**COURT OF APPEALS**
**DECISION**
**DATED AND RELEASED**

June 29, 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**

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**No. 94-3107**

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

**JOHN P. TRACHTE,**

**Plaintiff-Appellant,**

**v.**

**ANDREW E. BARRER,**

**Defendant,**

**MERITER HOSPITAL, INC.,**

**Defendant-Respondent.**

APPEAL from a judgment of the circuit court for Dane County: MORIA G. KRUEGER, Judge. *Affirmed*.

Before Eich, C.J., Dykman and Sundby, JJ.

EICH, C.J. John Trachte appeals from a judgment dismissing his second amended complaint in this medical malpractice action for failure to state a claim on which relief may be granted.

The issues are: (1) whether the trial court's unappealed decision dismissing a substantially identical complaint against a separate defendant earlier in the case stands as the "law of the case" requiring dismissal of the amended complaint; (2) if not, whether the amended complaint states a claim upon which relief may be granted; and (3) whether the trial court erroneously exercised its discretion when it denied Trachte's motion to amend the complaint yet again.

We conclude that the court's earlier decision is the law of the case and requires dismissal of Trachte's second amended complaint.[1] Finally, we are satisfied that the trial court appropriately exercised its discretion in denying Trachte's motion to amend. We therefore affirm the judgment.

After being involved in an automobile accident in March 1989, Trachte began to see Dr. James Schuh, a clinical psychologist, "for psychological counseling." Schuh administered some tests and told Trachte he had suffered "a closed head injury." At some time (undisclosed in any of Trachte's complaints) Schuh referred him to Dr. Andrew Barrer, a member of the neuropsychology staff at Meriter Hospital, for further testing and treatment.

At some (undisclosed) time, Trachte sued his automobile insurer, seeking recovery under the "uninsured motorist" provisions of his liability policy. At some other (undisclosed) time, Barrer told Trachte he was suffering from a brain injury. At various points (none disclosed) during his lawsuit against his insurer, Trachte and his attorney "consulted" with Barrer "with respect to diagnosis and causation." At some unspecified time, described by Trachte as "[s]ubsequent to June 7, 1990," Barrer lost his license to practice medicine in Wisconsin when it was discovered that he had misrepresented his qualifications.

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[1] As we explain below, we believe the trial court properly dismissed the complaint on the merits.

During the litigation, Trachte's insurer retained a neuropsychologist who, after review of Trachte's previous testing, concluded that those tests "did not suggest that Trachte had sustained brain damage." Trachte was subsequently examined by several experts, each of whom concluded that "Trachte's complaints were consistent with a conversion-type disorder" and not a brain injury.

Trachte initially brought this action against Barrer and Meriter in June 1993. His complaint alleged the facts stated above relating to his treatment with Barrer, the events occurring in the course of his automobile-accident lawsuit and the loss of Barrer's license to practice. He stated four claims: one against Barrer for "intentional deceit"; one against Barrer and Meriter for "negligent misrepresentation"; one against Meriter alone for negligence in failing to investigate Barrer's credentials before permitting him to practice on the hospital staff; and one against Barrer for negligently telling him "that [his] cognitive defects were the result of a permanent brain injury." Each claim contained an identical statement of Trachte's claimed injury. In each, he stated that, as a result of either Barrer's fraud or negligence, Barrer's and Meriter's misrepresentations, or Meriter's negligence, he became a patient of Barrer's and "believed what Barrer told him about his condition, pursuing treatment and suffering emotionally as a result thereof, relied on Barrer to be an expert witness on his behalf in the uninsured motorist litigation, and was otherwise damaged all in an amount to be determined at trial."

Approximately two weeks later, Trachte served and filed an amended complaint, adding Dr. Schuh as a defendant for his claimed negligence in advising Trachte that his problem was related to a brain injury. The complaint restated *verbatim* both the factual and "damage" allegations of his prior complaint, as quoted above.

Schuh moved to dismiss the action against him for failure to state a claim on which relief may be granted. The trial court granted the motion, concluding that the allegations in the complaint stating that Schuh (and Barrer) negligently told him his problem was related to a brain injury and that, as a result, he believed what Schuh (and Barrer) told him, "suffering emotionally as a result thereof," and relying on their statements in his automobile-accident lawsuit, failed to state a claim. The court reasoned that the complaint, even liberally construed: (1) failed to give reasonable notice to Schuh as to the nature

of the claim against him; and (2) failed to allege "a physical injury which manifested the alleged mental anguish."

