COURT OF APPEALS
DECISION
DATED AND FILED

May 30, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2017AP1007 **Cir. Ct. No. 2016CV475**

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

THOMAS ESSER AND KAREN ESSER,

PLAINTIFFS-APPELLANTS,

V.

HAWKEYE-SECURITY INSURANCE COMPANY, PEERLESS INDEMNITY INSURANCE COMPANY, INDIANA INSURANCE COMPANY AND SAFECO INSURANCE COMPANY OF AMERICA,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Ozaukee County: SANDY A. WILLIAMS, Judge. *Conditionally reversed and cause remanded with directions.*

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

¶1 GUNDRUM, J. Thomas and Karen Esser appeal from a final order of the circuit court dismissing with prejudice their complaint against the Hawkeye-Security Insurance Company, Peerless Indemnity Insurance Company, Indiana Insurance Company and Safeco Insurance Company of America[1] on the grounds that it failed to state a claim upon which relief may be granted and/or was barred by the applicable statute of limitations. The Essers assert the court erred in ordering the complaint dismissed in the first instance and further erred when it denied their motion for leave to amend the complaint, which motion they made at the hearing on the Insurers' motion to dismiss. We conclude the court properly determined that, as written, the Essers' complaint fails to state a claim upon which relief may be granted and/or the claims were untimely filed. We also conclude, however, that the court erred in denying the Essers' motion for leave to amend their complaint because, at the time they made their motion, six months had not yet passed since they filed the complaint and they still had the right to amend it once as a matter of course.

Background

¶2 According to the complaint, in May 2008, the Essers suffered a significant fire loss that caused them to move out of their home. In February 2009, while repairs to the home were being made, a heating plant failed, causing water damage to the home and its contents. In 2008, 2009 and 2012, the Essers received "payments toward the loss to the home," but, "not [their] personal

[1] The respondent insurance companies all played a role in either insuring the Essers' home during the relevant time period or adjusting the insurance claims or both. Although particular facts may relate to an individual insurer and not others, for ease of reading, we will refer to them collectively as "the Insurers."

property," with the exception of payment for a piano. The Insurers continually investigated the losses, updating their "replacement cost 'estimate' on the home."

¶3 In October 2011, the Essers provided the Insurers with "a final detailed report and the supporting documentation establishing" a loss to the home of "more than $1,366,000, without certain fixtures and trim." The Insurers responded "that [their] $643,000 [replacement cost estimate on the home] was correct" and the difference between the two numbers was due to "uninsured 'owner upgrades.'"

¶4 In 2013, the Essers and the Insurers "agreed to participate in a formal appraisal process," and on December 27, 2013, the appraisal panel "determine[d] the replacement value of the [Essers'] home, the value of appraised personal property items, and the value of [the Essers'] loss of use of the home under the Policy." The Insurers paid the balances remaining on the Essers' claims "[s]everal weeks" after the appraisal decision.

¶5 The Essers filed this action on December 23, 2016, alleging that through the manner in which they handled the Essers' claims, the Insurers breached the insurance policy, acted in bad faith, and violated WIS. STAT. § 628.46 (2015-16),[2] which requires prompt payment of claims. The Essers seek various forms of recovery, including statutory interest under § 628.46 and punitive damages.

[2] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

¶6 The Insurers filed a motion to dismiss in February 2017, asserting the complaint failed to state a claim upon which relief may be granted and was barred by the statute of limitations. At an April 3, 2017 hearing on the motion, the circuit court ordered that the complaint be dismissed on both grounds. The Essers immediately indicated that they "assum[ed]" the dismissal was "without prejudice" and then moved the court for leave to amend the complaint. The Insurers argued that the dismissal should be "with prejudice." The court did not address the Essers' motion directly but ordered that the dismissal be "with prejudice." The Essers appeal.

