COURT OF APPEALS
DECISION
DATED AND FILED

November 25, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 96-2696

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

MALCOLM H.,

PLAINTIFF-APPELLANT,

DAVID E. LASKER,

APPELLANT,

V.

MARC J. ACKERMAN,

DEFENDANT-RESPONDENT.

APPEAL from judgments of the circuit court for Milwaukee County: PATRICK J. MADDEN, Judge; LOUIS J. CECI, Reserve Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Cane, JJ.

PER CURIAM. Malcolm H. appeals from a summary judgment granting Marc J. Ackerman's motion to dismiss Malcolm's complaint, which

alleged that Ackerman had committed fraud, breach of contract, professional malpractice and intentionally inflicted emotional distress. Malcolm and his attorney, David E. Lasker, appeal from judgments entered requiring them to pay Ackerman costs and attorney's fees on the grounds that Malcolm's complaint against Ackerman constituted a frivolous action. The appellants claim the trial court erred in: (1) granting Ackerman's motion for summary judgment; (2) finding that the complaint was frivolous; and (3) denying a motion to admit Attorney Demosthenes A. Lorandos, *pro hac vice*.[1] Because Ackerman was entitled to absolute immunity as a witness in a judicial proceeding, the trial court did not err in granting summary judgment; because the trial court did not err in finding the complaint frivolous; and because the decision to deny Attorney Lorandos *pro hac vice* admission is moot, we affirm the judgments.

I. BACKGROUND

This case arises out of a divorce action wherein Ackerman was retained to perform a psychological evaluation. Malcolm's ex-wife, Elizabeth, sought a divorce after she suspected that Malcolm was sexually abusing their only daughter, Mary. During the pendency of those proceedings, Elizabeth retained Ackerman to evaluate the case. Both sides eventually mutually agreed to have Ackerman review the case and render an opinion. Subsequently, Ackerman was appointed by the court and eventually ended up as the expert witness advising the guardian ad litem.

[1] The Hon. Louis J. Ceci presided over the summary judgment proceeding and the frivolous claim hearing. The Hon. Patrick J. Madden denied the *pro hac vice* motion.

After independently meeting with Malcolm, Elizabeth, and Mary, Ackerman opined that Mary had been abused by her father and recommended that Elizabeth be granted sole custody. Ackerman rendered written reports and testified at the divorce proceeding.

As a result of Ackerman's opinions, Malcolm filed this action. Ackerman filed a motion seeking summary judgment on the basis that he is entitled to absolute immunity as a witness to a judicial proceeding. The trial court granted the motion, stating:

> [A]n expert witness retained by the court, is entitled to absolute immunity from civil liability for relevant testimony.… There is no doubt that the evaluations performed by [Ackerman] and disclosed to the court were made in a procedural context that was an integral part of the judicial proceeding involved, that is, the divorce.… A witness is entitled to immunity from civil liability for his examinations and testimony. The motion for summary judgment is granted.

Subsequently, the trial court determined that Malcolm's complaint was frivolous and ordered Malcolm and his attorney to pay costs and attorney's fees. Judgments were entered. Malcolm and Lasker now appeal.[2]

II. DISCUSSION

A. Immunity.

In reviewing a grant of summary judgment, we are governed by § 802.08, STATS. The methodology is set forth in detail in many cases, including

[2] Malcolm also alleges that the trial court erroneously exercised its discretion in denying his motion to have an out-of-state attorney appear *pro hac vice* on this case. Based on our disposition of the case, however, this issue is moot. Therefore, we need not address it.

Grams v. Boss, 97 Wis.2d 332, 338, 294 N.W.2d 473, 476-77 (1980), and will not be repeated here. We affirm the grant of summary judgment.