With the trial court's leave, Trachte again amended his complaint, retaining all of the original allegations and adding only a fifth claim against Barrer seeking double damages, punitive damages and attorney fees under the Wisconsin Organized Crime Control Act.

Meriter moved to dismiss Trachte's second amended complaint for failure to state a claim. While the motion was pending, Trachte moved to again amend his complaint to revise both the factual allegations and the damage allegations we have quoted above. The court denied the motion, noting that it came more than one year after the action was filed and that its stated purpose was to "cure any defects" the court might find in response to Meriter's dismissal motion. The court concluded, in essence, that "enough is enough."[2]

At the hearing on Meriter's dismissal motion, Trachte orally renewed his motion for leave to amend the second amended complaint. The court, repeating the reasoning of its earlier memorandum decision denying the motion, denied it again. Then, turning to Meriter's motion to dismiss, the court reiterated the points made in its earlier decision on Schuh's motion: (1) that the allegations--which, as indicated, have remained unchanged in all of Trachte's complaints--are insufficient as a matter of law to state a claim for negligence; and (2) in any event, there is nothing in the complaint to indicate a causal connection between Meriter's acts and any damage suffered by Trachte. The

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[2] The court, noting the unfairness involved in allowing Trachte, "without researching his own case," to request leave to amend only after the errors in his complaint have been pointed out to him by Meriter, stated:

> It would appear that after three efforts at filing a sufficient complaint, plaintiff should be held to his last attempt--especially when a motion has been premised and briefed on the expectation that the pleadings had finally solidified. Twice in plaintiff's motion for leave for this latest proposed amendment he, himself, says that the second amended complaint is adequate. Justice does not require refinement of a document its drafter already believes to be adequate.

court granted Meriter's motion and entered judgment dismissing Trachte's complaint against the hospital.

*I. Law of the Case*

Meriter argues first that Trachte is precluded from asserting his claims against Meriter because the trial court's ruling on the insufficiency of the allegations attempting to state a claim against Dr. Schuh--which are identical to those Trachte makes against Meriter--is the "law of the case."

The "law of the case" rule states that a "`decision on an issue of law made at one stage of a case becomes a binding precedent to be followed in successive stages of the same litigation.'" ***State v. Brady***, 130 Wis.2d 443, 447, 388 N.W.2d 151, 153 (1986) (quoted source omitted). Meriter also points out that Trachte never appealed Schuh's dismissal and refers us to ***Haase v. R&P Indus. Chimney Repair Co.***, 140 Wis.2d 187, 191, 409 N.W.2d 423, 426 (Ct. App. 1987), where we held that "[w]hen no appeal is taken ... all provisions of a judgment, and the findings and conclusions upon which it is based, are conclusive and binding upon all parties to the litigation."

***Haase*** was a personal injury action in which a paper company employee, while working with employees of a firm retained to clean a smokestack at the plant, was buried in hot fly ash that had been knocked loose inside the chimney through the activities of employees of another contractor engaged to repair the stack. He sued both the cleaning company and the repair company. The cleaning company sought dismissal from the action on grounds that its employees were not negligent as a matter of law, and the trial court granted the motion. ***Haase***, 140 Wis.2d at 190, 409 N.W.2d at 426. The case continued against the repair company, who requested that the cleaning company be included in the comparative negligence question. ***Id.*** at 191, 409 N.W.2d at 426. The trial court denied the motion and we affirmed, concluding that the summary judgment dismissing the plaintiff's claim against the cleaning company "was conclusive and binding upon [the repair company] at later stages of the action." ***Id***. at 193, 409 N.W.2d at 427.

