

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

March 14, 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. 95-0397

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

88 CV 581

ZONDRA D. HASLEY,

Plaintiff-Respondent,

v.

NEWARK MUTUAL INSURANCE COMPANY,

Defendant-Appellant,

FRANKENMUTH MUTUAL INSURANCE COMPANY,
and DANIEL ROBERTS,

Defendants.

90 CV 588

ZONDRA D. HASLEY, Individually,
and as Special Administrator of the
ESTATE OF CLARK G. HASLEY,
and the ESTATE OF MATTHEW C. HASLEY,
and ALLEN J. HASLEY, a minor,
by His Guardian Ad Litem,
ARNOLD J. WIGHTMAN,

Plaintiffs-Respondents,

v.

NEWARK MUTUAL INSURANCE COMPANY,

Defendant-Appellant,

**FRANKENMUTH MUTUAL INSURANCE COMPANY,
DANIEL ROBERTS,
and THE DEAN HEALTH PLAN, INC.,**

Defendants.

APPEAL from a judgment of the circuit court for Rock County:
JAMES DALEY, Judge. *Reversed.*

Before Eich, C.J., Sundby and Vergeront, JJ.

PER CURIAM. Newark Mutual Insurance Company appeals from a judgment awarding money damages to Zondra Hasley and to the estates of Clark, Matthew, and Allen Hasley. The issue is whether the jury heard sufficient evidence to find coverage for the respondents by reformation of Newark's insurance policy. We conclude that the evidence does not support reformation, and therefore reverse.

Zondra Hasley lived with her husband, Clark, and their two sons Matthew and Allen, in one-half of a farm duplex, while Clark's parents, Margaret and George Hasley, occupied the other. In 1988, a fire broke out in which George, Clark and Matthew died and Zondra was injured. George and Margaret were the named insureds in a homeowner's and liability insurance policy issued by Newark. Clark was listed as an additional insured in an endorsement to the policy.

The family exclusion clause in Newark's policy excluded coverage "for bodily injury to you and, if residents of your household, your relatives" On an earlier appeal, *Hasley v. Newark Mut. Ins. Co.*, No. 89-1712, unpublished slip op. (Wis. Ct. App. Jan. 24, 1991), we held that the clause excluded Clark's family because he was bound by it as an additional insured.

After a second appeal, *Hasley v. Newark Mut. Ins. Co.*, No. 91-2908, unpublished slip op. (Wis. Ct. App. Jan. 28, 1993), the trial court allowed Zondra to file an amended complaint alleging that the family exclusion clause applied to Clark due to the mutual mistake of Margaret Hasley and Newark's agent. At trial, Margaret testified that when she arranged to have Clark added to the policy, she only wanted him covered for farm operations because Clark already had homeowner's and liability coverage under a separate policy. She added that afterwards Newark never alerted her and she never noticed that the policy also included homeowner's liability coverage for Clark. The jury subsequently found that the policy should be reformed to provide coverage for Clark's family. The trial court refused to set aside that verdict on motions after verdict, resulting in this appeal.¹

Where the policy as drafted does not represent the intention of both parties due to the agent's neglect, it may be reformed to express the intended contract. *Artmar, Inc. v. United Fire & Casualty Co.*, 34 Wis.2d 181, 187, 148 N.W.2d 641, 644 (1967). The party seeking reformation must prove the intended contract, and the mistake in deviating from it, by clear and satisfactory evidence. *Shearer v. Dunn County Farmers Mut. Ins. Co.*, 39 Wis.2d 240, 245, 159 N.W.2d 89, 92 (1968). If there is any credible evidence to support the verdict on this issue, we must affirm it. *Fehring v. Republic Ins. Co.*, 118 Wis.2d 299, 305-06, 347 N.W.2d 595, 598 (1984).

Zondra failed to provide any evidence on a crucial element of her case. Although Margaret testified at length concerning her intentions in adding Clark to the policy, she was not able to testify that she communicated those intentions to Newark's agent. The agent testified that she understood Margaret's primary purpose in adding Clark, but did not testify that Margaret

¹ Upon resolving the coverage issue, the parties stipulated that Zondra could receive judgment for the policy limit of \$315,000.

specifically communicated to her that the policy should not apply to Clark in all other respects. The party seeking reformation must prove that the insured made certain statements to the agent concerning the coverage desired. *Sprangers v. Greatway Ins. Co.*, 175 Wis.2d 60, 71, 498 N.W.2d 858, 863 (Ct. App. 1993), *aff'd*, 182 Wis.2d 521, 514 N.W.2d 1 (1994). Margaret's statement as to her primary purpose was not proof of a certain statement directing limited coverage, such that the agent performed negligently.

Our decision makes it unnecessary to address Newark's contention that reformation is not an appropriate jury issue. In any event, Newark waived the issue by failing to raise a timely objection in the trial court.

By the Court. – Judgment reversed.

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