COURT OF APPEALS
DECISION
DATED AND RELEASED

JULY 12, 1995

No. 94-2081

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

DOROTHY WENTLAND,

Plaintiff-Appellant,

v.

AMERICAN FAMILY MUTUAL INSURANCE COMPANY,

Defendant-Respondent.

APPEAL from a judgment of the circuit court for Kenosha County: DAVID BASTIANELLI, Judge. *Affirmed.*

Before Anderson, P.J., Brown and Nettesheim, JJ.

ANDERSON, P.J. Dorothy Wentland appeals from a circuit court judgment granting American Family Mutual Insurance Company's motion for summary judgment. Because we conclude that there is no genuine issue as to any material fact, and American Family is entitled to judgment as a matter of law, we affirm.

Wentland was injured when she attempted to avoid an oncoming all-terrain vehicle (ATV) at a baseball diamond. The driver of the ATV had no insurance. Wentland notified her insurer, American Family, of her claim under the uninsured motorist coverage provisions of her policy. American Family denied her claim, stating that the ATV was not a "motor vehicle" as defined in the policy. Wentland filed suit against American Family.[1] The circuit court concluded that the ATV constituted a "motor vehicle" under Wentland's policy.

Although the court concluded that coverage was provided under the policy, American Family denied coverage, claiming that the issues of liability and damages remained unresolved. Prior to trial, American Family offered the Wentlands $100,000 to settle their claims. The offer was declined and a jury trial was held. The jury awarded damages in excess of $400,000.

Wentland also filed suit, which is the subject of this appeal (***Wentland II***), claiming that American Family's refusal to honor her claim after the coverage issue had been resolved constituted bad faith:

> There is and was no reasonable basis in fact or law for American Family's continued denial of Plaintiffs' claims, and Defendant knew, or acted in reckless disregard of the fact that there was no reasonable basis for denying Plaintiffs' claims. Said conduct constituted the tort of bad faith.

American Family filed a motion for summary judgment. The trial court granted summary judgment in favor of American Family, stating:

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[1] ***Wentland v. American Family Mut. Ins. Co.***, No. 93-3310, unpublished slip op. (Wis. Ct. App. May 10, 1995). This suit and subsequent appeal constitute ***Wentland I*** and serve as background for the cause of action at issue in the present appeal.

> Wentland sought certain benefits under her policy of insurance, as to future medical expenses and past economic loss. This court finds that there is no genuine issue of material fact that there was an absence of a reasonable basis for denying these benefits under the policy by American. Consequently, the court will grant American's motion for summary judgment seeking a dismissal of this action.

Wentland appeals.

In reviewing summary judgment determinations, we apply the same standards as the trial court. ***Posyniak v. School Sisters of St. Francis***, 180 Wis.2d 619, 627, 511 N.W.2d 300, 304 (Ct. App. 1993). A summary judgment motion will be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Section 802.08(2), STATS.

> The following elements are required 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, 376 (1978). This test of bad faith was further developed by the supreme court when it stated that an insurer will have committed the tort of bad faith only when it has denied a claim without a reasonable basis for doing so, that is, when the claim is not fairly debatable. *See* ***Mowry v. Badger State Mut. Casualty Co.***, 129 Wis.2d 496, 516, 385 N.W.2d 171, 180 (1986).

Wentland argues that "whether an insurer's lump sum offer to settle a first party claim was objectively reasonable must be assessed in terms of how a reasonable insurer would value the total claim." American Family offered Wentland $100,000 to settle her claim. Under the first part of the ***Anderson*** test, Wentland must show that a reasonable insurer under the circumstances would not have acted as American Family did by offering an amount which is alleged to be unreasonably low. ***Fehring v. Republic Ins. Co.***, 118 Wis.2d 299, 310-14, 347 N.W.2d 595, 601-02 (1984).

We conclude that the $100,000 settlement offer was within the range of what a reasonable insurer would offer under the circumstances. We agree with American Family that Wentland had an erratic salary history, substitute taught in 1991 and presented no evidence that she had been advised against working subsequent to her knee injury. These factors, coupled with the uncertainty of whether future surgery would be necessary and the extent of Wentland's pain and suffering, combined to make Wentland's damages subject to debate.

Next, Wentland argues that "[t]here was an insufficient evidentiary basis for the trial court's conclusion that two sub-parts of Mrs. Wentland's claim were 'fairly debatable.'" The two subparts Wentland refers to are "past loss of earning capacity and … future medical bills." We reject Wentland's argument. From our review of the record, we conclude that Wentland's damages were subject to debate. The evidence presented by American Family showed that future medical expenses, as well as the extent of Wentland's loss of earning capacity, were uncertain.

Contributory negligence was also an issue that was fairly debatable. As we stated in ***Wentland I***:

> [T]he trial court directed a verdict in Wentland's favor because no reasonable jury could find that [the ATV driver] was anything other than negligent and that his negligence caused Wentland's injuries. However, the court allowed the jury to decide whether Wentland was contributorily negligent and, if so, whether her contributory negligence was causal.

Wentland v. American Family Mut. Ins. Co., No. 93-3310, unpublished slip op. at 4 (Wis. Ct. App. May 10, 1995). The fact that there was conflicting testimony as to the ATV driver's rate of speed as he approached Wentland and his distance from her, coupled with the fact that a person standing next to Wentland at the scene did not feel the need to react, raised a debatable issue as to Wentland's contributory negligence. American Family, in the exercise of ordinary care, made an investigation of the facts and law and concluded on a reasonable basis that Wentland's claim was debatable. *See* ***Anderson***, 85 Wis.2d at 693, 271 N.W.2d at 377.

Lastly, Wentland argues that the real controversy has not been tried because it was the trial court, not American Family, that first raised the argument as to whether the two components of damages at issue were debatable and there was not a significant record addressing this issue. Section 752.35, STATS., provides in relevant part:

> **Discretionary reversal.** In an appeal to the court of appeals, if it appears from the record that the real controversy has not been fully tried … the court may reverse the judgment or order appealed from ….

We conclude that the real controversy has been fully tried. American Family raised the issue of damages in its pleadings and in its brief in support of the motion for summary judgment. Additionally, as we noted earlier, there is sufficient information from the pleadings to conclude that damages and Wentland's contributory negligence were fairly debatable; therefore, summary judgment in favor of American Family was appropriately granted.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.