Trachte does not respond to Meriter's argument that ***Haase*** is equally applicable here. Pointing to the supreme court's acknowledgement that we have the power to disregard the law-of-the-case rule "`in the interests of

justice,'" ***Brady***, 130 Wis.2d at 447, 388 N.W.2d at 153 (quoted source omitted), he argues that we should do so here because Meriter was not a party to Schuh's earlier motion, and because in addition to questions concerning the sufficiency of the complaint, this appeal "asks the question whether Trachte's first and only substantive attempt to state a claim should be dismissed ... without leave to amend."[3]

The fact that Meriter was "not a party" to Schuh's motion is immaterial in light of ***Haase***. And we note that Trachte *was* a party to the motion, and it is Trachte that Meriter seeks to bind by the earlier ruling. Further, we see no validity in Trachte's contention that justice requires us to re-examine the trial court's prior ruling on the sufficiency of his complaint because he is also claiming a misuse of discretion on the court's part for denying his motion to amend, for the latter question is one to be decided on this appeal.

We may, in our discretion, decline to apply the law-of-the-case rule "`whenever cogent, substantial, and proper reasons exist'" to warrant such action in the interests of justice. ***Brady***, 130 Wis.2d at 447, 388 N.W.2d at 153 (quoted source omitted). The reasons advanced by Trachte in support of his request that we ignore the law-of-the-case rule on this appeal do not meet that standard.[4]

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[3] We are unsure what Trachte means by his assertion that this is his "first and only substantive attempt to state a claim" against Meriter, for it comes not in his first or second--or even his third--pleading, but in connection with a request for leave to file a *fourth* complaint in this action.

[4] Trachte states in his reply brief--without citation to the record--that because he and Schuh had agreed not to litigate an appeal as to the court's decision dismissing Schuh from the case, it makes no sense to require him to appeal that decision in order for his action to survive against Meriter.

First, we do not consider arguments based on factual assertions unsupported by citations to the record. ***Dieck v. Unified Sch. Dist.***, 157 Wis.2d 134, 148 n.9, 458 N.W.2d 565, 571 (Ct. App. 1990), *aff'd*, 165 Wis.2d 458, 477 N.W.2d 613 (1991). Second, Trachte was granted leave by the trial court to amend his complaint after the decision to dismiss Schuh. Thus, all he would have had to do was to amend the allegations ruled insufficient by the court insofar as he wished them to apply to Meriter. He elected not to do so.

Under the circumstances of this case, where the trial court held that language in an earlier version of the complaint that was identical to that attempting to state a claim against Meriter in the present complaint was insufficient as a matter of law, we believe the law-of-the-case rule binds Trachte to that earlier decision.[5]

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[5] Even were we to consider the merits of the trial court's decision de novo, ***First Nat'l Bank v. Dickinson***, 103 Wis.2d 428, 442, 308 N.W.2d 910, 917 (Ct. App. 1981), construing the complaint liberally and with a view toward achieving substantial justice, ***Stefanovich v. Iowa Nat'l Mut. Ins. Co.***, 86 Wis.2d 161, 164, 271 N.W.2d 867, 868-69 (1978), and remaining mindful of the rule that dismissal is appropriate only where it appears that no relief can be granted under any set of facts a plaintiff might prove in support of his or her allegations, ***Morgan v. Pennsylvania Gen. Ins. Co.***, 87 Wis.2d 723, 732, 275 N.W.2d 660, 664 (1979), we would affirm.

In his claims against Meriter, Trachte alleges that he sought treatment with Dr. Schuh and another psychologist at Mental Health Associates for neuropsychological "complaints" following his automobile accident, and that he eventually sued an insurance company to recover damages for those complaints. And he alleges that, as a result of Meriter's conduct, he was "referred to Barrer, became a patient of Barrer, believed what Barrer told him about his condition, pursuing treatment and suffering emotionally as a result thereof ...." We agree with Meriter that the force of these allegations is that he is claiming damages from Meriter for emotional distress he suffered for being treated for the wrong condition but does not allege any facts from which to infer such emotional distress was separate from or an aggravation of his original emotional or psychological disorder.

A health care provider can be held liable for causing the aggravation of injuries to a patient that were initially caused by others, *see* ***Krenz v. Medical Protective Co.***, 57 Wis.2d 387, 394-401, 204 N.W.2d 663, 667-70 (1973), but it is liable only for the aggravation, not for the initial injury or damage. ***Butzow v. Wausau Memorial Hosp.***, 51 Wis.2d 281, 288, 187 N.W.2d 349, 352 (1971). And without additional facts, it is impossible to distinguish between the psychoneurological "complaints" for which Trachte originally sought treatment and any separate injury he claims was caused by Meriter.