Discussion

¶7 The Essers assert their complaint was sufficiently pled and timely filed, and thus the circuit court erred in dismissing it. They further contend that even if the court did not so err, it erred by denying their motion to amend the complaint. We conclude the court correctly determined the complaint as written failed to state a claim upon which relief may be granted and/or was untimely but erred in denying the Essers' motion for leave to file an amended complaint.

Failure to State a Claim Upon Which Relief May be Granted

¶8 Whether a complaint states a claim upon which relief may be granted is a question of law we review de novo. ***Data Key Partners v. Permira Advisers LLC***, 2014 WI 86, ¶17, 356 Wis. 2d 665, 849 N.W.2d 693. In reviewing the dismissal of a complaint, we accept as true all factual allegations in the complaint and all reasonable inferences therefrom. ***Id.***, ¶19.

Breach of Contract

¶9 The Essers insist their complaint alleges "sufficient facts to establish a breach of contract." Though they did not identify any specific insurance policy provisions in their complaint, the Essers have argued, at the hearing before the circuit court and again on appeal, the Insurers breached the following two provisions of the policy:

> **Loss Payment**. We will adjust all losses with you.… Loss will be payable 30 days after we receive your proof of loss *and*:
>
> **a**. Reach an agreement with you;
>
> **b.** There is an entry of a final judgment; or
>
> **c.** There is a filing of an appraisal award with us.

and

> **Loss Settlement**. Covered property losses are settled as follows:
>
> ….
>
> **b.** Buildings under Coverage A and B are replacement cost without deduction for depreciation, subject to the following:
>
> **(1)** If, at the time of the loss, the amount of insurance in this policy on the damaged building is 90% or more of the full replacement cost of the building immediately before the loss, we will pay the cost to repair or replace, after application of deductible and without deduction for depreciation, but not more than the least of the following amounts:
>
> ….
>
> **(c)** *The necessary amount actually spent to repair or replace the damaged building*. (Italics added.)

¶10 As to the "Loss Payment" provision, the factual allegations of the complaint do not allege that there was "an entry of final judgment" and can only be read as alleging that the Insurers did *not* "[r]each an agreement" with the Essers regarding the May 2008 and February 2009 losses. While the complaint does state that an appraisal award was filed on December 27, 2013, it never suggests the award was not paid within thirty days but affirmatively confirms that it was paid "[s]everal weeks after the appraisal decision."

¶11 The Essers complain, however, that "the Insurers failed to pay for items that were not included in the appraisal process." They point to paragraphs sixty and sixty-one of the complaint as demonstrating the Insurers' breach of the "Loss Payment" and "Loss Settlement" provisions. Those paragraphs state:

> 60. Indiana Insurance has not paid the remainder of the loss due under the Policy, including the additional finishes and fixtures required to complete the home and items of personal property that were not included in the appraisal process.
>
> 61. Indiana Insurance has failed to return or account for certain property that the Insurer and its agents removed from the home after the loss, including the high-value items of personal property such as jewelry, artwork, coins, brand-new high-end fashion merchandise, or the Baccarat fixtures worth $30,000.

¶12 The Essers contend these and other paragraphs of the complaint sufficiently allege the Insurers breached the "Loss Payment" language stating the Insurers would "adjust all losses" with them. The Essers insist the "adjust all losses" language "imposed upon the Insurers, at a minimum, an affirmative duty to do *something* to resolve the Essers' claims."

¶13 We first note the definition of "adjust" in Black's Law Dictionary: "To determine the amount that an insurer will pay an insured to cover a loss."

