

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 8, 2008

David R. Schanker
Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2007AP2592-FT

Cir. Ct. No. 2007CV161

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

PAULA S.-F.,

PETITIONER-RESPONDENT,

V.

THOMAS WEAVER,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Trempealeau County: JOHN A. DAMON, Judge. *Judgment reversed and cause remanded with directions.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Thomas Weaver appeals a child abuse injunction ordering him to avoid contact with his son, Gaige S.¹ He argues the evidence at the hearing did not show reasonable grounds to believe he had abused Gaige. He also challenges the court's fact findings. We conclude the evidence did not support a finding that Weaver abused his son during the incident in question. We therefore reverse and remand with directions to vacate the injunction.

BACKGROUND

¶2 In July 2007, Paula S.-F., Gaige's mother, filed a petition seeking a child abuse injunction preventing Weaver from having contact with Gaige. The petition alleged Weaver had sexual contact with Gaige and was causing him emotional damage.

¶3 At the hearing on the petition, Gaige testified about three incidents involving Weaver and Gaige's older sister Phyllis Weaver.² According to Gaige, the most recent incident happened in early July 2007, about a month before the hearing. He, Phyllis and Weaver were watching television, and Phyllis began tickling him and wrestling with him. He said Phyllis grabbed his groin over his pants twice during the wrestling. Gaige said Weaver told them to stop, but his sister did not stop.

¶4 Gaige also testified to an incident in summer 2006 in which Phyllis did something similar. He said on that occasion Weaver helped Phyllis hold him

¹ This is an expedited appeal under WIS. STAT. RULE 809.17. All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

² Gaige was fifteen years old in July 2007; Phyllis was eighteen.

down, and both Weaver and Phyllis grabbed his groin over his pants. Finally, Gaige described a similar incident in summer 2005 in which both Weaver and Phyllis grabbed his groin over his pants. Gaige said he thought the incidents were horseplay and were not intended for sexual gratification. He said Weaver and Phyllis thought they were “a big joke.”

¶5 Weaver testified that during the most recent incident, he saw Gaige and Phyllis “goofing around wrestling” but did not see anything inappropriate. He said he had told them to “knock it off” at one point when they were in front of the television, but otherwise was not paying attention. Phyllis testified there was wrestling and horseplay, but she did not touch Gaige’s groin area. Phyllis said in the past Gaige often grabbed her buttocks and breast area while they were working together at the family business, and she made a complaint to the local social services department. Weaver and Phyllis both testified the summer 2005 and 2006 incidents did not happen.

¶6 At the conclusion of the hearing, the court granted the injunction:

Well, this is the lowest possible burden of proof. All there has to be is reasonable grounds to believe that the father is engaged in abuse of the child and while I agree with [the guardian ad litem] it’s an issue of how much Mr. Weaver has, he certainly hasn’t abated it, abetted it, but not stopping it when he’s seen it.

So at this point I’ll grant the injunction. I’ll find the testimony of [Gaige] to be credible for today’s purposes and I don’t find [Phyllis’s] testimony to be credible, and I’ll order that [Weaver] avoid [Gaige’s] residence or any premises occupied by him now or in the future, avoid contacting him or any other person besides his attorney until [Gaige’s mother] consents in writing, and the Court agrees that the contact is in the best interest of [Gaige.]

DISCUSSION

¶7 We review child abuse injunctions in three steps. First, we uphold the circuit court’s fact findings unless clearly erroneous. *M.Q. v. Z.Q.*, 152 Wis. 2d 701, 708, 449 N.W.2d 75 (Ct. App. 1989); *see also* WIS. STAT. § 805.17(2). Second, whether those fact findings establish reasonable grounds for an injunction is a question of law reviewed without deference. *M.Q.*, 152 Wis. 2d at 708. Third, if reasonable grounds exist, the court’s ultimate decision on whether to grant an injunction calls for an exercise of discretion and will be upheld unless the court erroneously exercised its discretion. *See id.*

¶8 As relevant here, an injunction is proper only if there are “reasonable grounds to believe that the respondent has engaged in ... abuse of the child victim.” WIS. STAT. § 813.122(5)(a)3. Abuse for purposes of § 813.122 includes “sexual contact under ... [WIS. STAT. §] 948.02....” WIS. STAT. §§ 813.122(1)(a), 48.02(1)(b). Section 948.02(3), in turn, makes it a crime for a “person responsible for the welfare of a child” to fail to act to prevent a sexual assault if he or she “has knowledge that another person ... is having ... sexual contact with the child....”³

¶9 In this case, Gaige’s guardian ad litem⁴ concedes the court’s findings show the injunction was based on Weaver’s failure to stop Phyllis’s behavior

³ Weaver concedes that “sexual intercourse or sexual contact under ... 948.02” includes a failure to act under WIS. STAT. § 948.02(3) as well as first- and second-degree sexual assault. First- and second-degree sexual assault are defined in WIS. STAT. § 948.02(1) and (2) respectively.

A violation of WIS. STAT. § 948.02(3) also requires additional elements not relevant here.

⁴ Gaige’s mother, the petitioner-respondent, did not file a brief. Gaige’s guardian ad litem filed a brief in favor of affirming the injunction.

during the July 2007 incident, not on the two alleged incidents from 2005 and 2006.⁵ The parties dispute whether the evidence on the July 2007 incident showed reasonable grounds to believe Weaver violated WIS. STAT. § 948.02(3).

¶10 In response to questions from his guardian ad litem, Gaige testified about Weaver’s involvement in the July 2007 incident as follows:

Q: Was your dad present?

A: Yeah.

Q: What was his reaction to this horse play?

A: He said to stop like once.

Q: Once?

A: Yeah.

Q: Did your sister – was this during the first incident or second time after the commercial?

A: Second.

Q: After the commercial?

A: Yeah.

Q: So he was there and watched the whole thing the first time around?

A: Yes.

Q: Did he say anything to either one of you?

A: No.

Q: Then after the commercial when it started again, he told both of you to stop; is that correct?

⁵ Gaige’s guardian ad litem focuses on the July 2007 incident in his brief. He also does not respond to Weaver’s argument that the circuit court’s findings show it based the injunction solely on the most recent incident. “Arguments not refuted are deemed admitted.” *State v. Alexander*, 2005 WI App 231, ¶15, 287 Wis. 2d 645, 706 N.W.2d 191.

A: Yes.

Q: Did your sister stop?

A: No.

Gaige acknowledged on cross-examination that he and Phyllis engaged in horseplay “off and on” and that he sometimes initiated it. Gaige also said that when he looked at Weaver during the incident, Weaver was watching television and was not looking at him.

¶11 We conclude Gaige’s testimony does not establish Weaver knew Phyllis was having sexual contact with Gaige during the incident. Gaige initially answered “yes” when asked if Weaver “was there and watched the whole thing the first time around.” Then on cross-examination Gaige said when he looked at Weaver, Weaver was watching television. At most, this shows that Weaver must have seen the wrestling since he was in the same room, not that Weaver saw Phyllis grab Gaige’s groin.

¶12 Gaige’s guardian ad litem’s brief focuses on whether Phyllis’s conduct constituted sexual contact. However, this injunction is against Weaver, not Phyllis. Gaige’s guardian ad litem does not respond to Weaver’s argument that Gaige’s testimony did not establish Weaver knew about anything other than wrestling. Absent evidence Weaver knew about the sexual contact, there were not reasonable grounds to find abuse based on WIS. STAT. § 948.02(3). On remand, the court shall vacate the injunction against Weaver.

By the Court.—Judgment reversed and cause remanded with directions.

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

