COURT OF APPEALS
DECISION
DATED AND FILED

November 25, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-3594

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

ROBERT KOPFHAMER AND MARGARET KOPFHAMER,

PLAINTIFFS-APPELLANTS,

V.

MADISON GAS AND ELECTRIC COMPANY,

DEFENDANT,

WISCONSIN PUBLIC SERVICE CORPORATION,
WISCONSIN POWER AND LIGHT COMPANY,
ABC COMPANY, AND DEF INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from orders of the circuit court for Dane County: RICHARD J. CALLAWAY, Judge. *Reversed and cause remanded.*

Before Dykman, P.J., Vergeront and Deininger, JJ.

PER CURIAM. Robert Kopfhamer and Margaret Kopfhamer appeal from orders dismissing their claims against Wisconsin Power and Light Company (WPL). We conclude the complaint was properly pleaded in the alternative, and reverse and remand.

The Kopfhamers' complaint alleged that Robert Kopfhamer was injured while working at the Kewaunee Nuclear Power Plant, which at the time was co-owned by WPL, Wisconsin Public Service Corporation and Madison Gas and Electric Company. The complaint named all three companies as defendants. Wisconsin Power and Light moved to be dismissed from the action, and the circuit court granted the motion. The court concluded that because the complaint alleged WPL was Kopfhamer's employer, his negligence claims were barred because worker's compensation was his exclusive remedy. To the extent the complaint sought to allege claims against WPL that can be made even though WPL was his employer, the court concluded that it failed to state a claim. The Kopfhamers appeal.

For the purpose of testing whether a claim has been stated pursuant to a motion to dismiss, the facts pleaded must be taken as true, but legal conclusions need not be accepted. ***Morgan v. Pa. Gen. Ins. Co.***, 87 Wis.2d 723, 731, 275 N.W.2d 660, 664 (1979). The purpose of the complaint is to give notice of the nature of the claim, and the purpose of a motion to dismiss is to test the legal sufficiency of the claim. ***Id.*** Because the pleadings are to be liberally construed, a claim should be dismissed as legally insufficient only if it is quite clear that under no conditions can the plaintiff recover. ***Id.***

The Kopfhamers argue that the circuit court misinterpreted their complaint. They argue that, because they could not know in advance which

company would be considered Kopfhamer's employer, they alleged that both WPL and Wisconsin Public Service Corporation were his employer, and then alleged further theories against each of them with the expectation that only one of the companies would be protected by the worker's compensation exclusivity provision. They argue that this type of inconsistent pleading in the alternative is expressly permitted by § 802.02(5)(b), STATS.

Wisconsin Power and Light responds that paragraph five in the complaint alleges that WPL was Kopfhamer's "employer and self-insured Worker's Compensation carrier," and because this paragraph is realleged by reference in all the other claims in the complaint, those claims fail to state a claim as to WPL because they are barred by the exclusivity provision.

The Kopfhamers respond, in turn, that paragraph five does not allege all the necessary elements to trigger worker's compensation liability because it does not allege he was performing services related to his employment with that employer. Therefore, they argue, the realleging of this paragraph in subsequent claims does not trigger the exclusivity provision.

The above arguments descend into unnecessarily technical readings of the complaint. We are satisfied that, read liberally and as a whole, the complaint in this complicated situation attempts to allege alternative claims as argued by the Kopfhamers. As the Kopfhamers point out, the complaint also includes an allegation that Wisconsin Public Service Corporation was the worker's compensation employer. This type of alternative pleading is clearly allowed. Leaving aside the arguments about paragraph five, the fact that the Kopfhamers specifically alleged the elements of worker's compensation coverage by WPL in one part of the complaint (paragraphs nine and ten) does not prevent them from

making claims in other parts of the complaint that may be successful only if WPL was not the worker's compensation employer.

By the Court.—Orders reversed and cause remanded.

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