

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 19, 2005

Cornelia G. Clark
Clerk of Court of Appeals

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.

Appeal No. 2004AP841

Cir. Ct. No. 2002CV516

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

EARL ANDERSON,

PLAINTIFF-APPELLANT,

V.

AMERICAN FAMILY INSURANCE COMPANY,

DEFENDANT-RESPONDENT.

APPEAL from a judgment and an order of the circuit court for Dodge County: DANIEL W. KLOSSNER, Judge. *Affirmed.*

Before Deininger, P.J., Dykman and Higginbotham, JJ.

¶1 PER CURIAM. Earl Anderson appeals a judgment dismissing this case. The issue is whether American Family Insurance Company acted in bad faith toward its insured, Alan Newton. We affirm.

¶2 “An insurer owes a general duty to its insured to settle or compromise a claim made against the insured.” *Mowry v. Badger State Mut. Cas. Co.*, 129 Wis. 2d 496, 510, 385 N.W.2d 171 (1986). “This duty does not arise out of an express contractual provision; rather, it is implied from the terms of the contract which give the insurer the absolute control of the defense of the action against the insured.” *Id.* “The insurer has the right to exercise its own judgment in determining whether a claim should be settled or contested ... [b]ut ‘exercise of this right should be accompanied by considerations of good faith.’” *Id.* (citation omitted). “[B]ad faith conduct by one party to a contract toward another is a tort separate and apart from a breach of contract” *McEvoy v. Group Health Coop. of Eau Claire*, 213 Wis. 2d 507, 518, 570 N.W.2d 397 (1997) (citation omitted). “The rationale underlying a bad faith cause of action is to encourage fair treatment of the insured and penalize unfair and corrupt insurance practices.” *Id.* “By ensuring that the policyholder achieves the benefits of his or her bargain with the insurer, a bad faith cause of action helps to redress a bargaining power imbalance between parties to an insurance contract.” *Id.*

¶3 “To show a claim for bad faith, a plaintiff must show the absence of a reasonable basis for denying benefits of the policy and the defendant’s knowledge or reckless disregard of the lack of a reasonable basis for denying the claim.” *Anderson v. Continental Ins. Co.*, 85 Wis. 2d 675, 691, 271 N.W.2d 368 (1978). “‘Bad faith’ by definition cannot be unintentional.” *Id.*

¶4 We conclude as a matter of law that American Family did not act in bad faith. On the facts presented through the summary judgment submissions, no reasonable fact-finder could conclude American Family’s actions constituted bad faith. American Family was aware shortly after the accident at issue here that its policy, which provided \$25,000 in coverage per person or \$50,000 per accident,

might be insufficient to compensate all three of the victims. It offered the \$25,000 per person policy limit to one of the victims several months after the accident but explained it needed more information before paying the remaining \$25,000 because it was attempting to settle all three claims against its insured. It then negotiated with the two remaining injured parties to see if any excess liability could be avoided by parsing the remaining \$25,000 between the two remaining victims. American Family was thus ready, willing and able to pay its policy limits but was trying to do what it could to protect the interest of its insured by attempting to resolve all the claims with no excess judgment. Because American Family had a reasonable basis for not paying Anderson the entire remaining \$25,000 when he demanded it, Anderson cannot prove a claim for bad faith as a matter of law.

By the Court.—Judgment and order affirmed.

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

