**COURT OF APPEALS**
**DECISION**
**DATED AND RELEASED**

October 5, 1995



**No. 93-3184**

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

**ROBERT E. MOSS,**
**and CAROLE MOSS,**

**Plaintiffs-Appellants,**

**v.**

**MT. MORRIS MUTUAL INSURANCE COMPANY,**

**Defendant-Respondent.**

APPEAL from a judgment of the circuit court for Marquette County: DANIEL W. KLOSSNER, Judge. *Reversed*.

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

PER CURIAM. Robert and Carole Moss appeal from a summary judgment dismissing their claims against their home insurer, Mt. Morris Mutual Insurance Company. After an explosion destroyed the Mosses' home, Mt. Morris delayed payment on their claim, pending further investigation of the explosion's cause. The Mosses' complaint, filed five months after the explosion,

alleged that Mt. Morris's delay in paying the claim breached the insurance contract and constituted bad faith. The dispositive issue is whether a material fact dispute remains as to those claims. Because we conclude that one does, we reverse.

On several occasions after the explosion, the Mosses allowed Mt. Morris employees to enter their ruined home and inspect the furnace. The dispute arose when Mt. Morris asked to remove the furnace in order to run laboratory tests on it. Mt. Morris asserted its right to removal under policy provisions requiring the insured to cooperate with it, to exhibit the damaged property as often as the company reasonably requested and to assist in enforcing any right of recovery against a third-party. The Mosses asserted that their duties under the policy did not extend to allowing removal of the furnace. They did, however, offer to allow removal if Mt. Morris paid them for the furnace. Mt. Morris refused to pay the Mosses for testing the furnace, or for their home loss until it got the furnace, and this action resulted. On Mt. Morris's summary judgment motion, the trial court concluded as a matter of law that the Mosses breached the contract by refusing to allow removal of the furnace, and that Mt. Morris's subsequent actions were taken in good faith.

We decide summary judgment cases in the same manner as the trial court and without deference to its decision. ***In re Cherokee Park Plat***, 113 Wis.2d 112, 115-16, 334 N.W.2d 580, 582-83 (Ct. App. 1983). A case is properly resolved on summary judgment only if the material facts are undisputed and we can resolve the issues as a matter of law. ***Heck & Paetow Claim Serv. Inc. v. Heck***, 93 Wis.2d 349, 355-56, 286 N.W.2d 831, 834 (1980).

A material and prejudicial breach of the insured's obligation to cooperate with the insurer justifies the denial of a claim. *See* ***Kurz v. Collins***, 6 Wis.2d 538, 546-47, 95 N.W.2d 365, 370 (1959). If the insurer's obligation to indemnify the insured is fairly debatable, the refusal to pay a claim is not bad faith. ***State Farm Fire & Casualty Ins. Co. v. Walker***, 157 Wis.2d 459, 465, 459 N.W.2d 605, 608 (Ct. App. 1990). Denying benefits is fairly debatable when the insurer has a reasonable basis for doing so. ***Id***. at 466, 459 N.W.2d at 608.

A material fact dispute remains whether the Mosses materially breached the insurance contract by refusing to allow removal of the furnace

without payment for it, and whether Mt. Morris reasonably conditioned payment of the claim on removal of the furnace. Mt. Morris's proofs show that removal was necessary to determine the explosion's cause. The Mosses' opposing affidavits maintain that the in-house inspections were sufficient to determine causation, and that removal was therefore unnecessary. The policy required the Mosses to cooperate with reasonable requests to exhibit the property. They would not violate the contract by refusing an unreasonable demand. Further proceedings are therefore necessary to determine whether Mt. Morris's removal demand was, in fact, a reasonable request to exhibit the property.[1]

Additionally, Robert Moss's affidavit reports that he overheard a Mt. Morris employee say that "Mt. Morris wasn't going to eat this loss and if he couldn't pin the explosion on Lennox [the furnace manufacturer] he [w]ould pin it on Moss." If a fact finder believed Robert's statement, and inferred a plot to manufacture evidence, then bad faith would be proved.

The unresolved factual disputes identified in this opinion require further proceedings. Our decision makes it unnecessary to address the other issues raised on appeal.

*By the Court.*—Judgment reversed.

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

[1] Further proceedings are unnecessary, however, to determine whether the policy required Mt. Morris to pay the Mosses for use of the furnace in testing. The policy provided: "*We* may take all or any part of damaged property at the agreed or appraised value. Any property paid for or replaced shall become *our* property." That provision plainly applies to compensation for loss, not for temporary use in testing.