

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

October 17, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 94-1382

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

MARINO CONSTRUCTION CO., INC.,

Plaintiff-Appellant,

v.

CITY OF MILWAUKEE,
BOARD OF HARBOR COMMISSIONERS
OF THE CITY OF MILWAUKEE
and KENNETH J. SZALLAI,

Defendants-Respondents.

APPEAL from an order of the circuit court for Milwaukee County:
MICHAEL D. GUOLEE, Judge. *Affirmed.*

Before Wedemeyer, P.J., Sullivan and Schudson, JJ.

PER CURIAM. Marino Construction Co., Inc., appeals from an order dismissing, with prejudice, its amended complaint for defamation against the City of Milwaukee and the Board of Harbor Commissioners of the City of Milwaukee. The trial court dismissed the amended complaint after it concluded

that libel is an intentional tort and therefore the City and the Board of Harbor Commissioners as governmental entities were immune from liability under § 893.80(4), STATS.¹ We conclude that Marino Construction's seven causes of action for libel as pleaded in its amended complaint are premised upon alleged intentional conduct on the part of the City and its agents, and accordingly the trial court properly applied the doctrine of governmental immunity in dismissing the amended complaint against the City and the Board of Harbor Commissioners. We affirm.

On August 2, 1991, the City and the Board of Harbor Commissioners entered into a contract with Marino Construction to build portions of the Port of Milwaukee Headquarters Building. The company "constructed" the building.

On August 5, 1992, an article appeared in the *Milwaukee Sentinel* under the headline "Port cancels pact with Builder; Contractor disputes allegation of 'structural defect' in new offices." The relevant part of the article reads:

The Port of Milwaukee canceled its agreement with the major contractor on the new \$1.6 million port headquarters because of dissatisfaction with the firm's work, Port Director Kenneth J. Szallai said Tuesday.

"There is, in our opinion, a structural defect in our building," he said.

¹ Section 893.80(4) STATS., provides:

- (4) No suit may be brought against any volunteer fire company organized under ch. 213, political corporation, governmental subdivision or any agency thereof for the intentional torts of its officers, officials, agents or employees nor may any suit be brought against such corporation, subdivision or agency or volunteer fire company or against its officers, officials, agents or employees for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions.

The dispute with Marino Construction Co. has halted work and delayed indefinitely the port's move to its new offices, Szallai said.

On August 20, 1992, Marino Construction sent the defendants a written demand for correction, pursuant to § 895.05(2), STATS., on the statements made by Szallai. The defendants never retracted or corrected the allegedly false statements.

Marino commenced a seven-count defamation action against the City, the Board of Harbor Commissioners, and Szallai. The relevant portion of the amended complaint reads:

That on or about August 5, 1992, the defendant, Kenneth J. Szallai, made false oral and/or written statements to representatives of the Milwaukee Sentinel newspaper whereby defendant stated that the Port of Milwaukee Headquarters Building constructed by plaintiff contains a structural defect; that said statement consisted of the following: "There is, in our opinion, a structural defect in our building." A true and accurate copy of the Milwaukee Sentinel newspaper article is attached and ... incorporated herein by reference as if fully set forth herein.

The City and the Board of Harbor Commissioners moved the trial court for dismissal, pleading governmental immunity from liability for the intentional tortious conduct of its agents or employees. The trial court agreed with the defendants, concluding that libel is an intentional tort. Accordingly, it dismissed Marino's amended complaint against the City and the Board of Harbor Commissioners, with prejudice, under the aegis of § 893.80(4), STATS. The trial court further ordered Marino Construction to designate whether the remaining defendant, Szallai, was being sued in his official capacity as port director, or in his individual capacity. Marino Construction appeals from this order.

Whether the City and the Board of Harbor Commissioners are immune from liability under § 893.80(4), STATS., for the allegedly defamatory statements made by their agent or employee is a question of law that we review *de novo*. See *Snow v. Koeppl*, 159 Wis.2d 77, 81, 464 N.W.2d 215, 216 (Ct. App. 1990) (whether words spoken in the course of judicial proceedings pertain to the issues and therefore qualify for judicial immunity is a legal issue).

The trial court concluded that as a matter of law all causes of action for libel are intentional torts, and therefore subject to the governmental immunity provided by § 893.80(4), STATS. Marino Construction argues that all libel claims are not necessarily intentional torts, but that they can be based upon negligence theory as well. Accordingly, Marino argues that the trial court erred in applying governmental immunity for intentional torts. We need not address this dispute over the categorical distinction of libel because we conclude that Marino Construction's causes of action, *as pleaded in its amended complaint*, are premised solely on alleged intentional conduct. Accordingly, the trial court properly applied § 893.80(4), STATS., and dismissed the complaint against the City and the Board of Harbor Commissioners.

Because the trial court granted the City and the Board's dismissal motion, we are called upon to appraise the sufficiency of the amended pleading; that is, whether it is quite clear that under no circumstances can Marino Construction recover. See *Schuster v. Altenberg*, 144 Wis.2d 223, 228, 424 N.W.2d 159, 161 (1988).

Perusal of the seven causes of action makes it abundantly clear that five are specifically based upon allegedly intentional conduct on the part of Szallai and the defendants.² Hence, all fall under the governmental immunity provided by § 893.80(4). The remaining two causes of action, thus, are the focus of our attention. The substance of the causes of action is quoted above in full; however, the two causes are alternatively pleaded—one premised on an allegation that Szallai was acting within the scope of his employment, and the other based upon conduct outside his scope of employment.

² These five causes of action are based upon the defendants' alleged “actual malice,” or “willful, wanton and reckless disregard.” Hence, they allege intentional conduct.

The cause of action for defamation (libel) in this case is premised upon a private defendant suing a non-media defendant; accordingly, the elements are that the defendant communicated a false statement to a third person which “tends so to harm the reputation of another as to lower the person in the estimation of the community or deters others from associating or dealing with the person.” WIS JI—CIVIL 2501. Further, the statement “must be intentionally or negligently communicated to a person other than the person defamed.” WIS JI—CIVIL 2500. Marino Construction's complaint alleges that “Kenneth J. Szallai, made false oral and/or written statements to representatives of the Milwaukee Sentinel.” Even reading the complaint most favorably to Marino Construction as this court is required to do upon a motion to dismiss, *see Schuster*, 144 Wis.2d at 228, 424 N.W.2d at 161, we cannot conceive how this allegation does not allege intentional conduct on the part of Szallai. Szallai is alleged to have specifically made the statements to representatives of the *Milwaukee Sentinel*. While there may be cases in which a person negligently communicates statements to a third party, *see* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 113, at 802 (5th ed. 1984) (“[T]he defendant may not have intended to communicate the statement to anyone, or at least to anyone other than the person disparaged, but due to some mishap, foreseeable or otherwise, publication to others occurred.”), Marino Construction's allegation, *as pleaded in its complaint*, does not raise such a contention. Accordingly, we conclude that the causes of action are premised upon alleged intentional communication on the part of Szallai and thus, the City and the Board of Harbor Commissioners are immune from liability pursuant to § 893.80(4), STATS. The trial court properly dismissed the complaint and we affirm.

By the Court.—Order affirmed.

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