

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 28, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

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.

No. 98-2981

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

ROBERT MULLIGAN,

PLAINTIFF-APPELLANT,

V.

**RONALD A. BUSS, D/B/A BUSS CONTRACTORS,
A/K/A BUSS ALL TYPE ROOF REPAIR SPECIALISTS,**

DEFENDANT,

**ELMA AND WILLIAM MICHAELS
AND AMERICAN FAMILY INSURANCE COMPANY,**

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County:
JOHN J. DIMOTTO, Judge. *Affirmed.*

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

¶1 PER CURIAM. Robert Mulligan appeals from the trial court's order granting summary judgment in favor of Elma Michaels and her insurance company. Prior to granting summary judgment, the trial court also granted Michaels's and American Family Insurance Company's motion to dismiss for failure to state a claim. On appeal, Mulligan does not challenge the trial court's decision on the motion to dismiss. Instead, Mulligan argues that the trial court erred when it granted summary judgment in favor of Michaels, dismissing the claim against her with prejudice. We conclude that because Mulligan does not challenge the trial court's decision on the motion to dismiss, we must affirm because, absent a challenge to the dismissal order, the order granting summary judgment is superfluous. Further, because Mulligan appeals from a superfluous order, we cannot reach the merits of his claims.

I. BACKGROUND.

¶2 Elma Michaels and her husband, William Michaels, hired Buss Contractors to replace the roof on their home. Elma selected Buss after she saw Buss's ad in the Milwaukee Journal. Elma contacted Robert Buss and arranged for him to come to the Michaels's home to give them an estimate. William met with Buss and signed a contract. Buss began the work on the Michaels's roof on November 2, 1994.

¶3 Mulligan, the Michaels's next door neighbor, claims that on two separate occasions, Buss and his employees tore old roofing material off of the Michaels's roof and dumped it over the edge where it fell on Mulligan's collector car, which was parked in his driveway next to the Michaels's house. On the first occasion, Mulligan alleges that he told Buss to stop dumping the debris onto his car, and then informed William that the contractors were damaging his car.

Mulligan claims that William told him that the Michaels's homeowner's insurance would cover the damage.

¶4 The second incident occurred almost three weeks later, when Buss again dumped roofing material onto Mulligan's car. Mulligan obtained an estimate that the damages caused by the fallen debris exceeded \$7,000. Mulligan filed suit against Buss and the Michaels, but not before William died on October 22, 1995.

¶5 In his amended complaint, Mulligan alleged a single cause of action against Elma for negligent supervision.¹ Mulligan claimed that Elma failed to supervise Buss and negligently allowed the contractor to dump the shingles onto his car. Mulligan also alleged that during the time that the incidents occurred, Elma was insured under a homeowner's policy through American Family. Mulligan claimed that American Family failed to compensate him for the damage under the terms of the Michaels's homeowner's policy.

¶6 Elma and American Family moved to dismiss the amended complaint for failure to state a claim upon which relief may be granted, or, in the alternative, for summary judgment. The trial court first considered the motion to dismiss. Confining its analysis to the four corners of the amended complaint, the trial court concluded that the amended complaint failed to state a claim against Elma Michaels and American Family. The court noted that according to the

¹ In his original complaint Mulligan named Ronald A. Buss, d/b/a Buss Contractors, and S. Michaels (unknown first name), as defendants. S. Michaels was eventually dismissed and Mulligan filed an amended complaint naming Buss, Elma and William Michaels, and American Family as defendants. As noted, William died prior to the filing of the original complaint, and no attempt was made to serve his estate. Thus, as the trial court indicated in its oral decision, Elma and American Family were the only defendants.

allegations in the amended complaint, the only claim asserted by Mulligan against Elma was a claim for negligent supervision. The court asserted that while Wisconsin recognizes a cause of action for negligent supervision, it is predicated upon an employer-employee relationship. The court found that, even under the most liberal interpretation of the amended complaint, it was devoid of any allegations that an employer-employee relationship existed between Elma and Buss, thus precluding a claim for negligent supervision. The court then surmised that, because Buss was an independent contractor, the amended complaint failed to state a claim for negligent supervision, and the court then dismissed the complaint without prejudice.