A plaintiff alleging negligence must allege that actual loss or damage was caused by the defendant's conduct. ***Ziemann v. Village of N. Hudson***, 102 Wis.2d 705, 714, 307 N.W.2d 236, 241 (1981); ***Coffey v. City of Milwaukee***, 74 Wis.2d 526, 531, 247 N.W.2d 132, 135 (1976). And while Wisconsin adheres to a "notice-pleading" philosophy, a complaint still must state sufficient facts to give the defendant reasonable notice of the nature of the claim. ***Anderson v. Continental Ins. Co.***, 85 Wis.2d 675, 684, 271 N.W.2d 368, 373 (1978). Indeed, the supreme court has cautioned us that, while we are to construe complaints liberally in the face of a motion to dismiss, "`facts are not to be added in the process ....'" ***Wilson v. Continental Ins. Cos.***, 87 Wis.2d 310, 319, 274 N.W.2d 679, 684 (1979) (quoted

*II. Motion to Amend the Complaint*

Whether to allow a plaintiff to amend his or her complaint is committed to the trial court's discretion. ***Carl v. Spickler Enters., Ltd.***, 165 Wis.2d 611, 622, 478 N.W.2d 48, 52 (Ct. App. 1991). In ***Burkes v. Hales***, 165 Wis.2d 585, 590-91, 478 N.W.2d 37, 39 (Ct. App. 1991), we discussed at some length the scope of our review of a trial court's discretionary act:

> A court exercises discretion when it considers the facts of record and reasons its way to a rational, legally sound conclusion. It is "a process of reasoning" in which the facts and applicable law are considered in arriving at "a conclusion based on logic and founded on proper legal standards." Thus, to determine whether the trial court properly exercised its discretion in a particular matter, we look first to the court's on-the-record explanation of the reasons underlying its decision. And where the record shows that the court

(..continued)
source omitted).

And adding facts is just what we would have to do to sustain Trachte's complaint in this case, for it fails to notify Meriter how, if at all, it has injured him. He alleges that Meriter somehow caused him to rely on Barrer in his automobile lawsuit, but never indicates how he was damaged by that reliance. Moreover, he alleges he suffered "emotional" damage from being treated for the wrong condition, but fails to allege any facts showing that any distress he suffered aggravated or was separate from damage from, his original emotional problems.

Trachte is thus left with a claim for some undescribed "emotional" harm. It has long been the rule in Wisconsin that recovery may be had for emotional distress if manifested by some physical injury, *see* ***Ver Hagen v. Gibbons***, 47 Wis.2d 220, 227, 177 N.W.2d 83, 86 (1970), and the supreme court recently expanded the rule to permit recovery for negligent infliction of emotional distress without proof of physical injury in cases where the distress is "severe." ***Bowen v. Lumbermens Mut. Casualty Co.***, 183 Wis.2d 627, 653, 517 N.W.2d 432, 443 (1994). Distress is "severe" when it is something "far more than what typically would be considered mere emotional distress." ***Estate of Plautz v. Time Ins. Co.***, 189 Wis.2d 136, 152, 525 N.W.2d 342, 349 (Ct. App. 1994). There are no allegations in Trachte's complaint from which one could infer that the emotional suffering of which he complains was either severe or was manifested by a bodily injury. It fails to state a claim.

> looked to and considered the facts of the case and reasoned its way to a conclusion that is (a) one a reasonable judge could reach and (b) consistent with applicable law, we will affirm the decision even if it is not one with which we ourselves would agree.
>
> It need not be a lengthy process. While reasons must be stated, they need not be exhaustive. It is enough that they indicate to the reviewing court that the trial court "undert[ook] a reasonable inquiry and examination of the facts" and "the record shows ... a reasonable basis for the ... court's determination." Indeed, "[b]ecause the exercise of discretion is so essential to the trial court's functioning, we generally look for reasons to sustain discretionary decisions."

(Quoted sources and footnote omitted.)

We have referred to the trial court's statement of its reasons for denying Trachte's motion for leave to amend his complaint a third time. The court based its decision on the fact that more than one year had passed since the original complaint was filed and several months since the court had dismissed the identical claim against Schuh, that this would be Trachte's fourth attempt at stating a claim and that allowing him to do so under the circumstances of the case would be unfair to Meriter. The court emphasized that "at some point people must be allowed to rely on the pleadings having solidified." The court elaborated on these and other points in deciding the motion, explaining its reasoning in detail, and we cannot say that it reached an unreasonable result in denying Trachte's request to once again amend his complaint.

