COURT OF APPEALS DECISION DATED AND FILED

March 23, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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* § 808.10 and RULE 809.62, STATS.

No. 98-2634

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

GERALD E. LENZNER,

PLAINTIFF-RESPONDENT,

V.

SOCIETY INSURANCE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Langlade County: JAMES P. JANSEN, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

HOOVER, J. Society Insurance appeals a small claims judgment. It contends that the trial court erred by awarding $1,500 to Gerald Lenzner when he had no records to support that amount. This court agrees that the evidence does not support the award, but concludes there are records in evidence that support a

$260 loss. Therefore, the judgment is reversed and the case remanded for entry of judgment consistent with this opinion.

Society provided Lenzner property insurance covering his business, Wanderer's Bar & Grill. Lenzner's business was burglarized on or about January 21, 1998, and he claimed a $5,405.55 loss. The $5,405.55 consisted largely of cash Lenzner had in the bar for a variety of purposes: (1) $370 for Super Bowl pools; (2) $485.55 cash register receipts; (3) $350 in employee payroll; (4) $400 "bag money"; (5) $900 other money; and (6) $2,500 check cashing money. The remaining $200 was for damage to a door. Lenzner subsequently filed suit in small claims court against Society seeking recovery under the theft provision of the insurance policy.

At trial, Lenzner provided the only testimony. He acknowledged that he had no written records to support the Super Bowl pool, the employee payroll, the "bag money," the other money, or the check cashing money. The $485.55 in cash receipts were from January 17 and 28; Lenzner had no receipts from January 20 or 21. Both Lenzner and Society introduced evidence of Lenzner's bank deposits. One of Society's exhibits indicated that over a five-month period, Lenzner deposited an average of $260 a day on Tuesdays and Thursdays. Damage to the door in the amount of $200 was not contested.

The policy's limit of liability for theft of money is $5,000. The theft section of the policy contains a condition that provides: "You must keep records of all 'money' and 'securities' so we can verify the amount of any loss or damage." The policy also contained a $250 deductible.

The trial court found that there was a burglary and that there was a loss. Society does not contest these findings. The court acknowledged the provision in the policy that required records to be kept of all money and securities in order for Lenzner to file a proof of claim. Society also does not contest this conclusion. The trial court nonetheless determined the amount of loss without reference to any records:

> But I think what I'm going to do is accept, basically, the standards of the industry and say that there is some cash left in a bar at night, and I'm going to arbitrarily pick a number that I feel is reasonable. I believe there is a loss here. I can't accept those figures. I'll set the sum of $1,500 as the loss, plus damages to the building, plus the costs of this action. That will be the pay out figure.

Society contests a determination of loss when the insured failed to maintain verifying records as the policy requires.

This case presents a mixed question of law and fact. We must first determine whether the court's findings of fact are clearly erroneous, § 805.17(2), STATS., and then determine whether the undisputed and properly found facts fulfill the correct legal standard. ***DOR v. Exxon Corp***., 90 Wis.2d 700, 713, 281 N.W.2d 94, 101 (1979). A trial court's findings of fact shall not be set aside unless they are clearly erroneous. Section 805.17(2), STATS.; ***Mentzel v. City of Oshkosh***, 146 Wis.2d 804, 808, 432 N.W.2d 609, 611 (Ct. App. 1988). When more than one inference can be drawn from the credible evidence, the reviewing court must accept the inference the trier of fact drew. ***Cogswell v. Robertshaw Controls Co.***, 87 Wis.2d 243, 250, 274 N.W.2d 647, 650 (1979). The appellate court will search the record for evidence to support the trial court's findings of fact, ***In re Estate of Becker***, 76 Wis.2d 336, 347, 251 N.W.2d 431, 435 (1977), and may affirm a trial court's decision even if it reached its result for different reasons. *See* ***Haessly v.***

Germantown Mut. Ins. Co., 213 Wis.2d 108, 116-17, 569 N.W.2d 804, 807 (Ct. App. 1997). This court reviews questions of law, which include construction of contract terms, without deference to the trial court. ***General Cas. Co. v. Hills***, 209 Wis.2d 167, 175, 561 N.W.2d 718, 722 (1997).

Society contends that the trial court "disregarded [the record keeping condition] and awarded insurance benefits without any verification and records of loss." This court agrees that the trial court erred when it ignored the policy's record verification requirement in determining Lenzner's loss. The determination is erroneous because it does not comport with the contractual provisions. The court cannot rewrite Society's policy to bind it to a risk not contemplated. *See* ***Bankert v. Threshermen's Mut. Ins. Co.***, 105 Wis.2d 438, 444-45, 313 N.W.2d 854, 857 (Ct. App. 1981). This court, however, disagrees with Society that there were no records introduced at trial from which a loss could be verified. Society itself introduced Lenzner's bank records as to the amount Lenzner deposited on certain weekdays over a five-month period. It did so to disprove Lenzner's contention that he had in excess of $5,000 stolen, but it is nonetheless a record showing a daily average deposit of $260. Society has neither indicated that these records are inappropriate, nor cited any case law interpreting its condition that prohibits use of these records to ascertain the amount of loss. This court declines to develop Society's argument for it. *See* ***Barakat v. DHSS***, 191 Wis.2d 769, 786, 530 N.W.2d 392, 398-99 (Ct. App. 1995).

Accordingly, this court reverses the award because the trial court failed to enforce the contractual provisions when it set damages without reference to records as the insurance contract requires. Thus, this case is remanded to the trial court with directions to modify the judgment to award $260, plus $200 for damage to the door, less the $250 deductible plus costs.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions.

This opinion will not be published. RULE 809.23(1)(b)4, STATS.