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**DISTRICT II**

September 1, 2021

To:

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Circuit Court Judge  
Electronic Notice

Jeffrey L. Leavell  
Electronic Notice

Rebecca Matoska-Mentink  
Clerk of Circuit Court  
Kenosha County  
Electronic Notice

John V. O'Connor  
Electronic Notice

You are hereby notified that the Court has entered the following opinion and order:

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2021AP277-FT

Julie A. Nelson v. Badger Mutual Insurance Company  
(L.C. #2019CV1485)

Before Brash, C.J., Gundrum, P.J., and Reilly, J.

**Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).**

Julie A. Nelson appeals from an order of the circuit court granting Badger Mutual Insurance Company's (Badger Mutual) motion to dismiss Nelson's amended complaint for failure to state a claim upon which relief may be granted. Nelson argues that Badger Mutual acted in bad faith and breached its fiduciary duty of good faith and fair dealing. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for

summary disposition. *See* WIS. STAT. RULE 809.21 (2019-20).<sup>1</sup> We conclude that Nelson’s complaint does state a claim for bad faith against Badger Mutual, and, accordingly, we summarily reverse and remand for further proceedings consistent with this decision.

Nelson was severely injured in a motor vehicle accident caused by John Majerick’s negligence. Majerick was insured by Erie Insurance Company (Erie) under a policy with liability limits of \$100,000; Nelson was insured by Badger Mutual under a policy that included underinsured motorist (UIM) coverage. When negotiations failed, Nelson filed a personal injury suit against Majerick and Erie and named Badger Mutual as an involuntary plaintiff for its subrogated interest, as it had made payments under its medical payments coverage.<sup>2</sup> Badger Mutual sought to intervene as a defendant in the lawsuit and filed a complaint for declaratory judgment in the case, seeking a determination of the amount of Nelson’s damages. Nelson claims Badger Mutual did so to “gain a tactical advantage” as it “recogniz[ed] it could lessen or eliminate its obligation to pay Nelson UIM benefits by aligning itself with Erie in opposition to Nelson’s liability claim.” Over Nelson’s objection, the circuit court allowed Badger Mutual to intervene.

Nelson settled her case against Majerick and Erie—the latter of which paid its full policy limit—and they were dismissed from the suit. Nelson and Badger Mutual subsequently settled her UIM claim for \$40,000, with Nelson reserving her claim for bad faith as part of the settlement.

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2019-20 version.

<sup>2</sup> Nelson and Badger Mutual stipulated to dismissal of that subrogated claim.

Nelson then filed the suit at issue in this appeal, alleging bad faith against Badger Mutual. Badger Mutual moved to dismiss, and the circuit court granted the motion without prejudice. Nelson filed an amended complaint. In it, she alleged that (1) Badger Mutual refused to negotiate Nelson’s UIM claim prior to Erie’s payment of its policy limits; (2) “Badger Mutual intervened in the liability lawsuit for the express purpose of attempting to prevent Nelson from receiving UIM benefits or to minimize the UIM benefits it would be required to pay”; (3) “Badger Mutual took legal positions and actions intended to compromise Nelson’s tort claim against Majerick and Erie”; (4) Badger Mutual aligned itself with Majerick and Erie to “gain a significant tactical advantage that would either eliminate or lessen the benefits that it would have to pay its insured for underinsured motorist benefits”; (5) Badger Mutual’s “successful attempt to join the tort action greatly delayed” Erie’s payment of its limits, which forced Nelson to “incur significant unnecessary litigation expenses” and forced Nelson to settle her UIM claim against “Badger Mutual for much less than it was actually worth”; and (6) Badger Mutual sought to intentionally sabotage Nelson’s claim for UIM benefits.

Badger Mutual responded with a second motion to dismiss. The circuit court again granted Badger Mutual’s motion—this time with prejudice—concluding that the amended complaint “merely alleges that the defendant took advantage of the legal machinations available to it. And while the defendant could have acted differently, perhaps should have acted differently, they were under no obligation to do so.”<sup>3</sup> Nelson appeals.

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<sup>3</sup> Nelson also filed a motion for reconsideration, which was ostensibly denied when the circuit court entered the written order granting Badger Mutual’s motion to dismiss.

