

MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

ATTORNEYS FOR APPELLANT	ATTORNEY FOR APPELLEES
Adam Arceneaux	GAIL LEWIS HICKS AND
Eric J. McKeown	LARRY HICKS
Ice Miller LLP	John H. Davis
Indianapolis, Indiana	John H. Davis & Associates
Robert S. O'Dell	Merrillville, Indiana
O'Dell & Associates, P.C.	
Carmel, Indiana	

**IN THE
COURT OF APPEALS OF INDIANA**

American Family Mutual Insurance Company, S.I., <i>Appellant-Defendant,</i>	February 7, 2022 Court of Appeals Case No. 21A-CT-1441
v.	Appeal from the Lake Superior Court
Gail Lewis Hicks and Larry Hicks, <i>Appellees-Plaintiffs,</i>	The Honorable Calvin D. Hawkins, Judge
and	Trial Court Cause No.
Keith Head ¹	45D02-2007-CT-727
<i>Appellee-Defendant.</i>	

¹ Keith Head does not participate in this appeal. However, pursuant to Indiana Rule of Appellate Procedure 17(A), a party of record in the trial court shall be a party on appeal.

Bradford, Chief Judge.

Case Summary

Gail and Larry Hicks (collectively, “the Hickses”) filed suit against Keith Head and American Family Mutual Insurance Company, S.I. (“American Family”) after Gail was involved in a traffic collision with a vehicle owned by Head and insured by American Family. American Family filed a motion for summary judgment, arguing that there was no legal basis for the Hickses’ claims against it. The trial court denied American Family’s motion on June 10, 2021, and certified the issue for interlocutory appeal, and we accepted jurisdiction. Concluding that the trial court erred in denying American Family’s motion for summary judgment, we reverse and remand to the trial court with instructions to enter summary judgment in favor of American Family.

Facts and Procedural History

On July 20, 2020, the Hickses filed suit against Head and American Family. In their complaint, the Hickses alleged that on July 22, 2018, Pamela Dickerson was driving a vehicle owned by Head “in a careless and negligent manner and struck the vehicle” being driven by Gail, causing property damage to Gail’s vehicle and bodily injury to Gail and her daughter Diamond. Appellant’s App. Vol. II p. 12. The Hickses alleged that at the time of the accident, Head’s vehicle was insured by

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American Family. With respect to American Family, the Hickses further alleged:

7. That, [American Family] had a legal responsibility to, in good faith, settle the complete claim which – to date – [American Family] has not, causing financial harm to the plaintiffs due to the medical expenses incurred from the medical services provided for the physical bodily injury to [the Hickses] for loss of consortium and to physical injury to her daughter, Diamond Lewis.

8. That, [American Family] settled the claim for damages to plaintiffs vehicle but left the claims for physical bodily injury and medical expenses incurred to [Gail] and loss of consortium to [Larry], as set forth above, unsettled and it remains unsettled to this date – almost two (2) years later.

9. That, [American Family] had a legal responsibility to settle all claims in good faith, which [American Family] did not, thus causing financial hardship and burden to [Gail] for the unpaid medical expenses and which has adversely affected [Gail's] credit standing.

10. That, [Gail] spoke with agents of [American Family] on several occasions and Attorney John H. Davis, attorney for plaintiffs, communicated with agents of [American Family] about the medical expenses and loss of consortium of [the Hickses] and was informed that the expenses would be settled – two (2) years later this has not been done. . . .

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13. That, [American Family] can be held liable for insurance carried by their insured [Head], in allowing [Dickerson] to drive [Head's] vehicle, for the purposes of *third party beneficiaries* which, in the instant case, covers both [the Hickses]. . . .

19. [American Family] was under a legal requirement to use good faith in a timely and reasonable settlement under [Gail's] third party beneficiary of the insurance policy held by [Head] for bodily injuries caused by the permitted driver of [Head's] vehicle on or about July 22, 2018. . . .

