

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 9, 2007

David R. Schanker
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. 2006AP2887

Cir. Ct. No. 2005SC4218

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

JOHN DAGGETT,

PLAINTIFF-APPELLANT,

V.

MIKE LUEDEKE,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Winnebago County:
SCOTT C. WOLDT, Judge. *Order reversed and cause remanded.*

¶1 ANDERSON, J.¹ John Daggett appeals an order dismissing his small claims action against Mike Luedeke, an alleged employee of Luedeke's Automotive Center, for failure to state a claim upon which relief can be granted. The action arose from a dispute over work Luedeke agreed to perform on Daggett's car. The circuit court determined that the doctrine of respondeat superior required Daggett to file his action against the auto repair shop and its owner. We conclude that the circuit court incorrectly applied the doctrine and reverse and remand the matter for proceedings consistent with this opinion.

¶2 In 2005, Daggett filed this small claims action against Luedeke. Daggett claimed Luedeke negligently repaired his vehicle, misrepresented repair costs and violated Wisconsin's consumer protection laws. In his response brief, Luedeke states that he submitted a motion to dismiss on the grounds that Daggett's complaint failed to state a claim on which relief could be granted. Luedeke argued that he was acting as an employee of Luedeke's Automotive Center and therefore is an improper and wrongly named party. The court commissioner ruled in Luedeke's favor and dismissed Daggett's case on the merits.

¶3 Daggett objected to the court commissioner's decision and filed a demand for a trial with the circuit court. Luedeke filed a motion to dismiss, again arguing that he is an improper and wrongly named party and is not a real party in interest. In an affidavit, Tom Luedeke, the owner of Luedeke's Automotive Center, averred that Mike Luedeke was a compensated employee of the Center

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

acting within the scope of his employment at the time he performed the service work for Daggett.

¶4 Following a hearing, the circuit court granted the motion to dismiss and dismissed the case with prejudice. The court explained to Daggett that Wisconsin follows the law of respondeat superior, meaning that “employers are responsible for actions of employees.” Daggett appeals from this decision.

¶5 When the circuit court grants a motion to dismiss for a complaint’s failure to state a claim, we review the circuit court’s action de novo. *State ex rel. Lawton v. Town of Barton*, 2005 WI App 16, ¶¶2, 9, 278 Wis. 2d 388, 692 N.W.2d 304. A motion to dismiss for failure to state a claim tests the legal sufficiency of the complaint. *Torres v. Dean Health Plan, Inc.*, 2005 WI App 89, ¶6, 282 Wis. 2d 725, 698 N.W.2d 107 (citation omitted). “A complaint should not be dismissed as legally insufficient unless it appears certain that a plaintiff cannot recover under any circumstances.” *Beloit Liquidating Trust v. Grade*, 2004 WI 39, ¶17, 270 Wis. 2d 356, 677 N.W.2d 298.

¶6 We hold the circuit court improperly applied the doctrine of respondeat superior to dismiss Daggett’s claims. Under the tort doctrine of respondeat superior, an employer can be held vicariously liable for the negligent acts of its employees while they are acting within the scope of their employment. *Kerl v. Dennis Rasmussen, Inc.*, 2004 WI 86, ¶¶17, 23, 273 Wis. 2d 106, 682 N.W.2d 328. The additional liability of the employer, however, does not shield a negligent employee from his or her own personal liability, nor does it supplant the employee’s liability with that of the employer. *Shannon v. City of Milwaukee*, 94 Wis. 2d 364, 370, 289 N.W.2d 564 (1980). The purpose of the doctrine is to provide an alternative, and in some cases a more lucrative, source from which the

injured party may recover his or her damages. *Id.*; *Kerl*, 273 Wis. 2d 106, ¶26. These basic principles of the doctrine fail to support the circuit court's holding that Daggett could not bring a cause of action against Luedeke. We reverse the order dismissing Daggett's claims and remand the case for proceedings consistent with this opinion.

By the Court.—Order reversed and cause remanded.

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

