COURT OF APPEALS
DECISION
DATED AND RELEASED

MAY 6, 1997

NOTICE

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, STATS.

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

No. 96-2659

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

SUZANNE KRISTO AND ANDREW KRISTO,

PLAINTIFFS-APPELLANTS,

v.

GRE INSURANCE GROUP AND TOWER INSURANCE COMPANY, INC.,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Eau Claire County: BENJAMIN D. PROCTOR, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Suzanne and Andrew Kristo appeal a summary judgment granting them an $8,000 recovery on a homeowner's policy but denying any additional recovery for losses the Kristos incurred when they were defrauded in a real estate investment scheme. The Kristos argue that the insurance policy

provided coverage for their "loss to securities" and that if it did not, coverage was illusory. We reject these arguments and affirm the judgment.

The Kristos made investments in "second deeds of trust" (second mortgages) through Century Loan Corporation and Charles Herpick. The Kristos were given information about other couples seeking loans to renovate their homes. On the basis of that information, the Kristos sent money to Century and received in exchange a packet of papers purporting to be copies of promissory notes, a second deed of trust, and an assignment of the second mortgages and promissory notes signed by Herpick. In October 1992, the Kristos entered into a limited partnership with Herpick and Century after which Century retained all of the paperwork on the Kristos' investments. The Kristos received regular monthly checks representing the required monthly payments from Century through November 1994. In December of 1994, the Kristos learned that none of the people to whom they had lent money actually received the money and that Century and Herpick had defrauded the Kristos.

The Kristos brought this action seeking recovery under their homeowner's insurance policy. That policy provides coverage for "direct physical loss" to personal property, with a $200 limit on losses of money and a $2,000 limit on "securities, accounts, deeds, evidences of debt, letters of credit, notes other than bank notes, …." The trial court concluded that the Kristos were entitled to recovery for forty occurrences where they lost money by the fraudulent investment scheme and awarded $8,000 damages. The Kristos contend that they are entitled to forty times the $2,000 limit on loss of securities. We conclude that the policy provides no coverage for this type of loss, but affirm the $8,000 judgment because the insurance companies did not file a notice of cross-appeal challenging the judgment.

This case is factually indistinguishable from ***Katze v. Randolph & Scott Mut. Fire Ins. Co.,*** 116 Wis.2d 206, 341 N.W.2d 689 (1983). In ***Katze,*** a farmer voluntarily turned over his cattle to another person and was paid by a check that was returned by the bank for insufficient funds. The seller subsequently learned that the buyer obtained the cattle with the sole design of defrauding him. The Wisconsin Supreme Court determined that the farmer's insurance policy that covered "theft" did not provide coverage for this loss. Because the farmer voluntarily and intentionally delivered the cattle with no reservations other than a promise to be paid for them, the court concluded that the insurance policy's coverage of a "direct loss" did not include the failure of a third party to make a promised payment. ***Id.*** at 214, 341 N.W.2d at 693. "To hold otherwise would in effect hold that the policy insures the consideration in business transactions or that Katze was insured against a lack of prudence in making a bad bargain." ***Id.*** The money not received for the unrecovered cattle was the farmer's direct loss. This loss was not insured by the policy. A reasonable insured would not have assumed that the policy covered unsuccessful credit transactions.

Here, the Kristos' loss arose from Century's and Herpick's failure to continue making the monthly payments. That loss is not a "direct physical loss" of the Kristos' personal property. The notes, mortgages and assignments they received in return for their money were not lost or stolen. Rather, the value of those papers was reduced or eliminated by the conduct of others. Misrepresentations about the value of property do not constitute physical damage to the property. *See* ***Benjamin v. Dohm,*** 189 Wis.2d 352, 362, 525 N.W.2d 371, 375 (Ct. App. 1994). The personal property covered by the homeowner's insurance (the notes, deeds, mortgages and assignments) are still in their

possession. The insurance policy does not provide coverage for the indirect losses incurred in bad business deals.

The Kristos contend that the policy is illusory if they are not allowed to recover for this loss. A policy is illusory only where the premium was paid for coverage that would not benefit the insured under any reasonably expected set of circumstances. *See* ***Link v. General Cas. Co.,*** 185 Wis.2d 394, 400, 518 N.W.2d 261, 263 (Ct. App. 1994). This policy is not illusory. It provides coverage for direct physical loss. It would have provided coverage for loss of securities that were stolen from the home or destroyed by fire or natural disaster.

The insurance companies seek dismissal of all of the Kristos' claims under the policy. A notice of cross-appeal must be filed by any respondent seeking modification or reversal of the trial court's judgment. *See* § 809.10(1)(b), STATS. In the absence of a cross-appeal, this court has no jurisdiction to reverse the part of the judgment favorable to the Kristos. *See* ***State v. Huff,*** 123 Wis.2d 397, 407-08, 367 N.W.2d 226, 231-32 (Ct. App. 1985).

By the Court.—Judgment affirmed.

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