WHEREFORE, [the Hickses] pray for Judgment against [Head], when he (defendant) permitted [Dickerson] to drive [his] vehicle and for damages and Judgment against [American Family], including punitive damages for bad faith in settlement, attorney's fees and for all other just and proper relief in the premises.

Appellant's App. Vol. II pp. 13-16, 19, 20 (emphasis in original).

On May 18, 2021, American Family filed a motion for summary judgment, arguing that because the Hickses were not parties to Head's insurance contract and were not third-party beneficiaries under the insurance policy, they have no basis for their breach-of-contract, bad-faith, or punitive-damages claims.² The Hickses

² We acknowledge that the parties filed numerous documents and that the trial court issued various orders in the time

responded, claiming that their cause of action should proceed because they qualified as third-party beneficiaries under Head's insurance policy. The trial court conducted a hearing on American Family's motion on June 9, 2011. The next day, on June 10, 2021, the trial court issued an order denying American Family's motion for summary judgment. The trial court certified the matter for interlocutory appeal, and we accepted jurisdiction.

Discussion and Decision

American family contends that the trial court erred in denying its motion for summary judgment.

When reviewing a grant or denial of a motion for summary judgment our well-settled standard of review is the same as it is for the trial court: whether there is a genuine issue of material fact, and whether the moving party is entitled to judgment as a matter of law. The party moving for summary judgment has the burden of making a prima facie showing that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Once these two requirements are met by the moving party, the burden then shifts to the non-moving party to

between when the Hickses' complaint was filed and when American Family filed its motion for summary judgment. However, given that the only question before us on appeal is whether the trial court erroneously denied American Family's motion for summary judgment, we omit these other filings from our recitation of the procedural history as they are not relevant to the instant appeal.

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show the existence of a genuine issue by setting forth specifically designated facts. Any doubt as to any facts or inferences to be drawn therefrom must be resolved in favor of the non-moving party. Summary judgment should be granted only if the evidence sanctioned by Indiana Trial Rule 56(C) shows there is no genuine issue of material fact and that the moving party deserves judgment as a matter of law.

Goodwin v. Yeakle's Sports Bar & Grill, Inc., 62 N.E.3d 384, 386 (Ind. 2016) (internal citations omitted). “We review questions of law de novo and owe no deference to the trial court’s legal conclusions.” *Floyd Cnty. v. City of New Albany*, 1 N.E.3d 207, 213 (Ind. Ct. App. 2014). The party appealing the grant or denial of summary judgment has the burden of persuading this court on appeal that the trial court’s ruling was improper. *Id.*

American Family contends that the trial court erred in denying its motion for summary judgment because, as a matter of law, the Hickses cannot recover directly from American Family. For their part, the Hickses contend that they are third-party beneficiaries of Head’s insurance policy and, therefore, are entitled to sue American Family directly for redress from American Family’s alleged failure to negotiate a settlement with them in good faith. In raising these contentions, the parties dispute whether the Hickses qualify as third-party beneficiaries under the terms of Head’s insurance contract.

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The Indiana Supreme Court has held that “a third-party beneficiary may sue the insurer directly to enforce the contract between the insurer and the insured.” *Cain v. Griffin*, 849 N.E.2d 507, 514 (Ind. 2006). The record is clear that American Family has actively defended and moved to indemnify Head in response to the Hickses lawsuit and a reading of the Hickses complaint does not indicate that the Hickses are alleging that American Family has not done so. In addition, the designated evidence does not appear to create a material issue of fact as it clearly shows that American Family has taken steps to defend and indemnify Head in the suit brought by the Hickses against him. The Hickses claims instead seem to indicate their belief that American Family has not resolved the entire case in the manner/timeframe preferred by the Hickses.

Furthermore, in *Cain*, the Indiana Supreme Court went on to hold that “a third-party beneficiary cannot sue an insurer in a tort action for the insurer’s failure to deal in good faith with a third-party beneficiary.” *Id.* at 515. While the Hickses argue on appeal that their claims against American Family are contractual in nature, a plain reading of their claims against American Family demonstrates that by suing American Family, they are seeking to recover damages directly from American Family. Such claims fall under the type of direct claim that was disallowed by *Cain*.