Nelson's position is straightforward: Badger Mutual breached its fiduciary duty of good faith and fair dealing when it intervened in the liability lawsuit for the purpose of aligning its interests with Erie so as to limit its exposure. Nelson argues that the facts she pled, if true, establish bad faith on the part of Badger Mutual. Badger Mutual counters that no bad faith claim exists as a matter of law until Erie paid its policy limit, and after that occurred, Badger did not deny Nelson's UIM claim.

We conclude that dismissal of Nelson's claim at the pleadings stage was erroneous. Accepting the factual assertions in the amended complaint as true, Nelson states a viable claim for bad faith against Badger Mutual. "A motion to dismiss for failure to state a claim tests the legal sufficiency of the complaint." *Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶19, 356 Wis. 2d 665, 849 N.W.2d 693 (citation omitted). To survive a motion to dismiss for failure to state a claim, "a complaint must plead facts, which if true, would entitle the plaintiff to relief." *Id.*, ¶21; *see also* WIS. STAT. § 802.02(1). "When we review a motion to dismiss, factual allegations in the complaint are accepted as true for purposes of our review," but "legal conclusions asserted in a complaint are not accepted, and legal conclusions are insufficient to withstand a motion to dismiss." *Data Key*, 356 Wis. 2d 665, ¶18. "The reviewing court must construe the facts set forth in the complaint and all reasonable inferences that may be drawn from those facts in favor of stating a claim." *Northridge Co. v. W.R. Grace & Co.*, 162 Wis. 2d 918, 923-24, 471 N.W.2d 179 (1991). We review a circuit court's decision on a motion to dismiss for failure to state a claim de novo. *Data Key*, 356 Wis. 2d 665, ¶17.

"[E]very insurance contract from its inception has an implied covenant of good faith and fair dealing between the insured and the insurer." *Danner v. Auto-Owners Ins.*, 2001 WI 90, ¶54, 245 Wis. 2d 49, 629 N.W.2d 159. "When this duty of good faith and fair dealing is

breached, and the insured incurs damages as a result of that breach, a claim for bad faith will lie.” *Id.* “[A]n insurer has a ‘special “fiduciary” relationship’ to its insured.” *Id.*, ¶49 (citation omitted). “Having paid a premium for this first-party coverage, an insured has a right to be protected from acts of bad faith by the insurer prior to a final determination that he or she is legally entitled to payment under the insurance contract,” meaning that the duty of good faith and fair dealing exists at all points during the existence of the policy and not just when a cognizable claim exists. *Id.*, ¶51.

The purpose behind providing a bad faith cause of action to an insured is to “protect against the risk that an insurance company may place its own interests above those of the insured and that the recovery available to the insured for breach of contract would not fully compensate the insured for the resulting harms.”

*Brethorst v. Allstate Prop. & Cas. Ins. Co.*, 2011 WI 41, ¶35, 334 Wis. 2d 23, 798 N.W.2d 467 (citation omitted).

We agree with Nelson that her bad faith claim was not ripe for dismissal at the pleadings stage. *Danner* clearly provides a claim for bad faith against an insurance carrier under similar circumstances—where a breach of the duty of good faith and fair dealing could “arise in the investigation, evaluation and processing of a claim”—and, like Badger Mutual in this case, the UIM insurer in *Danner* argued that it could not commit bad faith until there was a cognizable claim and a legal obligation to pay, which the court rejected. *Danner*, 245 Wis. 2d 49, ¶¶50-55. (citation omitted). Further, the court in *Brethorst* identified “types of bad faith claims that had previously been recognized,” but explained that the “categories were not exhaustive of bad faith claims that may be brought in Wisconsin” and that “[w]here a new fact pattern is presented, the court must look to the principles of the tort of bad faith to determine whether the claim is proper.” *Brethorst*, 334 Wis. 2d 23, ¶¶34-35.

Under the circumstances, accepting Nelson’s factual assertions in the complaint as true, there is a viable claim at this stage. While Nelson’s claim might not survive summary judgment, it does survive the pleadings stage. By intervening as a defendant in the third-party action, a question is raised as to whether Badger Mutual did so in bad faith in order to limit its obligation to Nelson. Nelson’s allegations, if proven, could establish that Badger Mutual breached its duty of good faith and fair dealing, and, if damages resulted, could establish that Badger Mutual acted in bad faith.

IT IS ORDERED that the order of the circuit court is summarily reversed and the cause remanded for further proceedings, pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

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*Sheila T. Reiff*  
*Clerk of Court of Appeals*