

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 31, 2012

A. John Voelker
Acting 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. 2010AP3020

Cir. Ct. No. 2010CV393

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

GARY A. KRAMSCHUSTER AND STEPHANIE M. PRZYTARSKI,

PLAINTIFFS-APPELLANTS,

v.

LAURA R. SCHWEFEL,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County:
MEL FLANAGAN, Judge. *Affirmed.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 PER CURIAM. Gary A. Kramschuster and Stephanie M. Przytarski, both *pro se*, appeal from a circuit court order granting summary judgment to Attorney Laura R. Schwefel. Kramschuster and Przytarski sued Schwefel for malicious prosecution based on actions she took as guardian *ad litem*

for Przytarski's minor child. On appeal, Kramschuster and Przytarski challenge the circuit court's order denying their claims and declining to sanction Schwefel for filing a late brief. We affirm.

BACKGROUND

¶2 This case has its genesis in a Waukesha County action that established the paternity of Przytarski's minor child. Schwefel is the child's guardian *ad litem* in that action. In April 2008, Schwefel filed an order to show cause why the Waukesha County circuit court should not hold Przytarski in contempt for failing to comply with a placement order granting the child's father, Ted Vallejos, periods of physical placement with the child.¹ The Waukesha County circuit court found Przytarski in contempt, ordered her to serve time in jail, and required her to pay various costs and fees. Przytarski appealed. A one-judge panel of the court of appeals reversed the contempt order in its entirety as a sanction when neither Schwefel nor Vallejos filed a respondent's brief. *See State v. [Stephanie M.] Kramschuster*, No. 2008AP2094, unpublished slip op. (WI App Jan. 16, 2009).

¶3 In 2010, Przytarski and her father, Kramschuster, filed the Milwaukee County civil action directly underlying this appeal. They alleged that Schwefel's pursuit of a contempt finding constituted malicious prosecution, that pursuit of the finding was wrong as a matter of law, that Przytarski suffered emotional distress and other losses as a result of the proceeding, and that

¹ Schwefel named Stephanie M. Kramschuster as the alleged contemnor. We are advised that "Stephanie M. Przytarski" is her married name.

Kramschuster suffered financial losses when he shouldered some of Przytarski's obligations following the contempt finding.

¶4 The parties filed timely cross motions for summary judgment. Schwefel filed a late response brief, and Kramschuster and Przytarski moved to sanction Schwefel for missing a deadline.

¶5 The circuit court denied the motion for sanctions against Schwefel and granted her summary judgment on the claims filed by Kramschuster and Przytarski.² This appeal followed.

DISCUSSION

¶6 According to Kramschuster and Przytarski, the issues are:

(1) [w]hether the [circuit] court correctly ruled a guardian ad litem has standing to file a motion under WIS. STAT. § 785 [sic] for an alleged violation of a child placement order[;]

(2) [w]hether the [circuit] court correctly accepted a response to a motion for summary judgment filed ten (10) days late, in contravention of the scheduling order[;]

(3) [w]hether the [circuit] court properly dismissed a plaintiff because the plaintiff was not listed as a defendant in the original action that caused the lawsuit for malicious prosecution;

(4) [w]hether the [circuit] court properly interpreted a prolonged intention to jail someone for contempt without the statutory authority to so act, as not malicious;

² Schwefel filed a counterclaim against Kramschuster alleging harassment and defamation, and she filed a circuit court motion to sanction Kramschuster and Przytarski for bringing a frivolous action. The resolution of those matters is not material to the instant appeal.

(5) [w]hether the trial court properly applied quasi-judicial immunity to an act of malicious prosecution by a guardian ad litem.

¶7 We are not bound by the manner in which a party frames the issues. *See Travelers Indem. Co. of Ill. v. Staff Right, Inc.*, 2006 WI App 59, ¶8, 291 Wis. 2d 249, 714 N.W.2d 219. Our examination of the briefs and the record discloses that this appeal requires us to resolve: (1) whether Schwefel was entitled to summary judgment because she has absolute quasi-judicial immunity; and (2) whether the circuit court properly exercised its discretion by accepting a late submission from her. We address those issues *seriatim*.

