

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 23, 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. 98-0028

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

MALCOLM K. H.,

PLAINTIFF-APPELLANT,

V.

MICHAEL R. PHEGLEY,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Racine County:
MARY KAY WAGNER-MALLOY, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Anderson, JJ.

SNYDER, P.J. Malcolm K. H. appeals from a summary judgment dismissing his complaint alleging that Attorney Michael R. Phegley improperly performed his duties as guardian ad litem (GAL) for Malcolm's daughter. The trial court granted Phegley absolute quasi-judicial immunity from Malcolm's

claims. Malcolm contends that Phegley's actions were intentional and therefore not subject to immunity. We disagree and affirm.

Malcolm's complaint against Phegley stems from a divorce action brought by Malcolm's former wife Elizabeth H. and from her allegations that Malcolm had sexually abused their only child, Mary. Phegley was appointed as Mary's GAL on December 16, 1993. During his investigation, Phegley learned that Mary had made statements to Elizabeth and her maternal grandmother indicating that Malcolm had sexually abused her. In February 1994, Phegley requested, and the parties agreed, to use Dr. Marc Ackerman as a neutral expert to evaluate the sexual abuse allegations. Ackerman initially assessed that Mary had been sexually abused by Malcolm. Both parties then retained their own experts. During hearings on custody and visitation, the court found Ackerman's and Elizabeth's experts more compelling than Malcolm's experts and subsequently ordered Malcolm not to have contact with Mary.

In March 1997, Malcolm brought suit against Phegley for breach of contract, professional malpractice, gross negligence¹ and intentional infliction of emotional distress. Malcolm's claims arise from the following allegations: Phegley knew or should have known that Ackerman's reports of sexual abuse were false and based upon falsified data and flawed and unprofessional practices; Phegley knew or should have known that his recommendation to the court prohibiting contact between Malcolm and Mary was contrary to the best interests of the child; Phegley was "grossly negligent, professionally and otherwise, in his investigation, analysis and representation of the best interests of the child";

¹ Malcolm later dropped his gross negligence claim pursuant to *Bielski v. Schulze*, 16 Wis.2d 1, 17-18, 114 N.W.2d 105, 113-14 (1962).

Phegley acted with “deliberate indifference” to the effect of his substandard work upon Malcolm and Mary and his actions were “outside the scope of his authority”; Phegley manipulated and indoctrinated Mary “into [a] false ‘sexual abuse victim’ role with its concomitant psychological damage” to Malcolm and Mary; Phegley breached his duty of good faith, fair dealing, honesty and proper performance which he owed to Malcolm and Mary; Phegley acted out of his dislike of Malcolm and maintained a “vendetta” against him; and Phegley breached an express and implied contract that he had with Malcolm and Mary.

On October 17, 1997, Phegley filed a motion for summary judgment on the grounds that Malcolm’s complaint failed to state a claim for relief.² *See* § 802.06(2)(a)6, (2)(b), STATS. The court granted his motion, holding that because Phegley’s actions were within the scope of his GAL position, he was entitled to absolute quasi-judicial immunity.

We use the same summary judgment methodology as does the trial court, and we review its decision de novo. *See Grosskopf Oil, Inc. v. Winter*, 156 Wis.2d 575, 581, 457 N.W.2d 514, 517 (Ct. App. 1990). The first step in this methodology requires the court to examine the pleadings to determine whether a claim for relief has been stated. *See Green Spring Farms v. Kersten*, 136 Wis.2d 304, 315, 401 N.W.2d 816, 820 (1987). We are convinced that Malcolm’s pleadings fail to present a claim for relief.

Malcolm’s first claim is that Phegley impliedly and expressly breached a contract with Malcolm and Mary which was made on December 16,

² Although this action was venued in Racine county, all of the Racine county judges disqualified themselves. The case was subsequently assigned to Judge Mary Kay Wagner-Malloy of Kenosha county.

1993, the date Phegley was appointed GAL. Malcolm, however, provides no indication of what contract Phegley had entered into with Malcolm or Mary.³ Likewise, we fail to find any contract in the record. Therefore, Malcolm's breach of contract allegation fails to state a claim for relief.

Next, Malcolm contends that Phegley exercised professional misconduct, including breaching a duty of good faith, fair dealing, honesty and proper performance which he owed Malcolm and Mary. A claim of professional misconduct requires a finding of negligence. *See Helmbrecht v. St. Paul Ins. Co.*, 122 Wis.2d 94, 103, 362 N.W.2d 118, 124 (1985). In the recent supreme court case of *Paige K.B. v. Molepske*, 219 Wis.2d 418, 424, 580 N.W.2d 289, 292 (1998), the court ruled that absolute quasi-judicial immunity specifically covered the negligent acts of a GAL. Accordingly, Malcolm's professional misconduct allegation fails to state a claim.

Finally, Malcolm alleges that Phegley intentionally inflicted emotional distress on him. In particular, Malcolm contends that because Phegley adopted Ackerman's conclusions, which were contrary to those reached by Malcolm and his experts, Phegley acted maliciously and carried a personal vendetta against him. Malcolm asserts that because Phegley's actions were malicious, he acted outside the scope of his authority. Malcolm further claims that Phegley acted with deliberate indifference to his substandard work. These allegations are conclusory and pure speculation. Malcolm provides no factual support for these claims in his pleadings or affidavits. *See* § 802.08(3), STATS.

³ Throughout his complaint, Malcolm asserts that Phegley's actions harmed Malcolm and Mary. However, because Mary is not a party in interest in this action, she has no claim against Phegley. *See generally* § 803.01(1), STATS.

Although he relies on an affidavit submitted by an expert social psychologist, Melvin Guyer, Guyer's opinion is based entirely on Malcolm's representations which we have already determined are not supported by fact.⁴ Thus, we are satisfied that Malcolm has failed to state a claim for relief and affirm the circuit court's decision.⁵

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

⁴ The only specific facts Malcolm sets forth involve Phegley's allegedly improper recommendation and use of Ackerman as a neutral expert. Malcolm charges that Ackerman should not have been recommended because Elizabeth had previously contacted Ackerman and Ackerman had reached a conclusion before the parties agreed to use his services. This allegation, however, relates solely to Phegley's performance as GAL and therefore involves professional misconduct which is subject to absolute quasi-judicial immunity. See *Paige K.B. v. Molepske*, 219 Wis.2d 418, 435, 580 N.W.2d 289, 296 (1998).

⁵ Because no claim for relief exists, we need not address Malcolm's argument that Wisconsin law does not extend absolute quasi-judicial immunity to the intentional acts of a GAL that reach beyond the scope of his or her quasi-judicial duties, notwithstanding case law granting immunity to a GAL's negligent acts. We also need not consider whether genuine issues of fact exist. See *Green Spring Farms v. Kersten*, 136 Wis.2d 304, 315, 401 N.W.2d 816, 820 (1987).

