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**DISTRICT II**

June 15, 2022

To:

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

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2021AP831

Maria Fenske, D.C. v. ProHealth Chiropractic Center, S.C.  
(L.C. #2020CV270)

Before Gundrum, P.J., Grogan and Kornblum, JJ.

**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).**

ProHealth Chiropractic Center, S.C. and Eric Stanenas, D.C. (collectively, "ProHealth") appeal an order granting West Bend Mutual Insurance Company's ("West Bend") and Germantown Mutual Insurance Company's ("Germantown") motions for summary judgment in this insurance coverage dispute. ProHealth argues the allegations in the underlying lawsuit against it can arguably be construed as establishing an employment relationship between it and the plaintiff, thereby triggering West Bend's and Germantown's duties to defend and indemnify

ProHealth against the claims. 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 affirm.

Maria Fenske, an experienced chiropractor, filed suit against ProHealth, alleging that after she had brought her practice to ProHealth in 2015, a medical issue arose and her affiliation with ProHealth was subsequently terminated. Essentially, Fenske alleged that ProHealth had unilaterally reduced her compensation, began directing her patients to other service providers, wrongfully retained her patient files and other personal property, and exploited those materials to convert her patients to ProHealth after her termination. Her complaint advanced legal claims for theft, conversion, unjust enrichment, promissory estoppel, and interference with her contractual relationships with her patients.

During the relevant time period, ProHealth had in force a Commercial Lines Package policy issued by West Bend. Additionally, Germantown had issued two Business Owners policies to ProHealth. The circuit court granted West Bend's and Germantown's motions to bifurcate the insurance coverage issues from the merits and stay further proceedings on liability pending resolution of the coverage dispute.

West Bend and Germantown then filed motions for summary judgment, asserting they had no duty to defend and indemnify ProHealth against Fenske's claims because, *inter alia*, the allegations of the complaint established that Fenske was an independent contractor and not an

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

employee. The circuit court agreed, granted summary judgment as to West Bend and Germantown, and dismissed them from the lawsuit.

The issue in this appeal is whether West Bend and Germantown had a duty to defend and indemnify ProHealth against Fenske’s lawsuit. ProHealth argues the circuit court incorrectly concluded there is no such duty as to the Employment Practices Liability Endorsement (“EPL”) in both West Bend’s and Germantown’s policies.<sup>2</sup> Coverage under the relevant policies turns on whether Fenske was an “employee” as defined by the policies, which definitions specifically exclude independent contractors.

We independently determine both the interpretation of an insurance policy and whether the circuit court properly granted summary judgment. *Water Well Sols. Serv. Grp., Inc. v. Consol. Ins. Co.*, 2016 WI 54, ¶¶11-12, 369 Wis. 2d 607, 881 N.W.2d 285. An insurer’s duty to defend its insured against a particular claim is determined by comparing the four corners of the underlying complaint to the terms of the insurance policy. *Id.*, ¶15. We will liberally construe the allegations contained in the underlying complaint, assume all reasonable inferences from the allegations made in the complaint, and resolve any ambiguity in the policy terms in favor of the insured. *Id.*

Here, the complaint explicitly references Fenske as an independent contractor. Specifically, the complaint alleges that

Dr. Stanenas asked Dr. Fenske to join him as an independent contractor and told Dr. Fenske he would (1) take care of the

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<sup>2</sup> ProHealth’s brief does not address coverage under any other policy provisions; therefore, we confine our analysis to the EPL in the relevant policies.

business side of the practice, (2) pay her a percentage of her patient billings, and (3) keep the remainder of the money received for the treatment of Dr. Fenske’s patients.

And though ProHealth is correct that the parties’ identification of an independent contractor relationship in a contractual setting is generally not dispositive, *see Kerl v. Dennis Rasmussen, Inc.*, 2004 WI 86, ¶24, 273 Wis. 2d 106, 682 N.W.2d 328, the complaint’s other descriptions of the contractual relationship here—e.g., “move her practice,” “her patients,” and “affiliated with [ProHealth],”—suggest no arrangement other than that of an independent contractor.<sup>3</sup> Accordingly, the circuit court correctly concluded that West Bend and Germantown had no duty to defend ProHealth.

Therefore,

IT IS ORDERED that the order of the circuit court is summarily affirmed. *See* 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*

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<sup>3</sup> We need not address ProHealth’s subsidiary arguments that coverage was appropriate under the relevant policies—both as a matter of the policy language and based upon the expectations of a reasonable insured—if the complaint arguably suggested Fenske could be categorized as an employee. *See Barrows v. American Family Ins. Co.*, 2014 WI App 11, ¶9, 352 Wis. 2d 436, 842 N.W.2d 508.

