

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

September 11, 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. 95-1958

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

PAUL KLUTH,

Plaintiff-Appellant,

v.

**GENERAL CASUALTY
COMPANY OF WISCONSIN,**

Defendant-Respondent.

APPEAL from a judgment of the circuit court for Waukesha County: MARK S. GEMPELER, Judge. *Affirmed.*

Before Anderson, P.J., Nettesheim and Snyder, JJ.

PER CURIAM. Paul Kluth has appealed from a judgment determining that a business automobile liability insurance policy issued by the respondent, General Casualty Company of Wisconsin, to R.K. Towing, Inc. did not provide coverage for a motor vehicle accident in which Kluth was injured. The accident occurred when the vehicle being driven by Kluth collided with a 1978 Chevy Malibu being driven by Michael Clermont, who had been given the Malibu as a loaner vehicle by Ray Mierzjewski when Clermont brought his own

vehicle to R.K. Towing for repair work. Mierzjewski and his wife are the operators and sole shareholders of R.K. Towing.

The coverage issue was decided by the trial court after a jury trial on the liability and damages issues. The trial court concluded that coverage did not exist because it was not requested by either R.K. Towing or Mierzjewski within thirty days of acquisition of the Malibu. In making this determination, the trial court also found that Mierzjewski, rather than R.K. Towing, was the owner of the Malibu at the time of the accident and that Mierzjewski's testimony that he intended the vehicle to belong to R.K. Towing was incredible. Because the trial court's finding that Mierzjewski owned the Malibu is not clearly erroneous, we affirm the judgment determining that coverage did not exist under R.K. Towing's policy.

On review of a factual finding made by a trial court without a jury, we will not disturb the trial court's finding unless it is clearly erroneous. *Noll v. Dimiceli's, Inc.*, 115 Wis.2d 641, 643, 340 N.W.2d 575, 577 (Ct. App. 1983). The trial court is the ultimate arbiter of the credibility of the witnesses, and when more than one reasonable inference can be drawn from the credible evidence, we must accept the inference drawn by the trial court. *Id.* at 644, 340 N.W.2d at 577.

The parties stipulated that the trial court could consider Mierzjewski's deposition testimony and affidavit, along with the evidence presented to the jury, in deciding the coverage issue. In his affidavit and deposition testimony, Mierzjewski indicated that R.K. Towing obtained the Malibu approximately two weeks before the accident as payment for towing fees incurred when R.K. Towing towed the Malibu for its then-owner, Elizabeth Lytle. Mierzjewski testified that the vehicle was never sold or transferred to him and that he never intended to acquire it personally. He indicated in his affidavit that before the accident occurred, he sent an application for title to the Malibu to the Wisconsin Department of Transportation "for transfer of the car into my name and the company name, for use as a company car," and that he intended to use the vehicle solely for R.K. Towing business purposes.

Mierzjewski's testimony was contradicted by the title application submitted by him to the Department of Transportation in which he requested

title solely in his own name. In the title application, he also listed his home address rather than the business address of R.K. Towing. Based on the title application, the trial court was entitled to find that Mierzjewski personally took ownership of the Malibu, regardless of whether he kept it at the towing yard or acquired it in exchange for towing services.

This conclusion was corroborated by other evidence in the record. While Mierzjewski testified that he intended to use the Malibu as a loaner vehicle for people who brought vehicles to R.K. Towing for repair, he admitted that he had never provided a customer with a loaner vehicle before Clermont asked him for one and never did it again after loaning the Malibu to Clermont, thus rendering suspect his claim that he intended to use the Malibu for business purposes. The credibility of his professed intention was also impaired by evidence that all of the other vehicles listed in R.K. Towing's policy with General Casualty were tow or flatbed trucks used in R.K. Towing's business operations, and title to those vehicles was held by R.K. Towing.

Evidence also indicated that before permitting Clermont to take the Malibu, Mierzjewski spoke to Clermont's insurer to make sure that Clermont's automobile insurance policy covered his use of the car. In conjunction with evidence indicating that neither Mierzjewski nor anyone else acting on R.K. Towing's behalf ever notified General Casualty that R.K. Towing had acquired the Malibu prior to the time General Casualty received notice of this action, the trial court could reasonably conclude that Mierzjewski had taken personal ownership of the Malibu and did not consider it to be a vehicle acquired by R.K. Towing and insured under R.K. Towing's policy.¹

¹ Mierzjewski testified that he did not notify General Casualty that R.K. Towing had acquired the Malibu before the accident because he believed he had thirty days from the date of acquisition and was waiting until he obtained a certificate of title from the Department of Transportation. He testified that he did not notify General Casualty of the acquisition of the vehicle after the accident because he believed Clermont's insurance covered the accident and because Clermont paid him for the value of the vehicle. However, even if these explanations are deemed plausible, the trial court reasonably was entitled to draw the alternative inference that Mierzjewski did not contact General Casualty regarding coverage for the Malibu because he had taken personal ownership of the Malibu and did not consider it to be a vehicle owned by R.K. Towing and insured under R.K. Towing's policy.

Because the trial court's finding that Mierzejewski, rather than R.K. Towing, owned the Malibu at the time of the accident is not clearly erroneous, we affirm its judgment determining that the policy provided by General Casualty to R.K. Towing provided no coverage for the accident. Based on this disposition, we need not address the remaining arguments raised in the briefs regarding coverage, the release or credit for payments paid by another insurer. However, in affirming the dismissal of the action against General Casualty, we also point out that the appellant's brief was one of the poorest attorney-drafted briefs this court has reviewed in a long time. It contained numerous grammatical errors and was so disjointed as to make it difficult to follow any logical argument being presented by counsel. We trust that counsel will do better in the future.

By the Court. – Judgment affirmed.

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