**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**May 1, 2002**

**Cornelia G. Clark**
**Clerk of Court of Appeals**



**Appeal No. 01-0872** **Cir. Ct. No. 00-SC-3184**

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

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**MICHAEL S. ELKINS,**

**PLAINTIFF-APPELLANT,**

**V.**

**SHAWN B. SCHNEIDER, F/K/A SHAWN B. ELZ,**

**DEFENDANT-RESPONDENT.**

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APPEAL from an order of the circuit court for Waukesha County: PATRICK L. SNYDER, Judge. *Affirmed*.

¶1 BROWN, J.[1] Michael S. Elkins appeals from an order of the circuit court dismissing his claim for alienation of affection against Shawn B. Schneider. On appeal, Elkins argues that the circuit court erred when it denied his requests for substitution of a court commissioner and for a trial by jury. He also

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (1999-2000). All other references to the Wisconsin Statutes are to the 1999-2000 version.

asserts that the circuit court erred when it dismissed his complaint alleging alienation of affection without allowing him to amend the complaint to allege intentional infliction of emotional distress. We reject these arguments and affirm.

¶2 Elkins and Schneider have a daughter together. On July 21, 2000, Elkins filed a lawsuit in small claims court against Schneider alleging alienation of affection. The complaint alleged that Schneider had hidden Elkins' daughter from him. The case was scheduled for a pretrial hearing before a small claims court commissioner on August 14, 2000. On July 31, 2000, Elkins filed an amended complaint alleging that Schneider had refused to allow him to send letters or gifts to their daughter as well. The case was then rescheduled to September 21, 2000, presumably to allow Schneider to prepare an answer. On September 8, 2000, Elkins requested a substitution of the commissioner. The substitution request was subsequently denied.

¶3 On October 3, 2000, the commissioner dismissed the case on the grounds that Elkins' claim belonged in family court rather than small claims court. The commissioner's order for dismissal allowed Elkins to seek a de novo review of the decision by filing a Notice of Demand for Trial by October 18, 2000. Elkins filed this notice on October 16, 2000, at which time a circuit court judge was assigned to the case. On review, the circuit court dismissed Elkins' claim on its merits.

¶4 Elkins' first argument, that the circuit court should have granted his substitution request, is utterly without merit. Under Wisconsin law, a party to a small claims action may seek substitution of a judge if notice of substitution is

timely filed. *See* WIS. STAT. § 799.205.[2] However, Elkins' letter of September 8 clearly indicates that he sought substitution of the court commissioner, not substitution of a judge. The plain language of the statute does not allow for substitution of commissioners. A small claims contestant has a remedy if he or she does not like the court commissioner. That remedy is de novo review. Elkins took advantage of that remedy.

¶5 If Elkins is claiming that he substituted against a judge, we have no record of it. The record contains no documentation showing that a judge had been assigned and a date set for trial. Without this documentation, we are unable to discern whether Elkins filed a request against a judge, whether the request for substitution was timely filed or even if the ten-day period for filing had been triggered. It is Elkins' responsibility to ensure that the record is adequate and sufficiently complete to facilitate appellate review. *See* ***LaRock v. Dep't of Revenue***, 2000 WI App 24, ¶2 n.1, 232 Wis. 2d 474, 606 N.W.2d 580, *aff'd*, 2001 WI 7, 241 Wis. 2d 87, 621 N.W.2d 907 (stating that when the record is incomplete, the court may assume the missing material supports the court's ruling).

¶6 Elkins' second argument, that the circuit court erred by denying him a trial by jury, is baseless. Pursuant to WIS. STAT. § 768.01, Wisconsin does not allow actions for alienation of affection. *See* ***Prill v. Hampton***, 154 Wis. 2d 667, 681-82, 453 N.W.2d 909 (Ct. App. 1990). Thus, there was no valid cause of

[2] WISCONSIN STAT. § 799.205(1) provides, in relevant part, that "[a]ny party to a small claims action or proceeding may file a written request with the clerk of courts for a substitution of a new judge for the judge assigned to the case. The written request shall be filed on the return date of the summons or within 10 days after the case is scheduled for trial."

action to warrant any kind of trial, much less a jury trial. Therefore, Elkins was not denied a trial by jury. Rather, he failed to meet his burden of presenting a meritorious claim necessary to entitle him to a trial, and the circuit court appropriately dismissed the action.

¶7 Elkins' final argument, that the circuit court erred when it dismissed his action for lack of merit without allowing him to amend the complaint, also fails. The circuit court has the discretion to dismiss any action if it determines the action lacks merit. *See* ***Latham v. Casey & King Corp.***, 23 Wis. 2d 311, 314, 127 N.W.2d 225 (1964) (recognizing that "[i]t is considered well established that a court has the inherent power to resort to a dismissal of an action in the interest of orderly administration of justice").

¶8 Elkins contends that he should have been allowed to amend his complaint to allege intentional infliction of emotional distress. The elements to be proved in an action for intentional infliction of emotional distress are: (1) "defendant's conduct was intended to cause emotional distress"; (2) "the defendant's conduct was extreme and outrageous"; (3) "the defendant's conduct was a cause-in-fact of the plaintiff's emotional distress"; and (4) "the plaintiff suffered an extreme disabling emotional response to the defendant's conduct." ***Rabideau v. City of Racine***, 2001 WI 57, ¶33, 243 Wis. 2d 486, 627 N.W.2d 795 (citation omitted). Elkins has failed to set forth any facts in either the original or amended complaint that would justify bringing an action for intentional infliction of emotional distress under the standard set forth in ***Rabideau***.

*By the Court*.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.