. 1984). Such recantations are not unusual in child sexual assault victims. Moreover, postconviction recantations are even more suspect; they usually require some persuasive newly discovered evidence, such as corroboration, in addition to the recantation itself. *See Nicholas v. State*, 49 Wis.2d 683, 694, 183 N.W.2d 11, 17 (1971); *State v. Marcum*, 166 Wis.2d 908, 928, 480 N.W.2d 545, 555 (Ct. App. 1992). Gast's allegations lack any corroboration by disinterested witnesses or by independent circumstances and are not internally consistent. Under these circumstances, the trial court had no obligation to disregard Gast's unreversed conviction and to permit his malicious prosecution lawsuit to proceed under the exception to the general rule. Gast must have his conviction set aside as a precondition to bringing a malicious prosecution lawsuit.

*By the Court.* — Order affirmed.

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