COURT OF APPEALS
DECISION
DATED AND FILED

July 7, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1531

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

BRADLEY K. BETTINGER,

PLAINTIFF-APPELLANT,

V.

FIELD CONTAINER COMPANY, L.P. AND RONALD TROJAN, INDIVIDUALLY AND AS AGENT FOR FIELD CONTAINER COMPANY, L.P., AND ANTHONY GRASSI, INDIVIDUALLY AND AS AGENT FOR FIELD CONTAINER COMPANY, L.P.,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County: CHRISTOPHER R. FOLEY, Judge. *Affirmed.*

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

PER CURIAM. Bradley K. Bettinger appeals from the trial court's order dismissing his defamation-by-self-publication claim against his former

employer, Field Container Company, L.P., and his former superiors at Field Container, Ronald Trojan and Anthony Grassi (collectively Field Container). The trial court determined that Wisconsin does not recognize a cause of action for defamation by self-publication. Bettinger argues that this court should adopt the tort of defamation by self-publication. We affirm the trial court's order dismissing Bettinger's complaint.

I. BACKGROUND

Bettinger worked at Field Container from August of 1993 to May of 1996. Bettinger's complaint alleged that he was fired from Field Container after Trojan and Grassi falsely accused him of committing sexual harassment and creating a hostile working environment. Bettinger's complaint further alleged that he was compelled to repeat those false accusations to prospective employers, his family and "other significant people," and that, as a result of his compelled disclosure of those false accusations, he "was denied employment opportunities and he has suffered irreparable harm to his reputation."

On February 26, 1997, Field Container filed a motion to dismiss Bettinger's complaint for failure to state a claim upon which relief can be granted, arguing that Wisconsin does not recognize a cause of action for defamation by self-publication. The trial court granted the motion, and entered an order dismissing Bettinger's complaint on April 18, 1997.

II. DISCUSSION

In determining whether a complaint states a claim upon which relief can be granted, the facts pleaded must be taken as admitted. *See* ***Morgan v. Pennsylvania Gen. Ins. Co.***, 87 Wis.2d 723, 731, 275 N.W.2d 660, 664 (1979).

The pleadings are to be liberally construed, and "a claim should be dismissed as legally insufficient only if 'it is quite clear that under no conditions can the plaintiff recover.'" ***Id.*** (quoted source omitted). We review *de novo* the trial court's decision to dismiss for failure to state a claim. *See* ***Heinritz v. Lawrence Univ.***, 194 Wis.2d 606, 610, 535 N.W.2d 81, 83 (Ct. App. 1995).

The Wisconsin Supreme Court has recently set forth the elements of a defamatory communication:

> (1) a false statement; (2) communicated by speech, conduct or in writing to a person other than the person defamed; and, (3) the communication is unprivileged and tends to harm one's reputation so as to lower him or her in the estimation of the community or to deter third persons from associating or dealing with him or her.

Torgerson v. Journal/Sentinel, Inc., 210 Wis.2d 524, 534, 563 N.W.2d 472, 477 (1997). A defendant's intentional or negligent communication of a defamatory matter to a person other than the one defamed is referred to as publication. *See* ***Ranous v. Hughes***, 30 Wis.2d 452, 461, 141 N.W.2d 251, 255 (1966).

As noted, Bettinger's complaint alleged that he himself communicated the allegedly defamatory matter to third parties. The trial court held that, because Bettinger failed to allege that Field Container communicated defamatory matter to a third party, his complaint failed to state a claim for defamation.

Indeed, Bettinger has not identified, and our research has not revealed, any Wisconsin case that has recognized a cause of action for defamation when the plaintiff, rather than the defendant, published the defamatory matter. Although not specifically addressing whether, under any circumstances, Wisconsin will recognize a defamation action based on a plaintiff's publication of

a defamatory matter, ***Suick v. Krom***, 171 Wis. 254, 177 N.W. 20 (1920), arguably forecloses such an action.

In ***Suick***, the plaintiff was a customer who purchased some items from the defendant's store and then left the store. As the plaintiff was walking outside the store, the defendant came to the door and, in the presence of many others, shouted to the plaintiff, "Do you want to be arrested?" ***Id.***, 171 Wis. at 255, 177 N.W. at 20. The plaintiff inquired, "For what?" ***Id.*** The defendant replied, "For stealing that package of silk you have under your arm." ***Id.*** Based upon this defamatory communication, the jury returned a verdict for the plaintiff. The defendant appealed, challenging the jury instruction with regard to the assessment of the plaintiff's damages because it improperly "allow[ed] the jury to take into consideration the circulation of the charges among her relatives, friends, and neighbors." ***Id.***, 171 Wis. at 257, 177 N.W. at 21. The supreme court agreed that the instruction was improper, and stated:

> There was evidence in the case that the plaintiff herself told a number of her friends of the incident. The charge as given would permit the jury to give consideration to such circulation. Manifestly, defendant should not be responsible for damages resulting from the circulation of the incident by plaintiff, for which reason the charge was erroneous.

Id., 171 Wis. at 258, 177 N.W. at 21.[1]

Bettinger argues, nonetheless, that this court should adopt the tort of defamation by self-publication, and permit claims for defamation when the

[1] In ***Lehner v. Kelley***, 215 Wis. 265, 270–271, 254 N.W. 634, 636 (1934), the supreme court specifically approved ***Suick v. Krom***, 171 Wis. 254, 177 N.W. 20 (1920), for the proposition that "one who utters a slander is not responsible for the unauthorized repetition thereof."

plaintiff is foreseeably compelled to communicate a defendant's defamatory statement to a third party.[2] We decline Bettinger's invitation to adopt a new cause of action; such a task is properly left to the supreme court or the legislature. *See* ***Cook v. Cook***, 208 Wis.2d 166, 189, 560 N.W.2d 246, 255–256 (1997) ("The supreme court, 'unlike the court of appeals, has been designated by the constitution and the legislature as a law-declaring court.'") (citation omitted); ***Larson v. City of Tomah***, 193 Wis.2d 225, 230, 532 N.W.2d 726, 728 (1995) (the function of the court of appeals is to correct errors of law, not to declare new law); ***Vollmer v. Luety***, 156 Wis.2d 1, 14, 456 N.W.2d 797, 803 (1990) (developing and clarifying the law are functions of the supreme court). We therefore affirm the trial court's dismissal of Bettinger's complaint for failure to state a claim upon which relief can be granted.[3]

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[2] Bettinger cites ***Downs v. Waremart, Inc.***, 903 P.2d 888 (Or. Ct. App. 1995), *aff'd in part and rev'd in part*, 926 P.2d 314 (Or. 1996), and proposes the following elements for a cause of action:

> (1) The defendant-employer makes defamatory statements to the plaintiff-employee;
> (2) It was reasonably foreseeable to the defendant that plaintiff would be under a strong compulsion to disclose the content of that statement to prospective employers;
> (3) The plaintiff, under compulsion, communicates the defamatory statements to prospective employers; and
> (4) Because of that communication, the plaintiff was damaged.

Bettinger acknowledges that this "doctrine creates an exception to the general rule that the defamatory statements must be communicated to third parties **other** than the person defamed." (Emphasis in original.)

[3] Because we conclude that Bettinger's complaint fails to state a claim upon which relief can be granted, we need not address Bettinger's argument that the Worker's Compensation Act does not bar his claim. *See* ***Gross v. Hoffman,*** 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (if a decision on one point disposes of an appeal, the appellate court will not decide the other issues raised).

By the Court.—Order affirmed.

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