

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 6, 2003

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. 02-2226-FT
STATE OF WISCONSIN**

Cir. Ct. No. 01-CV-27

**IN COURT OF APPEALS
DISTRICT IV**

RONALD NORTMAN AND CHERYL NORTMAN,

PLAINTIFFS-RESPONDENTS,

v.

**MARK J. ROOU D/B/A ROOUSTER'S EXCAVATING AND
TRUCKING, INCORPORATED, AND SELECTIVE INSURANCE
COMPANY OF AMERICA, A FOREIGN INSURANCE
CORPORATION,**

DEFENDANTS,

**WAUSAU UNDERWRITERS INSURANCE COMPANY, A
DOMESTIC CORPORATION,**

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Jackson County:
ROBERT W. RADCLIFFE, Judge. *Affirmed.*

Before Roggensack, Deininger and Lundsten, JJ.

¶1 PER CURIAM. Wausau Underwriters Insurance Company appeals an order approving a worker's compensation settlement. The issue is whether the trial court erred by distributing all of the available proceeds under the distribution formula set forth in WIS. STAT. § 102.29(1) (1999-2000).¹ We affirm.

¶2 Ronald and Cheryl Nortman are the parents of Dean Nortman, who died in a work accident while employed by Hoffmann Construction Company. Wausau, Hoffmann's worker's compensation insurer, immediately paid the Nortmans \$12,500 in death and funeral benefits. Wausau also complied with WIS. STAT. § 102.49(5) by paying the State fund \$163,200.

¶3 The Nortmans subsequently commenced this action in wrongful death against Mark Rouu, the driver of the truck that struck and killed Dean, and his insurer.² Wausau was a party to the action and claimed subrogation rights.

¶4 The Nortmans ultimately settled their claim against Rouu for \$125,000. The parties, including Wausau, stipulated to payment of \$83,333.34 directly to the Nortmans on their claim for the loss of Dean's society and companionship. The remaining \$41,666.66 was placed in escrow for division between the Nortmans, Wausau, and their respective attorneys, as determined by the court.

¶5 The court held that the entire escrow sum was subject to distribution under the formula in WIS. STAT. § 102.29(1), for allocation of money judgments

¹ All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

² The Nortmans could sue Rouu as a liable third party because he was not a Hoffman employee. *See* WIS. STAT. § 102.29(1).

in tort cases where the plaintiff has also received worker's compensation. Consequently, the court divided the \$41,666.66 among the Nortmans, Wausau, the attorneys for both parties, and to pay for costs. Under the formula, Wausau's award came to \$12,464.11.

¶6 In this appeal Wausau contends that only \$2,916.66 of the escrowed amount was subject to the WIS. STAT. § 102.29(1) distribution, and that the remainder, or \$38,750.00, should have been directly awarded to it as compensation for its payment to the State fund, before the § 102.29(1) distribution.

¶7 WISCONSIN STAT. § 102.29(1) provides the formula for distributing money recovered in a tort action based on the death or injury of an employee, when the claim is also subject to the employer's or its worker's compensation insurer's claim. Under the formula, the employee shall receive one-third of the balance left after deducting collection costs. The employer or the insurer is reimbursed for its claim out of the remaining two-thirds. The employee receives the remainder, if any.

¶8 WISCONSIN STAT. § 102.29(2) grants the employer or its insurer a cause of action against a third party tortfeasor to recover sums paid to the State fund, including those paid under WIS. STAT. § 102.49(5) for the employee's death. The interpretation of these statutes is a question of law that this court reviews *de novo*. *Sturgis v. Neenah Bd. of Canvassers*, 153 Wis.2d 193, 198, 450 N.W.2d 481 (Ct. App. 1989).

¶9 Essentially, Wausau contends that WIS. STAT. § 102.29(2) takes precedence in that its claim for recovery of the WIS. STAT. § 102.49(5) payment is a separate claim, payable before, and not subject to the § 102.29(1) distribution.

However, nothing in the plain language of these statutes, nor in the case law applying them, grants this claim a priority or a separate status. The distribution formula of § 102.29(1) applies to all proceeds subject to the employer's claims if the case is: (1) in tort, (2) for the injury or death of an employee, and (3) the employer or its insurer is or may be liable. *Johnson v. ABC Ins. Co.*, 193 Wis. 2d 35, 45, 532 N.W.2d 130 (1995). Each of those criteria is satisfied here. The trial court therefore properly subjected Wausau's § 102.49(5) claim to the § 102.29(1) formula.³

By the Court.—Judgment affirmed.

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

³ We note that both parties requested publication of the opinion on this appeal. Generally, this court issues an unpublished per curiam opinion in cases reviewed under the expedited appeals procedure. We are not persuaded that this case merits deviation from this procedure.