Adjust, BLACK'S LAW DICTIONARY (10th ed. 2014). Thus, the policy language "[w]e will adjust all losses with you" merely means the Insurers would make a determination as to how much they would pay the Essers; it does not mean the Insurers were obliged to pay whatever amount the Essers demanded. As to "do[ing] *something*," we observe that the complaint is replete with statements that the Insurers "[did] something," including meeting and otherwise communicating with the Essers on numerous occasions, continually investigating the losses, determining the amount to which the Insurers believed the Essers were entitled, and paying them various amounts throughout the process. According to the complaint, this all culminated in the Insurers paying the Essers "the unpaid balance of the replacement cost of the home (without certain finishes and fixtures), the unpaid balance of the items of personal property that had been appraised, and the unpaid balance for plaintiffs' loss of use of their home" within weeks of the filing of the appraisal award. And as to items for which the Insurers declined to pay the Essers, the complaint indicates the Insurers were made aware of such items and determined the Essers were not entitled under the policy to payment they sought. Under no reading of the complaint could one conclude the Insurers did not "adjust all losses" with the Essers.

¶14 The Essers also assert the Insurers "violat[ed] the plain language" of the "Loss Payment" provision by "fail[ing] to make partial payments for the Essers' losses within 30 days even after being provided with the requested proof for several portions of the claim." The Essers, however, are reading only a portion of the "plain language" of that provision. The relevant portions state that "[l]oss will be payable 30 days after we receive your proof of loss *and*: **a.** Reach an agreement with you; **b.** There is an entry of a final judgment; or **c.** There is a filing of an appraisal award with us." (Italics added.) Thus, under this provision, the

Insurers had no obligation to pay the Essers within thirty days of the Essers merely supplying them with proof of loss but within thirty days of that *and* either the Insurers and Essers reaching an agreement, entry of a final judgment, or the filing of an appraisal award. None of the paragraphs of the complaint identify any "agreement" reached with the Insurers or a "final judgment" that would have triggered this thirty-day payment requirement, and there is no allegation that the Insurers failed to timely pay the appraisal award amount. The complaint fails to sufficiently allege a breach of the "Loss Payment" provision.

¶15 With regard to the "Loss Settlement" provision, the Essers fail to sufficiently develop an argument as to how the complaint alleges a breach of that provision. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (We need not consider undeveloped arguments.). Furthermore, by its plain terms this provision relates only to repairing/replacing the damaged "building." Thus, this provision appears to have no application with regard to the Essers' complaint allegations that the Insurers failed to properly pay for personal property items. Additionally, we agree with the Insurers and the circuit court that under the circumstances identified by the Essers' complaint, items for which the Essers seek payment should have been included in the appraisal process.

¶16 The "Appraisal" provision of the policy provides:

> If you and we fail to agree on the amount of loss, either may demand an appraisal of the loss. In this event, each party will choose a competent appraiser within 20 days after receiving a written request from the other. The two appraisers will choose an umpire. If they cannot agree upon an umpire within 15 days, you or we may request that the choice be made by a judge of a court of record in the state where the "residence premises" is located. The appraisers will separately set the amount of loss…. If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will set the amount of loss.

> Each party will:
>
> **a.** Pay its own appraiser; and
>
> **b.** Bear the other expenses of the appraisal and umpire equally.

¶17 According to the complaint, the Essers and Insurers spent years going back and forth as to the amount the Insurers owed the Essers for the May 2008 and February 2009 losses, with the Insurers making various payments to the Essers along the way. Finally, in 2013, the Essers and Insurers "agreed to participate in a formal appraisal process." That process played out over several months, eventually culminating in a determination by the appraisal panel that the Essers' loss totaled approximately $2.7 million. Within weeks of this determination, the Insurers paid the Essers the unpaid balance. It is the Essers' position now that, despite the appraisal process they engaged in and the award paid by the Insurers, they are entitled to additional amounts for items they chose not to present to the appraisal panel for consideration.