*By the Court*.--Judgment affirmed.

Not recommended for publication in the official reports.

**No. 94-3107(D)**

SUNDBY, J. (*dissenting*). I conclude that plaintiff's amended complaint states a claim upon which relief may be granted. I would reverse the judgment dismissing plaintiff's action and remand for further proceedings.

In March 1989, plaintiff John P. Trachte was involved in a motor vehicle accident. In April 1989, he began to treat with Mental Health Associates. Dr. James Schuh referred Trachte to Andrew Barrer for cognitive retraining and neuropsychological retesting. Barrer was employed by defendant Meriter Hospital, Inc. as a neuropsychologist. However, Barrer had obtained a license to practice psychology in Wisconsin by misrepresenting his degrees and qualifications. After Barrer's fraud was discovered, Trachte retained a psychiatrist who concluded that Trachte's complaints were consistent with a conversion-type disorder.

Trachte began this action against Barrer and Meriter. He filed an amended complaint approximately eleven days after the original complaint, adding Dr. Schuh as a defendant. It is this amended complaint that the trial court concluded did not state a claim. I disagree.

The trial court erroneously concluded that Trachte was required to allege with particularity how he was injured. The trial court stated: "The defendant is entitled to know what the injury is that is complained of and the notes and questions I have to myself[,] is the plaintiff contending that Meriter caused the conversion disorder or what is the injury that Meriter caused?"

Whether a complaint states a claim sufficient to survive a motion for judgment on the pleadings is a matter which we review without deference to the trial court. ***First Nat'l Bank v. Dickinson***, 103 Wis.2d 428, 433, 308 N.W.2d 910, 912 (Ct. App. 1981). A complaint is entitled to all reasonable inferences in its favor. ***Stefanovich v. Iowa Nat'l Mutual Ins. Co.***, 86 Wis.2d 161, 164, 271 N.W.2d 867, 868-69 (1978). "A claim should not be dismissed ... unless it appears *to a certainty that no relief can be granted under any set of facts that plaintiff can prove in support of his allegations.*" ***Morgan v. Pennsylvania General Ins. Co.***, 87 Wis.2d 723, 732, 275 N.W.2d 660, 664 (1979) (emphasis added). In reviewing a complaint to determine whether it states a claim, we look only to the facts alleged and not to any theory of recovery:

> It has long been basic to the pleading of a cause of action that a particular theory on which recovery may be based is not of great significance if the facts alleged or noticed are sufficient to state a cause of action or to assert a claim on which relief can be based.

***Austin v. Ford Motor Co.***, 86 Wis.2d 628, 645, 273 N.W.2d 233, 240 (1979).

The trial court also erred when it based its decision to dismiss Trachte's complaint upon the merits. The trial court stated:

> The difficulty is, as I think ... has been pointed out by Meriter, in two particular places. The causal connection between Meriter's conduct and plaintiff's injury doesn't appear to exist on the face of the complaint that I'm analyzing. There is also a failure to allege a separate or aggravated injury as a result of Meriter's alleged negligence. And there is also a failure to plead severe emotional distress which even under the ***Bowen*** case appears to be required.

As to Trachte's failure to allege "severe emotional distress," the court said:

> It's clear that it's not just momentary upset that the courts are interested in having litigated; that there has to be severe emotional distress and as regards the negligence, the negligent representation, I'm having trouble finding that the plaintiff has met the requirements for pleading.

The court further said:

> We don't know what the injury is. Not knowing what the injury is, it's very difficult to find any

> pleading meeting the causal connection requirement and again ... we're missing it on the negligent misrepresentation; we're missing severe emotional distress which is still required under the ***Bowen*** case.

Meriter argues that Trachte's amended complaint fails to notify Meriter how, if at all, it injured Trachte. Meriter also argues that Trachte has failed to allege any facts from which it may be inferred that his emotional suffering is separate from or an aggravation of a pre-existing emotional disorder.

