COURT OF APPEALS
DECISION
DATED AND RELEASED

June 22, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62(1), STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-0413-FT

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

WILLIAM D. PURDY and LISA PURDY, and ABBY PURDY and COREY PURDY, Minors, by their Guardian ad Litem, JAMES J. MURPHY,

Plaintiffs-Co-Appellants,

TIME INSURANCE COMPANY,

Plaintiff,

AUDREE HEDERER,

Intervenor-Plaintiff-Appellant,

JEFFREY STROEDE, CINDY STROEDE, and DANE COUNTY,

Intervenors-Plaintiffs,

v.

FEDERATED MUTUAL INSURANCE COMPANY,

Defendant,

HERITAGE MUTUAL INSURANCE COMPANY,

Defendant-Respondent.

APPEALS from a judgment of the circuit court for Dane County: MORIA KRUEGER, Judge. *Reversed*.

Before Gartzke, P.J., Sundby and Vergeront, JJ.

PER CURIAM. William Purdy, his wife Lisa and his children Abby and Corey, by their guardian ad litem, appeal from that part of a judgment dismissing the Purdys' complaint against Heritage Mutual Insurance Company. Audree Hederer appeals from that part of the same judgment dismissing her complaint against Heritage. William Purdy was injured and Mrs. Hederer's husband died in an automobile accident caused by William's father, Donald Purdy, who also died in the accident. Heritage was sued as one of two companies that insured Donald. The issue is whether § 631.43(1), STATS., invalidates a clause in the Heritage policy that negates coverage for the Purdys' and Mrs. Hederer's injuries. We conclude that it does, and therefore reverse the trial court's ruling to the contrary.[1]

[1] This is an expedited appeal under RULE 809.17, STATS.

Donald caused the accident while driving a car owned by a car dealership. Liability coverage of $500,000 was provided to Donald, as an insured, under the dealership's policy with Federated Mutual Insurance Company. Donald's own liability policy with Heritage has liability limits of $100,000 per person and $300,000 per accident. His policy provides, in relevant part:

> OTHER INSURANCE ... 2. Other Car. Insurance afforded under this part for a vehicle **you** do not own is excess over any other collectible auto liability insurance, and this insurance then applies only in the amount by which the limit of liability exceeds the applicable limit of liability of the other insurance.

Because the "other insurance" provided by Federated exceeds Heritage's liability limit, the quoted clause, if valid, denies coverage for the Purdys' and Mrs. Hederer's injuries.

The clause is not valid, however, because it conflicts with § 631.43(1), STATS. That section provides in relevant part:

> When two or more policies promise to indemnify an insured against the same loss, no "other insurance" provisions of the policy may reduce the aggregate protection of the insured below the lesser of the actual insured loss suffered by the insured or the total indemnification provided by the policies if there were no "other insurance" provisions. The policies may by their terms define the extent to which each is primary and each excess, but if the policies contain inconsistent terms on that point, the insurers shall be jointly and severely liable to the insured on any coverage where the terms are inconsistent, each to the full amount of coverage it provided.

The Purdys' or Mrs. Hederer's actual loss may exceed $500,000. Heritage's exclusion clause denies the Purdys and Mrs. Hederer any recovery above $500,000. Section 631.43(1) plainly prohibits that outcome.

Heritage contends, however, that § 631.43(1), STATS., does not apply because as the excess insurer it did not insure against the same risk as Federated's primary coverage policy. It relies on ***Millers Nat'l Ins. Co. v. City of Milwaukee***, 184 Wis.2d 155, 172-73, 516 N.W.2d 376, 381-82 (1994), in which the supreme court, in another context, commented that primary and excess insurers do not cover the same "risk." Heritage then argues that "risk" equates to "loss," a premise we cannot accept. The "risk" described in ***Millers*** was the insurer's risk of incurring liability under the policy as a primary or excess insurer. The "loss" that § 631.43(1) refers to is the insured's damages resulting from an accident covered by the policy.

Heritage also contends that § 631.43(1), STATS., does not apply because Donald was not Federated's policy holder, and that the intent of § 631.43(1) is to protect policy holders only. However, the statute plainly identifies the protected person as "an insured," which Donald undisputedly was under both policies, and not as a "policy holder." The plain language of a statute is conclusive as to legislative intent, absent a clearly expressed legislative purpose to the contrary. ***Matter of Estate of Berth***, 157 Wis.2d 717, 722, 460 N.W.2d 436, 438 (Ct. App. 1990). No contrary purpose exists here.

By the Court.—Judgment reversed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.