¶18 In ***Farmers Automobile Insurance Ass'n v. Union Pacific Railway Co.***, 2009 WI 73, 319 Wis. 2d 52, 768 N.W.2d 596, our supreme court noted that appraisals are "favored and encouraged" in part because they "promote finality" and are "time and cost-efficient." ***Id.***, ¶43. The court repeated that the purpose of the binding appraisal process "is to help litigants resolve their disputes relatively quickly and inexpensively." ***Id.***, ¶45 n.17. The ***Farmers*** court frowned upon approaches that "would defeat this purpose by expanding and protracting expensive and stressful litigation—the exact opposite purpose such clauses were intended to have." ***Id.*** Here, the Essers suggest the appraisal clause should be interpreted in a manner that would allow the invocation of the appraisal process multiple times. Such an interpretation would defeat the purpose of appraisal

clauses as lack of finality and increased time, expense and stress would result. *See also* ***Farmers Auto. Ins. Ass'n v. Union Pac. Ry. Co.***, 2008 WI App 116, ¶15, 313 Wis. 2d 93, 756 N.W.2d 461 (agreeing with the circuit court in that case that "[t]he appraisal process is a means of alternate dispute resolution. It is designed to effectively and cost efficiently resolve disputes over the amount of an insured's loss.… It is less formal than a court proceeding, yet it is designed to give finality."), *aff'd*, 2009 WI 73, 319 Wis. 2d 52, 768 N.W.2d 596.

¶19 A reasonable insured would not read the appraisal provision as the Essers do—essentially that it allows them to unilaterally reinvoke the appraisal process for every piece of furniture, chandelier, piece of crown molding, etc. The appraisal process is detailed and formalistic and, as laid out in the policy, would result in significant expense to the parties when invoked. Additionally, the policy's "Loss Payment" provision places the "filing of an appraisal award" on par with "entry of a final judgment." A reasonable insured would read the appraisal provision more comprehensively, as the Insurers do—that the appraisal process is the final determination of the "amount of loss" from the May 2008 and February 2009 losses. *See* ***Wisconsin Pharmacal Co. v. Nebraska Cultures of Cal., Inc.***, 2016 WI 14, ¶20, 367 Wis. 2d 221, 876 N.W.2d 72 ("We interpret insurance policies from the perspective of a reasonable insured."). The Essers' position strikes us as it did the circuit court—as little more than "the [Essers] saying we want additional amounts" and "trying to rewrite that policy."

¶20 We see no support—either in the insurance contract, case law or common sense—for the Essers' suggestion that they could unilaterally decide, i.e., without agreement with the Insurers, to exclude individual items from the amount

of loss determination of the appraisal process,[3] accept the award paid by the Insurers, and then seek additional recovery for the May 2008 and February 2009 losses based on items they chose not to include in the appraisal process.

¶21 For the foregoing reasons, we agree with the circuit court that the complaint fails to sufficiently state a claim for breach of contract.

Bad Faith

¶22 The Essers acknowledge the general rule of ***Brethorst v. Allstate Property & Casualty Insurance Co.***, 2011 WI 41, ¶65, 334 Wis. 2d 23, 798 N.W.2d 467, that "some breach of contract by an insurer is a fundamental prerequisite for a first-party bad faith claim against the insurer by the insured." As we have already determined, however, the circuit court did not err in concluding the complaint fails to sufficiently allege a breach of contract. As a result, the Essers' bad faith claim fails as well.

Timeliness

¶23 The circuit court also concluded that the Essers' breach of contract claim and claim that the Insurers violated WIS. STAT. § 628.46,[4] allowing for the

[3] We note that the allegations of the complaint do not allow for any reasonable inference that the Essers and the Insurers agreed to address certain items of dispute outside of the appraisal process.

[4] WISCONSIN STAT. § 628.46(1) provides:

(continued)

recovery of statutory interest, are barred by the relevant statute of limitations. We agree and further conclude that the policy's Limitation of Action clause also bars these claims.

¶24 Whether a claim is barred by a statute of limitations is a matter of law we review de novo, ***Cianciola, LLP v. Milwaukee Metro. Sewerage Dist.***, 2011 WI App 35, ¶19, 331 Wis. 2d 740, 796 N.W.2d 806, as is the application of insurance policy language to undisputed facts, ***Zarnstorff v. Neenah Creek Custom Trucking***, 2010 WI App 147, ¶15, 330 Wis. 2d 174, 792 N.W.2d 594.