Trachte's amended complaint alleges that, after his accident, he treated with Mental Health Associates who told him that his complaints were related to the accident and that he had suffered a closed-head injury. Dr. Schuh referred Trachte to Barrer for cognitive retraining and neuropsychological retesting. Trachte alleges that he commenced a lawsuit related to his accident and consulted with Barrer with respect to diagnosis and causation. He further alleges that Barrer reviewed Dr. Schuh's neuropsychological tests, administered additional tests and advised him that he had suffered a brain injury which was causing Trachte's cognitive deficits. He further alleges that his insurance carrier retained a neuropsychologist, Dr. Charles Cleeland, who reviewed the tests administered by Dr. Schuh and Barrer and formed an opinion that Trachte had not sustained brain damage. After the depositions of Dr. Schuh and Dr. Cleeland, Trachte retained another psychiatrist who examined him and opined that Trachte's complaints were consistent with a conversion-type disorder. He also consulted with a psychologist and neuropsychologist who also reviewed the neuropsychological tests and found them to be consistent with a conversion-type disorder. Trachte alleged that Dr. Schuh and Barrer had failed to diagnose his psychological condition and that he acted on the advice of Dr. Schuh and Barrer that he had a closed-head injury.

In his first claim (intentional deceit), Trachte alleges that Barrer's representation as to his credentials and qualifications was made by Barrer knowing that the representation was untrue or recklessly without caring whether it was true or false, and that Trachte acted upon the representation to his pecuniary damage. He further alleged:

> As a direct and proximate result of Barrer's fraud as set forth above, Trachte treated with Barrer, believed what Barrer told him about his condition, pursu[ed] treatment and suffer[ed] emotionally as a result thereof, relied on Barrer to be an expert witness on his behalf in the uninsured motorist litigation, and was otherwise damaged all in an amount to be determined at trial.

Trachte's second claim was for negligent misrepresentation. He alleged that Barrer and Meriter each represented that Barrer was a qualified clinical neuropsychologist and he relied on those representations to his damage. He further alleged:

> As a direct and proximate result of the negligent misrepresentations of ... Barrer and Meriter, Trachte ... became a patient of Barrer, believed what Barrer told him about his condition, pursu[ed] treatment and suffer[ed] emotionally as the result thereof, relied on Barrer to be an expert in his behalf in the uninsured motorist litigation, and was otherwise damaged in an amount to be specified at trial.

For his third claim (negligence), Trachte alleged that Meriter negligently failed to investigate Barrer's qualifications before permitting Barrer to practice at Meriter. He alleged:

> As a direct and proximate result of Meriter's negligence, Trachte was referred [to] Barrer, became a patient of Barrer, believed what Barrer told him about his condition, pursu[ed] treatment and suffer[ed] emotionally as the result thereof, relied on Barrer to be an expert in his behalf in the uninsured motorist litigation, and was otherwise damaged in an amount to be specified at trial.

For his fourth claim (negligence), Trachte alleged that Barrer and Dr. Schuh negligently and repeatedly told Trachte that his cognitive defects were the result of permanent brain injury. He further alleged:

> As a direct and proximate result of Barrer's and Schuh's negligence, Trachte believed what Barrer and Schuh told him about his condition, pursu[ed] treatment and suffer[ed] emotionally as a result thereof, relied on Barrer and, thereafter on Schuh, to be an expert in his behalf in the uninsured motorist litigation, and was otherwise damaged in an amount to be specified at trial.

Meriter argues that Trachte's amended complaint fails to notify it how, if at all, it injured Trachte. I disagree. The complaint alleges that Meriter was negligent in failing to investigate Barrer's qualifications before permitting him to practice on staff and that Trachte, relying on Barrer's credentials, became his patient and pursued treatment with him and suffered emotionally as a result thereof. Trachte also alleges that he relied on Barrer's diagnosis that his "cognitive defects" were a result of a permanent brain injury and that he relied on that diagnosis in the uninsured motorist litigation.

In his Prayer for Relief, Trachte demands judgment against the defendants, including Meriter, for compensatory damages, as well as punitive damages against Barrer. I conclude that the amended complaint states a claim against Meriter and Barrer.

It is true that Trachte's complaint could be more complete as to his specific items and causes of damage. However, Wisconsin has adopted notice pleading. Section 802.02(1), STATS., provides in part:

> A pleading or supplemental pleading that sets forth a claim for relief ... shall contain all of the following:
>
> (a) A *short and plain statement of the claim*, identifying the transaction or occurrence or series of transactions or occurrences out of which the claim arises and showing that the pleader is entitled to relief.