Given the Indiana Supreme Court’s decision in *Cain*, the Hickses cannot sue American Family directly on a claim that American Family failed to negotiate a settlement with the Hickses in good faith regardless of

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whether they qualify as third-party beneficiaries.³ *See id.* American Family is therefore entitled to judgment as a matter of law and the trial court erred in denying American Family's motion for summary judgment.

The judgment of the trial court is reversed, and the matter is remanded with instructions to enter summary judgment in favor of American Family.

Crone, J., and Tavitas, J., concur.

³ We acknowledge that the Hickses cited to *Donald v. Liberty Mutual Ins. Co.*, 18 F.3d 474 (7th Cir. 1994) in support of their assertion that they could bring their claims directly against American Family. Their reliance on *Donald*, however, is misplaced given that the Indiana Supreme Court's decision in *Cain* expressly rejected *Donald* on this point. *See Cain*, 849 N.E.2d at 515.

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STATE OF INDIANA) LAKE SUPERIOR COURT
)
) SS: CIVIL DIVISION, ROOM
) TWO SITTING IN EAST
COUNTY OF LAKE) CHICAGO, INDIANA

GAIL LEWIS HICKS and)
LARRY HICKS)
Plaintiffs,) CAUSE NO.:
) 45D02-2007-CT-000727
KEITH L. HEAD,)
AMERICAN FAMILY)
MUTUAL INSURANCE)
COMPANY, S.I.,)
Defendants.)

ORDER

(Filed Jun. 10, 2021)

This matter came before the Court on June 9, 2021, for a hearing on Defendant, AMERICAN FAMILY MUTUAL INSURANCE COMPANY, S.I.'s, Motion for Summary Judgment. The Plaintiffs, GAIL LEWIS HICKS and LARRY HICKS, appear by counsel, JOHN H. DAVIS. The Defendant, AMERICAN FAMILY MUTUAL INSURANCE COMPANY, S.I., appears by counsel, ROBERT S. O'DELL, via video CourtCall. The Defendant, KEITH L. HEAD, did not appear pursuant to a Motion filed by HEAD'S counsel, BRIDGETTE J. NELSON.

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Cause submitted. Arguments heard.

The Court, having taken this matter under advisement and being duly advised in the premises, now hereby finds and orders as follows:

1. That the Defendant's Motion for Summary Judgment is denied.
2. That the Court certifies this order for interlocutory appeal.

ALL OF WHICH IS ORDERED THIS 10th DAY OF June, 2021.

/s/ Calvin D. Hawkins

CALVIN D. HAWKINS, JUDGE
LAKE SUPERIOR COURT
CIVIL DIVISION, ROOM TWO

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STATE OF INDIANA) IN THE LAKE
) SUPERIOR COURT
) SS:
) Case No.:
COUNTY OF LAKE) 45D02-2007-CT-000727

GAIL LEWIS HICKS and)
LARRY HICKS)
 Plaintiffs,)
 v.)
KEITH L. HEAD,)
AMERICAN FAMILY)
MUTUAL INSURANCE)
COMPANY, S.I.,)
 Defendants.)

ORDER

(Filed Dec. 7, 2020)

This matter being before the Court upon Plaintiffs' Motion for Sanction and Sanction under Rule 11 to wit:

H.I.

The Court having reviewed the same and being otherwise duly advised in the premises, now Grants Judgment on the pleadings in favor of plaintiffs, and Denies **all** of defendants' motions, and Grants Sanctions against defendants for filing frivolous pleadings.

WHEREFORE, IT IS ORDERED, ADJUDGED and DECREED that Judgment on the pleadings in favor of plaintiffs, denial of all of defendants' motions

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and Sanctions against defendants for frivolous pleadings is hereby GRANTED.

SO ORDERED this ___ day of _____, 2020.