"Statements made in the course of judicial proceedings are absolutely privileged and insulate the speaker from liability so long as the statements 'bear a proper relationship to the issues.'" ***Snow v. Koeppel***, 159 Wis.2d 77, 80, 464 N.W.2d 215, 216 (Ct. App. 1990) (citing ***Bergman v. Hupy***, 64 Wis.2d 747, 750, 221 N.W.2d 898, 900 (1974)). "The rule extends to attorneys, witnesses and physicians appointed to examine a person in connection with judicial proceedings." ***Id.***, 159 Wis.2d at 80-81, 464 N.W.2d at 216.[3] "The determination whether the statements are pertinent and relevant to the issues is a question of law for the court and not a fact issue for the jury." ***Id.*** In determining this issue, we resolve any doubt in favor of relevancy. *See* ***id.***

In the instant case, Ackerman is entitled to absolute immunity for the statements he made in the course of the judicial proceeding, here the divorce, so long as the statements bear a reasonable relationship to the issues. In reviewing the record, we conclude that Ackerman is entitled to absolute immunity. He was initially contacted by Elizabeth, subsequently retained by both parties and eventually appointed by the court. The statements he made during the pending divorce are clearly related to the judicial proceeding. All of his reports tie his comments to the "custody determination dispute." The record contains a contract that Malcolm signed with Ackerman denoting the contract as one for

[3] *See also* RESTATEMENT OF TORTS, § 588, cited with approval in ***State v. Cardenas-Hernandez***, No. 96-3605 (Wis. Ct. App. Oct. 2, 1997, ordered published Nov. 19, 1997), which provides in pertinent part: "A witness is absolutely privileged to publish false and defamatory matter of another in communications preliminary to a proposed judicial proceeding and as part of a judicial proceeding in which he is testifying, if it has some relation thereto."

"Psychological Services Pursuant to Legal Proceedings." Ackerman's reports were directed to the guardian ad litem appointed in the divorce action.

Malcolm concedes that he is not pursuing this action relative to Ackerman's comments made during the judicial proceeding. Rather, Malcolm contends that the suit was pursued for redress against Ackerman's conduct which occurred outside the context of the judicial proceedings. There is no evidence in the record to support these contentions. The fact that Malcolm's expert witnesses believe that Ackerman is wrong and professionally incompetent does not remove Ackerman's conduct from the cloak of absolute immunity in this case. We reject Malcolm's attempt to construe the facts to somehow separate Ackerman's evaluation for the divorce proceeding from "other independent, non-judicially related conduct." The distinction does not exist on the facts of record here.

Malcolm also asserts that because Ackerman's conduct was intentional and malicious, absolute immunity does not apply. We are not convinced. "Witnesses are immune from civil liability for damages caused by false and malicious testimony, if relevant to the issues in the matter where the testimony is given." ***Bromund v. Holt***, 24 Wis.2d 336, 341-42, 129 N.W.2d 149, 152 (1964). As a court-appointed expert, Ackerman was acting in a quasi-judicial capacity and, irrespective of the existence of malice or corrupt motives, is entitled to absolute immunity. *See* ***id.*** at 341, 129 N.W.2d at 152.

Absolute immunity is the law in Wisconsin. There is good reason for the rule granting absolute immunity to witnesses in judicial proceedings.

> If parties are shadowed by the fear that by some mistake as to facts or some excess of zeal, or by some error ... they may be subjected to harassing litigation ... they may well feel that justice is too dearly bought and that it is safest to abandon its pursuit.... [F]eelings are often wounded and

> reputations are sometimes soiled. This is, of course to be regretted, but ... "[T]he paramount public interest here intervenes and overrides considerations of mere private right as between the parties."

Snow, 159 Wis.2d at 80, 464 N.W.2d at 216-17 (citation omitted). Here, Ackerman was subject to compulsory process, he took an oath, responded to questions on direct and cross-examination and could be subject to prosecution if he perjured himself. Ackerman is entitled to immunity from civil liability.

B. Frivolous Action.

Malcolm and Lasker claim the trial court erred in finding this action frivolous. Our review on this issue involves a mixed question of fact and law. *See* ***Stern v. Thompson & Coates, Ltd.***, 185 Wis.2d 220, 241, 517 N.W.2d 658, 665-66 (1994). Findings of fact will be upheld unless clearly erroneous. *See* ***id.*** Whether those facts support a conclusion that an action is frivolous, however, is a question of law. *See* ***id.***

The record demonstrates that the trial court found Malcolm commenced this action solely for the purpose of harassing Ackerman. The record supports this finding and, therefore, it is not clearly erroneous. The trial court also found that Attorney Lasker knew or should have known that an action should not have been brought based upon the law of Wisconsin. This finding is also not clearly erroneous. The law in Wisconsin is settled. These findings support the trial court's conclusion that this action was frivolous. Therefore, we affirm.

By the Court.—Judgments affirmed.

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