(Emphasis added.)

The Judicial Council Committee's Note, 1977, says as to this statute:

> Sub. (1) is amended to allow a pleading setting forth a claim for relief under the Rules of Civil Procedure to contain a *short and plain statement* of any series of transactions, occurrences or events under which a claim for relief arose. This modification will allow a pleader in a consumer protection or anti-trust case, for example, to plead a pattern of business transactions, occurrences or events leading to a claim of relief rather than having to specifically plead each and every transaction, occurrence or event when the complaint is based on a pattern or course of business conduct involving either a substantial span of time or multiple and continuous transactions and events....

(Emphasis added.)

I have no difficulty understanding Trachte's claim against Meriter from a reading of his complaint. We know that Trachte was injured and consulted doctors who referred him to Barrer, who was on the staff of Meriter Hospital. Trachte's complaint also informs us that Barrer was not qualified to provide Trachte with the diagnosis and treatment he gave him, and that Meriter was negligent in not investigating Barrer's qualifications to determine whether he had the expertise to treat Trachte. We also learn from the complaint that Trachte suffered emotional damages and compensatory damages in conducting his lawsuit against his uninsured motorist carrier because he relied on Barrer's diagnosis. He asks for punitive damages against Barrer.

Notice pleading expects that if the defendant wishes more information in order to plead, the defendant may move the court for a more definite statement of plaintiff's claim. Section 802.06(5), STATS., provides in part:

> If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading. The motion shall point out the defects complained of and the details desired....

In ***Hertlein v. Huchthausen***, 133 Wis.2d 67, 72, 393 N.W.2d 299, 301 (Ct. App. 1986), the court said: "Other functions served by pleadings under former laws, such as stating the facts and defining the issues, have been shifted to discovery and pretrial motion practice." (Citing Charles D. Clausen & David P. Lowe, *The New Wisconsin Rules of Civil Procedure: Chapters 801-803*, 59 MARQ. L. REV. 1, 38 (1976)).

Meriter further argues that Trachte's arguments about the sufficiency of his claims against Meriter are barred by the law-of-the-case doctrine. Meriter points to the fact that Trachte's "substantially identical" claims against Dr. Schuh were dismissed by the trial court as legally insufficient. Meriter's argument in this respect is clearly frivolous. Trachte's claim against Meriter is based primarily on its negligence in failing to investigate Barrer's qualifications. Dr. Schuh had no responsibility to determine whether Barrer was qualified. Further, Trachte stipulated to dismissing Dr. Schuh, who had died prior to this action.

Our decision presents a party who has filed a complaint with a dilemma: What should the party do when met with a motion to dismiss a complaint for failure to state a claim when that defect can be remedied by amendment? In this trial court, counsel would be well-advised to fight it out on the complaint as filed rather than attempt to meet defendant's concerns. The trial court ruled: "Justice does not require refinement of a document its drafter already believes to be adequate." The trial court also said:

I have particular difficulty when in the middle of briefing and decision on a motion challenging the existing proceedings, the plaintiff runs in and says, well, now that I see the law as presented by the defendant, I'm going to make my pleadings try to conform to that

> law. I do believe that there is an obligation and I do believe there is case law that counsel know the law and try to meet the law as best as the facts will allow in terms of filing the original pleading.

I conclude that a plaintiff's attorney who is met with a motion to dismiss on the pleadings should attempt to amend the pleadings to satisfy any objections of the defendants or the trial court so as to limit the issues involved on an appeal. A defendant who believes that a plaintiff has filed a frivolous pleading may file a motion for sanctions under § 802.05, STATS. The objective of the parties and the trial court should be to litigate any claim having merit if possible.

Meriter argues that Trachte's amended complaint is insufficient because it does not allege causation and damages. Trachte's complaint alleges how Meriter was negligent, how that negligence injured him and that he was damaged thereby. Whether Meriter's acts caused his damages is a matter to be decided by the factfinder. Likewise, whether those acts damaged Trachte is an issue for the factfinder.

In view of our decision, we need not decide whether the trial court erroneously exercised its discretion when it denied Trachte's motion to amend its complaint.