MAGISTRATE, Lake Superior Court

ORDERED AND APPROVED this ___ day of December 7, 2020, 2020.

/s/ Calvin D. Hawkins
JUDGE, Lake Superior Court

Distribution:

- Robert S. O'Dell, Attorney at Law,
email: rodell@odell-lawfirm.com
 - John H. Davis, Attorney at Law,
email: attvhdavis@gmail.com
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**In the
Indiana Supreme Court**

American Family Mutual
Insurance Company, S.I.,

Appellant(s),

v.

Gail Lewis Hicks; Larry
Hicks; and Keith L. Head,

Appellee(s).

Court of Appeals Case No.
21A-CT-01441

Trial Court Case No.
45D02-2007-CT-727

Order

(Filed Jun. 28, 2022)

This matter has come before the Indiana Supreme Court on a petition to transfer jurisdiction, filed pursuant to Indiana Appellate Rules 56(B) and 57, following the issuance of a decision by the Court of Appeals. The Court has reviewed the decision of the Court of Appeals, and the submitted record on appeal, all briefs filed in the Court of Appeals, and all materials filed in connection with the request to transfer jurisdiction have been made available to the Court for review. Each participating member has had the opportunity to voice that Justice's views on the case in conference with the other Justices, and each participating member of the Court has voted on the petition.

Being duly advised, the Court DENIES the petition to transfer.

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Done at Indianapolis, Indiana, on 6/28/2022.

/s/ Loretta H. Rush
Loretta H. Rush
Chief Justice of Indiana

All Justices concur.

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[LOGO]

JOHN H. DAVIS
ATTORNEY AT LAW

5201 Broadway, Suite 205 (219) 884-2461
Merrillville, Indiana 46410 Fax (219) 884-2472
P.O. Box 43
Crown Point, Indiana 46307

January 2, 2019

Jack Salzwedel, Chair & CEO
American Family Mutual Insurance Company
Headquarters
6000 American Parkway
Madison, Wisconsin 53783

RE: Date of Accident: 7/22/2018
Our Client: Gail Lewis – Hicks
Date of Loss: 7/22/2018
Your Claim Number: 01 – 000 – 743193
Our File Number: H – 0005

Dear Mr. Salzwedel:

The purpose of this letter is to avoid protracted litigation which now seems to involve a cause of action wherein American Family Mutual Insurance Company appears to be interfering with the retainer/contract between this Office and our client, Gail Lewis – Hicks.

Your claims adjuster – Nenad Markovic has been communicating with this Office regarding a settlement in the above – mentioned case.

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Mr. Markovic – in his most recent communication with this Office on December 31, 2018, has indicated that American Family Mutual Insurance Company would seek to pay medicals bills and indemnification amounts directly to the providers of said medical services. This action would interfere with this Office's contracted responsibility to pay those bills and assess a percentage of the total amount of recovery as the standard amount for attorney's fees.

The attempt to pay those bills directly adversely affects the amounts of the attorneys' fees and would affect the lien letters sent to those medical providers by this Office indicating this Office's responsibility to pay off these bills.

Additionally, your claims adjuster communicated with this Office on several occasions the items he needed in order to make a settlement offer. These communications continued to shift and add additional information he needed to resolve or make a settlement offer. This constant change in the required information he needed borders on, and in fact represents, bad faith.

We are attaching our demand letter – dated October 1, 2018 and the subrogation letter – dated December 6, 2018. This added amount brings the total medical services bill to \$16, 431.45.

We offer to settle this amount within thirty (30) days of the date of this letter our bottom/minimum amount acceptable – at this point, is \$60,000.00. Thereafter, we will file our lawsuit against your insured with the elements, set forth in this letter, as additional

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causes of action against American Family Mutual Insurance Company.

Thank you for your time and consideration in resolving this matter.

Very truly yours,

/s/ John H. Davis
Attorney for Gail Lewis – Hicks
& Larry Hicks (spouse)

JHD/dc

Enclosures:

Letter Dated October 1, 2018

Letter Dated December 6, 2018
