**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

May 28, 1998

**Marilyn L. Graves**
**Clerk, Court of Appeals**
**of Wisconsin**

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**No. 97-0742**

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

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**92 CV 201**

**ROBERT E. MOSS AND CAROLE MOSS,**

**PLAINTIFFS-APPELLANTS-CROSS-RESPONDENTS,**

**V.**

**MT. MORRIS MUTUAL INSURANCE COMPANY,**

**DEFENDANT-RESPONDENT-CROSS-APPELLANT.**

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**94 CV 97**

**MT. MORRIS MUTUAL INSURANCE COMPANY,**

**PLAINTIFF-RESPONDENT-CROSS-APPELLANT,**

**V.**

**ROBERT E. MOSS, JR. AND CAROLE MOSS,**

**DEFENDANTS-APPELLANTS-CROSS-RESPONDENTS.**

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APPEAL and CROSS-APPEAL from a judgment of the circuit court for Marquette County: RICHARD L. REHM, Judge. *Affirmed in part; reversed in part and cause remanded for further proceedings.*

Before Dykman, P.J., Vergeront and Roggensack, JJ.

ROGGENSACK, J. Robert and Carole Moss appeal from a judgment which dismissed their claims for breach of contract and bad faith against their insurer, Mt. Morris Mutual Insurance Company, based on its failure to pay under their homeowner's insurance policy following an explosion and fire in their home. Mt. Morris refused payment while its investigation into the explosion was pending, and eventually it filed a counter-suit against the Mosses for fraud, bottomed on arson. After a jury found that the Mosses had not committed fraud, but that Mt. Morris had reasonably requested that the Mosses release their furnace to Mt. Morris for testing, the circuit court ruled that Mt. Morris was excused from payment because the policy was void for lack of cooperation by the Mosses. It also held that Mt. Morris was not entitled to recover from the Mosses the $30,000 it had paid to settle with the mortgagee, an additional insured under the policy. Mt. Morris cross-appeals the latter determination, as well as the circuit court's refusal to change one of the jury's special verdict answers. Because we conclude that the special verdict form submitted to the jury erroneously failed to ask whether the Mosses' refusal to turn over their furnace for testing until ordered to do so by the circuit court was material in respect to Mt. Morris's ability to defend the action, we remand the case for further proceedings on that materiality issue.

However, for the reasons discussed in this opinion, we affirm the circuit court's decisions on both issues in the cross-appeal.

## BACKGROUND

The Mosses constructed a log home in 1991 and 1992, and insured it through Mt. Morris Mutual Insurance Company. The home was severely damaged by an explosion and fire on Friday, June 19, 1992. When Mt. Morris representatives came to the property that day, Robert Moss informed them that the family would be out of town until June 25, but he gave Mt. Morris's representative a key to the house and permission to examine the premises in the family's absence.

Mt. Morris retained engineer James Ramsey to assist in its investigation. On June 24, Ramsey inspected the furnace. Ramsey took pictures of the furnace, but concluded that he lacked the appropriate equipment to do further testing that day. Another inspection was arranged for July 2, 1992. During that inspection, Moss and one of the Mt. Morris representatives, Howard Fenske, got into an argument, which resulted in Moss ordering Fenske off of the property. The parties vigorously disagreed on the details of the dispute, but the Mosses claimed that Fenske had insulted them, and that they had overheard him commenting that if Mt. Morris could not attribute the explosion to the Lennox furnace, then it would blame the Mosses. Meanwhile, over the next hour or two, Ramsey and the other investigators were able to trace a gas leak to a joint where the gas line turned to the furnace.

The investigators for Mt. Morris believed that the best way to conduct further testing would be to remove the furnace and pipe assembly from the house. However, Moss refused to release the furnace to Mt. Morris unless the

insurer paid for it. Mt. Morris, relying on a cooperation clause in the insurance policy, maintained that it would not settle the claim unless the Mosses permitted it to take the furnace. Mt. Morris also claimed the Mosses' refusal to let its representative back into their house interfered with its adjustment process.

On November 16, 1992, the Mosses sued Mt. Morris for breach of contract and for bad faith. Valley First National Bank of Ripon, the mortgagee who was listed as an additional insured under the Mt. Morris policy, also filed suit against Mt. Morris. Mt. Morris settled the Valley Bank lawsuit by paying Valley Bank $30,000. The agreement between Mt. Morris and the bank stated that Mt. Morris was subrogated to the interest of the bank up to $30,000. It also purports to assign any rights which the bank might have against the Mosses, up to that amount.

On April 2, 1993, the circuit court entered a written order allowing Mt. Morris to remove and inspect the furnace without payment.[1] As a result of the testing performed on May 26th and 27th, Mt. Morris's investigative personnel determined that a coupling joint was the cause of the explosion. They were also of the opinion that the joint had been loosened one or two hours prior to the explosion by a deliberate human act. Ramsey claimed that his time estimation would have been more accurate if the joint had not corroded due to the delay between the explosion and his examination.