A grant of summary judgment is reviewed *de novo* using the same methodology as the circuit court. Summary judgment shall be granted “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits ... show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.”

Mullen v. Walczak, 2003 WI 75, ¶11, 262 Wis. 2d 708, 664 N.W.2d 76 (italics added, citations omitted, ellipsis in original).

¶8 Kramschuster and Przytarski alleged that Schwefel, in her capacity as guardian *ad litem*, maliciously prosecuted Przytarski by instituting an unwarranted and unauthorized contempt proceeding. The circuit court correctly concluded that Schwefel was entitled to judgment as a matter of law.

¶9 A guardian *ad litem* in a custody dispute is appointed pursuant to statute “to independently represent the best interests of a child.” *Paige K.B. v. Molepske*, 219 Wis. 2d 418, 421, 427-28, 580 N.W.2d 289 (1998) (applying Wis.

STAT. § 767.045(4) (1993-94)).³ The responsibility of the guardian *ad litem* to promote a child’s best interests is the same as the responsibility of the circuit court. *Id.* at 430. Accordingly, a guardian *ad litem* “performs functions intimately related to the judicial process and, therefore, is entitled to absolute quasi-judicial immunity.” *Id.* at 424.

¶10 In *Paige K.B.*, the supreme court afforded immunity to a guardian *ad litem* facing allegations of professional negligence. *Id.* at 421-22. Absolute quasi-judicial immunity also protects a guardian *ad litem* from liability for an allegedly malicious prosecution because “absolute immunity” includes circumstances “where the [quasi-judicial] officer is charged with improper motive or malice.” See *Scarpaci v. Milwaukee Cnty.*, 96 Wis. 2d 663, 701, 292 N.W.2d 816 (1980). As a matter of law and public policy, “it is better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.” See *Paige K.B.*, 219 Wis. 2d at 432 (citations and one set of quotation marks omitted). This rule is almost universally embraced. See *Carrubba v. Moskowitz*, 877 A.2d 773, 783-84 (Conn. 2005) (collecting cases and stating that “[c]ourts in other jurisdictions have almost unanimously accorded guardians ad litem absolute immunity for their actions that are integral to the judicial process”); see also *Billups v. Scott*, 571 N.W.2d 603, 606 (Neb. 1997) (collecting cases holding that “guardians ad litem are absolutely immune from liability for actions within the scope of their roles in custody disputes and investigations of sexual abuse”).

³ Pursuant to 2005 Wis. Act 443, § 25, the legislature renumbered WIS. STAT. § 767.045. That statute is now WIS. STAT. § 767.407 (2009-10). All subsequent references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

¶11 Here, Kramschuster and Przytarski base their claims on actions that Schwefel took solely within the scope of her role as guardian *ad litem*. The complaint contains the express allegation that Schwefel “used her position as guardian *ad litem*” to cause harm. Moreover, Schwefel submitted an affidavit in this case averring that she filed pleadings in the paternity proceeding in her capacity as guardian *ad litem* to serve the best interests of the minor child and to comply with a Waukesha County circuit court order directing her to “apprise the court of whether its orders were being [followed].” Nothing in the record suggests an alternative context for Schwefel’s actions.

¶12 To be sure, Kramschuster and Przytarski accuse Schwefel of exceeding her statutory authority as guardian *ad litem*, but that accusation does not permit a tort suit against Schwefel for damages. “[A]n immunity is a freedom from suit or liability’ conferred upon a particular defendant ‘not because of the existence of a particular set of facts or the moral justification of an act[,]’ but as a result of that defendant’s status or position.” *Paige K.B.*, 219 Wis. 2d at 424 (one set of quotation marks omitted; second set of brackets in *Paige K.B.*).