¶25 WISCONSIN STAT. § 631.83(1)(a) provides: "An action on a fire insurance policy must be commenced within 12 months after the inception of the loss." Furthermore, the insurance policy in this case provides: "**Suit Against Us**. No action can be brought unless the policy provisions have been complied with and the action is started within one year after the date of loss."

¶26 The Essers do not dispute that the "date of loss" and "inception of the loss" was in May 2008 for the fire loss and in February 2009 for the water loss. *See* ***Borgen v. Economy Preferred Ins. Co.***, 176 Wis. 2d 498, 504-05, 500

> Unless otherwise provided by law, an insurer shall promptly pay every insurance claim. A claim shall be overdue if not paid within 30 days after the insurer is furnished written notice of the fact of a covered loss and of the amount of the loss. If such written notice is not furnished to the insurer as to the entire claim, any partial amount supported by written notice is overdue if not paid within 30 days after such written notice is furnished to the insurer. Any part or all of the remainder of the claim that is subsequently supported by written notice is overdue if not paid within 30 days after written notice is furnished to the insurer. Any payment shall not be deemed overdue when the insurer has reasonable proof to establish that the insurer is not responsible for the payment, notwithstanding that written notice has been furnished to the insurer.

N.W.2d 419 (Ct. App. 1993) ("'[I]nception of the loss' clearly and unambiguously means the date on which the loss occurs."). The December 23, 2016 filing of the Essers' complaint is of course several years beyond "12 months"/"one year" from the "inception of the loss"/"date of loss." The Essers assert that the limitation period of the statute and policy has not run, however, "because both have been tolled or do not apply under the facts set forth in the Complaint." As to the insurance policy's limitation period, the Essers suggest it "can be tolled when the parties have engaged in negotiations or during the time period before the insurer has denied or closed out the claim." They conclusorily state that "[n]o grounds exist to conclude, based on the facts alleged in the Complaint, that the breach of contract … or WIS. STAT. § 628.46 claims are time-barred." The Essers fail to develop an argument in support of these assertions and therefore we need not consider them. *See* ***Pettit***, 171 Wis. 2d at 646 (We need not consider undeveloped arguments.). That said, we observe the following.

¶27 While it could be argued that ongoing negotiations might toll the limitation period, *see* ***Dishno v. Home Mut. Ins. Co.***, 256 Wis. 448, 452-53, 41 N.W.2d 375 (1950), as indicated, the Essers fail to develop such an argument. Importantly, while we could infer from the complaint that some "negotiations" took place between the Essers and the Insureds at some point following the 2008 and 2009 losses, the allegations do not permit an inference that negotiations took place for anywhere near the length of time necessary to whittle down to one year or less the time between the May 2008 and February 2009 losses and the December 2016 filing of the complaint. Indeed, according to the complaint, the last contact of any kind between the Essers and the Insurers occurred in or around January 2014, when the Insurers paid the balance of the appraisal award, and even this could not be considered "negotiation." Thus, nearly three years passed since

the last alleged contact and the filing of the complaint. The breach of contract claim and WIS. STAT. § 628.46 claim for interest are barred by the one-year limitation period of both WIS. STAT. § 631.83(1)(a) and the policy.[5]

Denial of Motion for Leave to Amend Complaint

¶28 In their brief in response to the Insurers' motion to dismiss, filed one month prior to the April 3, 2017 hearing on that motion, the Essers stated: "Of course, to [the] extent this Court disagrees [with the Essers] regarding the sufficiency of [the] allegations [of the complaint], it should permit the Essers to amend the complaint to address the deficiencies. WIS. STAT. § 802.09." At the April hearing, the circuit court ordered that the Insurers' motion be granted, at which point the Essers immediately expressed that they "assum[ed]" the dismissal was "without prejudice" and then moved for leave to amend the complaint. The court did not directly address the Essers' motion but implicitly denied it when the court provided no response other than stating that it was ordering that the dismissal would be "with prejudice."