¶7 Then, addressing the alternative argument offered by Elma Michaels and American Family, the trial court remarked further that there was “one other thing.” Stating that, “[t]here is also, in the alternative, summary judgment,” the trial court then addressed the remaining motion. Despite the fact that the trial court had already granted the motion to dismiss, the trial court also found that under no set of facts could Elma Michaels be found liable for the acts of an independent contractor. The court then granted summary judgment to Elma and dismissed the cause of action against her with prejudice.

II. ANALYSIS.

¶8 Mulligan raises one issue on appeal—whether the trial court erred by granting summary judgment in favor of Elma Michaels and her insurance company, dismissing the claim against them with prejudice. Mulligan argues that issues of material fact remain and the possibility of legal liability exists and, therefore, summary judgment was improper. Mulligan then raises several substantive arguments in an effort to support this assertion. However, this appeal

is properly decided on procedural grounds.² The record clearly indicates that the trial court granted the motion to dismiss before addressing the alternative argument regarding summary judgment. Mulligan has not appealed from the order granting the motion to dismiss; instead, he appeals from the subsequent order granting summary judgment in favor of Elma Michaels. Therefore, this appeal is not properly before us because this case has been properly dismissed and we do not decide extraneous disputes.

¶9 The record clearly indicates that the trial court dismissed the amended complaint before granting summary judgment.³ When the trial court dismissed the amended complaint for failure to state a claim, Mulligan's cause of action ended. Thus, the case was already in a dismissed posture when the trial

² Although neither party has raised this issue on appeal, we note that "[i]t is always the duty of this court in considering any appeal to resolve, even sua sponte, the initial question of whether the order involved on appeal is, in fact, appealable, because, of course, this goes to the very jurisdiction of the court on appeal." *Worthington v. Farmers Ins. Exch.*, 64 Wis. 2d 108, 109, 218 N.W.2d 373 (1974).

³ We note that even if the trial court had addressed the summary judgment motion first, a dismissal based on the complaint would have occurred. Under the summary judgment methodology a court must first consider the sufficiency of the complaint and if the complaint fails to state a claim the court's analysis ends and the motion is granted. See *Bauer v. Murphy*, 191 Wis. 2d 517, 527, 530 N.W.2d 1 (Ct. App. 1995). However, it is clear from the record that in determining the sufficiency of the amended complaint, the trial court was analyzing only the motion to dismiss, and not employing the summary judgment methodology.

court granted summary judgment in Elma's favor.⁴ Nevertheless, on appeal, Mulligan only challenges the trial court's grant of summary judgment.

¶10 We need not consider Mulligan's arguments because he fails to challenge the dispositive order. Mulligan does not challenge the trial court's order dismissing the amended complaint. Instead, Mulligan challenges the order granting summary judgment in favor of Elma Michaels. Because Mulligan does not challenge the trial court's dismissal of the amended complaint, we must conclude that the amended complaint was properly dismissed. *Cf. Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (assertions that are not disputed are deemed admitted). Therefore, we affirm the trial court's order granting Elma Michaels's and American Family's motion to dismiss for failure to state a claim, dismissing the complaint without prejudice. Further, we conclude that the trial court's subsequent grant of summary judgment in favor of Elma Michaels was superfluous.⁵

⁴ A dismissal for failure to state a claim and a grant of summary judgment are not complementary remedies. A motion to dismiss for failure to state a claim tests the legal sufficiency of the complaint. *See Vogel v. Liberty Mut. Ins. Co.*, 214 Wis. 2d 443, 447, 571 N.W.2d 704 (1997). To be legally sufficient, a complaint must set forth a claim for relief. *See id.* The motion to dismiss will be granted if it is clear that, based on the allegations in the complaint, the plaintiff cannot recover under any circumstances. *See id.* However, although a motion for summary judgment, as noted in note 2 *supra*, also tests the sufficiency of the complaint, it does not stop there. Summary judgment looks beyond the pleadings to determine whether the evidentiary material demonstrates a genuine issue of material fact. *See* WIS. STAT. § 802.08(2).

⁵ We note that our disposition of this appeal affirms the dismissal of Mulligan's amended complaint without prejudice. Thus, Mulligan retains the right to replead. We do not determine whether any subsequent pleadings will be able to overcome further motions to dismiss or motions for summary judgment, as such a determination would be premature.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE
809.23(1)(b)5.