¶13 Kramschuster and Przytarski assert, however, that their litigation is permitted by *City of Kenosha v. State*, 35 Wis. 2d 317, 151 N.W.2d 36 (1967), and *Berlowitz v. Roach*, 252 Wis. 61, 30 N.W.2d 256 (1947). Kramschuster and Przytarski note: “[a] general exception to the rule of state immunity for agencies and arms of the [S]tate ... is that courts may entertain suits to enjoin [S]tate officers and [S]tate agencies from acting beyond their constitutional or jurisdictional authority.” See *City of Kenosha*, 35 Wis. 2d at 323. *City of Kenosha* and *Berlowitz* do not apply here. Both cases address the breadth of sovereign immunity in a declaratory judgment action, not the application of absolute quasi-judicial immunity in a tort action. See *Herro v. Wisconsin Fed.*

Surplus Prop. Dev. Corp., 42 Wis.2d 87, 106, 166 N.W.2d 433 (1969) (explaining the holdings of *City of Kenosha* and *Berlowitz*).

¶14 The guardian *ad litem*'s role requires that he or she "be allowed to independently consider the facts of a case and advocate the best interests of the child, free from the threat of harassment for retaliatory litigation." *Paige K.B.*, 219 Wis.2d at 433. The circuit court therefore properly granted summary judgment to Schwefel. "[A] number of mechanisms, aside from civil liability, exist to prevent and punish abuse, misconduct, and irresponsibility on the part of a [guardian *ad litem*]." *Id.* at 434. Kramschuster and Przytarski may not, however, challenge Schwefel's actions as guardian *ad litem* through tort litigation. *See id.* at 424.

¶15 We turn to the contention that the circuit court erred when it accepted Schwefel's late response to the summary judgment motion filed by Kramschuster and Przytarski. We reject the claim.

¶16 The scheduling order in this case required the parties to follow local circuit court rules, including the local rule governing deadlines for summary judgment briefing. All parties filed timely motions for summary judgment. Schwefel submitted her response to the summary judgment motion filed by Kramschuster and Przytarski after the deadline dictated by local rule. Kramschuster and Przytarski moved for sanctions, but the circuit court elected to accept the late submission without penalizing Schwefel.

¶17 The circuit court has wide discretion when applying local rules to circuit court cases. *Kotecki & Radtke, S.C. v. Johnson*, 192 Wis.2d 429, 447, 531 N.W.2d 606 (Ct. App. 1995). "For this court to mandate that the [circuit] court unblinkingly disregard all untimely filed pleadings and affidavits would be

counter-productive to the orderly judicial disposition of the cases brought before the [circuit] court.” *Id.*

¶18 We uphold a circuit court’s discretionary decision if it is ““consistent with the facts of record and established legal principles.”” *Id.* at 448 (citation omitted). “We search the record for reasons to sustain the court’s discretionary decision.” *Tralmer Sales and Serv., Inc. v. Erickson*, 186 Wis. 2d 549, 573, 521 N.W.2d 182 (Ct. App. 1994). In this case, the circuit court observed that Schwefel offered virtually the same arguments in support of her timely motion for summary judgment as she offered in her untimely brief opposing the summary judgment motion filed by Kramschuster and Przytarski. The circuit court concluded that a sanction therefore served no purpose. We approved a similar rationale for allowing a late submission in *Kotecki*. There, the circuit court determined that no party was prejudiced by the late submission and that all parties and the court had adequate time to review the delayed materials. *Id.*, 192 Wis. 2d at 448. As in *Kotecki*, the circuit court in this case recognized that the parties and the court had sufficient notice of Schwefel’s position. Further, Kramschuster and Przytarski did not demonstrate that Schwefel’s late brief prevented them from marshalling evidence or arguments that they would otherwise have submitted. The circuit court’s decision to accept the late submission was reasonable and must be upheld.

¶19 Nonetheless, Kramschuster and Przytarski assert that the circuit court was obligated to impose a sanction because the scheduling order states that parties will be sanctioned for failure to comply with its terms. Kramschuster and Przytarski overlook the circuit court’s inherent power to manage its docket. *See Parker v. Wisconsin Patients Comp. Fund*, 2009 WI App 42, ¶10, 317 Wis. 2d 460, 767 N.W.2d 272. The power necessarily includes broad discretion to permit amendments to the scheduling order ““because that broad discretion is essential to

the court's ability to manage its calendar.” *Id.* (citation omitted). The scheduling order in this case reflects that the circuit court may consent to extend deadlines. The circuit court consented in this case. For all of these reasons, we affirm.

By the Court.—Order affirmed.

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