¶29 On appeal, the Essers assert the circuit court erred in denying their motion for leave to amend their complaint because they made their motion less than four months after the complaint was filed and, pursuant to WIS. STAT. § 802.09(1), they had the right to amend the complaint at any time within six

[5] The Essers assert that their bad faith claim is not time-barred because they "had three years from accrual of their insurance bad-faith claim, which they allege occurred on December 27, 2013 [the date the appraisal award was filed], to bring this action." The Insurers in no way dispute that the Essers' bad faith claim was timely filed. Indeed, the Insurers argue that "the statute of limitations and policy suit limitation bar the Essers' breach of contract and WIS. STAT. § 628.46 claims," but say nothing suggesting the bad faith claim is time barred. Nonetheless, the bad faith claim was properly dismissed by the circuit court for the reason we discuss in ¶21.

months of filing it. The Insurers counter that the Essers could have amended the complaint unilaterally within that six-month period and now should be precluded from doing so. We agree with the Essers.

¶30 WISCONSIN STAT. § 802.09(1) provides in relevant part: "A party may amend the party's pleading once as a matter of course at any time within 6 months after the summons and complaint are filed …." The application of this statute to the undisputed factual circumstances presented in this case is a matter of law we review de novo. *See* ***Kox v. Center for Oral & Maxillofacial Surgery, S.C.***, 218 Wis. 2d 93, 99, 579 N.W.2d 285 (Ct. App. 1998); *cf.* ***Butcher v. Ameritech Corp.***, 2007 WI App 5, ¶34, 298 Wis. 2d 468, 727 N.W.2d 546 (2006) ("Whether to allow an amendment to a complaint *when the party does not have a right to amend* under … § 802.09(1) is a matter within the discretion of the circuit court." (emphasis added; footnote omitted)).

¶31 We conclude the circuit court erred in not affording the Essers, upon their motion, leave to amend their complaint. At the time the court entered the final order dismissing the complaint with prejudice, more than two months remained of the six-month period during which the Essers could amend their complaint as a matter of right under WIS. STAT. § 802.09(1).

¶32 Similar to the present case, in ***Welzien v. Kapec***, 98 Wis. 2d 660, 298 N.W.2d 98 (Ct. App. 1980), the plaintiff orally moved to amend his complaint during a hearing on the defendants' motion for summary judgment. ***Id.*** at 661. The circuit court denied plaintiff's motion to amend and granted defendants' summary judgment motion, dismissing the complaint. ***Id.*** Referring to WIS. STAT. § 802.09(1), we noted on appeal that plaintiff's motion to amend "was made less than four months after the filing of the original summons and complaint. [The

plaintiff] had not previously amended his complaint and thus still had the right to amend as a matter of course." ***Welzien***, 98 Wis. 2d at 662. Although we noted the motion to amend was "not necessary" and "should [have been] in writing," and further noted that the plaintiff "acknowledged that he knew before the hearing that his complaint did not state the cause of action he wished to plead," ***id.*** at 661 n.2, we nonetheless reversed the circuit court's grant of summary judgment and gave plaintiff time to serve and file his amended complaint. ***Id.*** at 663. Doing so, we observed that "a more liberal pleading and practice procedure has been adopted, allowing controversies to be fairly tried and determined rather than avoided by technicalities." ***Id.*** We further noted that "[i]f the complaint had been amended, the [defendants] could have still filed a motion for summary judgment on the newly amended complaint." ***Id.*** at 662.

