COURT OF APPEALS
DECISION
DATED AND RELEASED

September 26, 1996

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.

NOTICE

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

No. 94-1722

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

TYLER MLSNA, by his Guardian ad Litem, COREY L. GORDON, BRIDGET MLSNA and MARK MLSNA, Individually,

Plaintiffs-Appellants,

v.

ALFA-LAVAL AGRI, INC., a Delaware Corporation,

Defendant-Third Party Plaintiff-Co-Appellant,

WEST AGRO, INC., a Delaware Corporation, ALFA-LAVAL, INC., a New Jersey Corporation,

Defendants-Third Party Plaintiffs,

CIGNA PROPERTY and CASUALTY INSURANCE COMPANY,

Defendant,

BECKSON INDUSTRIAL PRODUCTS, INC.,
a Connecticut Corporation,
THE AETNA CASUALTY & SURETY COMPANY,

Defendants-Third Party Plaintiffs,

BLUE CROSS & BLUE SHIELD
UNITED OF WISCONSIN,

Defendant,

FARMERS TOWN MUTUAL INSURANCE
COMPANY,

Third Party Defendant-Respondent.

APPEAL from an order of the circuit court for Monroe County: MICHAEL J. MCALPINE, Judge. *Affirmed*.

Before Eich, C.J., Dykman, P.J., and Paul C. Gartzke, Reserve Judge.

PER CURIAM. Tyler Mlsna, by his guardian ad litem, and his parents, Bridget and Mark Mlsna, appeal from a trial court order granting summary judgment dismissing all claims against Farmers Town Mutual Insurance Company. The Mlsnas were insured by Farmers under a comprehensive personal liability policy at the time Tyler suffered severe injuries by drinking a caustic substance manufactured by Alfa-Laval and dispensed through a pump manufactured by Beckson Industrial Products.

On appeal the Mlsnas argue that Farmers should offer coverage under its policy, leaving intact Alfa-Laval's third-party action against Farmers. For the reasons set forth below, we affirm the order granting summary judgment to Farmers.

In October 1990, while in his parents' milkhouse, Tyler, then two years old, swallowed a cup of dairy pipeline cleaner. The caustic substance burned his stomach, necessitating several surgeries, and left permanent, painful esophageal scarring.

Tyler, by his guardian ad litem, and his parents[1] filed an action against Alfa-Laval. Alfa-Laval filed counterclaims against the Mlsnas, alleging contributory negligence, and also filed a third-party complaint against Farmers. Farmers moved for summary judgment in the circuit court, arguing that its policy with the Mlsnas contains an exclusion for the type of injury Tyler suffered. The circuit court agreed and granted summary judgment. The Mlsnas appeal to this court.[2]

Farmers' policy with the Mlsnas contains the following language:

> We pay for damage for which an insured is liable by law if the bodily injury or property damage is caused by an occurrence to which this policy applies.
>
> ....
>
> This coverage does not apply to liability:
>
> a. for bodily injury to you, and if residents of your household, your relatives, and persons under the age of 21 in your care or in the care of your resident relatives.

Disposition of this appeal is controlled by the recent case of ***Whirlpool Corp. v. Ziebert***, 197 Wis.2d 144, 539 N.W.2d 833 (1995). In that case, a three-year-old injured her hand in a meat grinder, and the girl and her parents sued the grinder's manufacturer, Whirlpool. Just as in this appeal, Whirlpool sought contribution from the parents' liability insurer, Allstate. Allstate's policy

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[1] Tyler and his parents are represented by the same law firm.

[2] Alfa-Laval also appeals the trial court's order and joins in the Mlsnas' arguments.

excluded coverage for "bodily injury to an insured person ... whenever any benefit of this coverage would accrue directly or indirectly to an insured person." ***Id***. at 153, 539 N.W.2d at 886.

In affirming the summary dismissal of Allstate, the supreme court explained that family exclusion policies serve the legitima`te purpose of exempting insurers from family member collusion in intrafamily lawsuits. ***Id***. at 149, 539 N.W.2d at 885. The court held that when public policy does not intervene and clear and unambiguous policy language encompasses contribution claims, the family exclusion legitimately precludes coverage. ***Id.*** at 155-56, 539 N.W.2d at 887.

Whirlpool applies here. As in ***Whirlpool,*** the Farmers policy contains an exclusion. Relying on New York law, the Mlsnas argue that ***Whirlpool*** can be distinguished because, unlike Allstate's policy language in ***Whirlpool***, the Farmers policy fails to explicitly address cross-claims for contribution, such as that brought here. We conclude that this is a distinction without a difference. Although Allstate's exclusion language in ***Whirlpool*** contained a phrase missing here,[3] the Farmers policy language achieves the same effect.[4]

By the Court.—Order affirmed.

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

[3] Specifically, Allstate's policy contained an exclusion for "direct or indirect" benefit to the insured.

[4] The Farmers policy excludes "liability" arising from bodily injury to insureds and insureds' household relatives. Alfa-Laval's third-party action against Farmers is premised on the very liability excluded. As the court stated in ***Whirlpool Corp. v. Ziebert***, 197 Wis.2d 144, 155, 539 N.W.2d 833, 887 (1995), contribution claims are dependent and stem from the original action, having no independent existence.