¶33 ***Welzien*** carries great weight for the case now before us. Here, the Essers indicated to the Insurers and the circuit court a month before the hearing on the Insurers' motion to dismiss that the Essers should be permitted to amend their complaint if the court concluded the original complaint was insufficient. This certainly put the Insurers and the court on notice that the Essers wished to avail themselves of their right to amend pursuant to WIS. STAT. § 802.09(1) if the original complaint, which they were (and are) contending was sufficient as it was, was deemed to be insufficient. Then, at the hearing on the motion to dismiss, the Essers formally moved the court for leave to file an amended complaint.

¶34 Similar to ***Welzien***, the Essers' motion for leave to amend their complaint was made less than four months after the original complaint had been filed and they "had not previously amended [their] complaint and thus still had the right to amend as a matter of course." *See* ***Welzien***, 98 Wis. 2d at 662. Furthermore, as in ***Welzien***, had the complaint been amended, Insurers "could

have still filed a motion for [dismissal] on the newly amended complaint." *See* ***id.*** Although the Essers' motion for leave to amend was "not necessary" and they could have simply filed at the hearing an amended complaint as a matter of right, under WIS. STAT. § 802.09(1) they still had more than two months within which to do so.[6] *See also* ***Kox***, 218 Wis. 2d at 99-101 (stating § 802.09(1) "is, by its terms, mandatory: If the six-month period has not yet passed, a party has the right to amend the pleading 'once as a matter of course,'" and this right "is extinguished only after the passage of six months from the filing of the original complaint" and is an "absolute right to amend so plainly conferred … by the statute").

¶35 WISCONSIN STAT. § 802.09(1) plainly allows a party the right to amend once, as a matter of course, "at any time" within six months of the filing of the original complaint. We have previously stated in reference to § 802.09(1) that "[a]mended complaints are the rule, not the exception." ***Kelly v. Clark***, 192 Wis. 2d 633, 649, 531 N.W.2d 455 (Ct. App. 1995). Here, the circuit court's denial of the Essers' request for leave to amend the complaint and its subsequent entry of a final order dismissing the complaint with prejudice denied the Essers

[6] We note that had the Essers served their amended complaint upon the Insurers prior to the circuit court's ruling, that amended complaint would have become the operative complaint, ***Holman v. Family Health Plan***, 227 Wis. 2d 478, 487, 596 N.W.2d 358 (1999); ***Ness v. Digital Dial Commc'ns, Inc.***, 222 Wis. 2d 374, 380, 588 N.W.2d 63 (Ct. App. 1998) ("As a general rule, an amended complaint supersedes any prior complaints."), and they thus effectively would have given up their right to argue the legal validity of the original complaint. While one might argue the Essers should have had an amended complaint prepared and available to serve and file immediately in the event the court orally ruled in favor of the Insurers' motion to dismiss the complaint, this would have resulted in a waste of the Essers' resources if the court ultimately ruled that the original complaint was sufficient. Further, one reasonably could contend that it would be a strategic error for the Essers to intentionally or unintentionally let it be known at the hearing that they already had prepared an amended complaint in that it may have signaled to the court a lack of confidence in the sufficiency of their original complaint. In any event, the language of WIS. STAT. § 802.09(1) does not suggest that a plaintiff needs to take any particular course of action such as those discussed above.

their statutory right to file an amended complaint within the time remaining of the six-month period. This was in error.

Conclusion

¶36 For the foregoing reasons, we conclude the circuit court properly determined that, as written, the Essers' complaint fails to state a claim upon which relief may be granted and/or the claims were untimely filed. We also conclude, however, that the court erred in denying the Essers' motion to amend their complaint, which they had the right to do one time as a matter of course within the first six months following its filing. Thus, we conditionally reverse and remand with the directive that the Essers be permitted the remainder of that six-month period to file an amended complaint, which period shall be considered as being tolled from the date of the effective denial of the Essers' motion for leave to amend, April 3, 2017, until remittitur. If the Essers fail to file an amended complaint within the remainder of this six-month period, the order dismissing the complaint with prejudice shall be reinstated.

By the Court.—Order conditionally reversed and cause remanded with directions.

Not recommended for publication in the official reports.