Based upon the test results, Mt. Morris filed a counter-suit against the Mosses, asserting fraud, malicious prosecution, and abuse of process, and seeking damages, including recovery of the sum which Mt. Morris had paid to

[1] This court declined the plaintiff's request for a supervisory writ.

Valley Bank.[2] On May 17, 1993, Mt. Morris filed a motion for summary judgment contending that the Mosses' delay in providing the furnace for testing breached their duty to cooperate with the insurer, thereby voiding the policy. The circuit court granted the motion on November 12, 1993, but this court reversed on October 5, 1995, stating:

> 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.

On remand, the case proceeded to a jury trial. The circuit court submitted a special verdict form to the jury, which responded as follows:

> **QUESTION 1:** Was the request by Mt. Morris to remove the furnace from the Moss premises for testing reasonable?
>
> **ANSWER:** Yes.
>
> **QUESTION 2:** Without consideration of the issue of the removal of the furnace for testing, answer this question: Did Robert E. Moss, Jr. and/or Carole Moss materially breach their duty to cooperate under their insurance policy with Mt. Morris?

[2] Mt. Morris also sought to recover the $1,000 which it had paid the Mosses for living expenses on the day of the fire. However, the court ruled that that payment was valid because it was made without reservation before any breach of the cooperation clause. That determination has not been appealed.

**ANSWER:** No.

**QUESTION 3:** Did Robert E. Moss, Jr. and/or Carole Moss conceal or misrepresent a material fact to Mt. Morris concerning their claim under their policy of insurance?

**ANSWER:** No.

**QUESTION 4:** Did Robert E. Moss, Jr. and/or Carole Moss intentionally cause the explosion at their home?

**ANSWER:** No.

**QUESTION 5:** Regardless of how you have answered any previous questions, answer this question: Under their policy of insurance, what sum will fairly and reasonably compensate the Mosses for damages caused by the explosion:

| | |
|---|---|
| A. House | $60,000.00 |
| B. Contents | $30,000.00 |
| C. Additional Living Expense | $22,250.00 |
| | -1,000.00 received |

Both the Mosses and Mt. Morris moved for judgment on the verdict. In the alternative, the Mosses moved for judgment notwithstanding the verdict (JNOV) or a new trial, based on the court's failure to ask the jury whether the Mosses' breach was material. Mt. Morris also asked the court to change the jury's answer to Question 2. The trial court granted Mt. Morris's motion to dismiss all claims against it, based on the jury's answer to Question 1 and its interpretation of this court's prior opinion, or in the alternative, its own conclusion that the Mosses had materially breached the insurance contract as a matter of law. However, the circuit court denied Mt. Morris's motion for a judgment of $30,000 against the Mosses, and its request to change the answer to Special Verdict Question 2. Both parties appeal.

## DISCUSSION

**Standard of Review.**

We review JNOV *de novo*, following the same methodology as that employed by the trial court. ***State v. Michael J.W.***, 210 Wis.2d 132, 140, 565 N.W.2d 179, 183 (Ct. App. 1997). "[A] motion for judgment notwithstanding the verdict admits for purposes of the motion that the findings of the verdict are true, but asserts that judgment should be granted the moving party on grounds other than those decided by the jury." ***Management Computer Servs., Inc. v. Hawkins, Ash, Baptie & Co.***, 206 Wis.2d 158, 177, 557 N.W.2d 67, 75 (1996).

"The form of the special verdict is a matter addressed to the trial court's discretion." ***Hannenbaum v. Direnzo & Bomier***, 162 Wis.2d 488, 501, 469 N.W.2d 900, 906 (Ct. App. 1991) (citation omitted). Therefore, we will not disturb the form so long as "the material issues of fact are encompassed within the questions asked and appropriate instructions are given." ***Id***.

Since the parties stipulated to the facts concerning recovery of the payment made to the bank, we will independently decide the legal consequences of those facts. *See* ***Bindrim v. B. & J. Ins. Agency***, 190 Wis.2d 525, 534, 527 N.W.2d 320, 323 (1995). And, the standard for reviewing a requested change to a jury's answer in a verdict is whether the verdict is supported by any credible evidence. ***Management Computer Servs.***, 206 Wis.2d at 187, 557 N.W.2d at 79.

**Special Verdict Question No. 1.**

The policy required the Mosses to "cooperate with [Mt. Morris] in performing all acts required by [the] policy," and to "exhibit the damaged property as often as [Mt. Morris] reasonably request[ed]." By its answer to Special Verdict

Question No. 1, the jury determined that Mt. Morris had reasonably requested the Mosses to provide their damaged furnace for testing. Since the evidence is uncontroverted that the Mosses did indeed refuse Mt. Morris's request, the jury's determination may have been sufficient to establish a technical breach of the cooperation clause. However, "a material breach [of a contract] by one party [is necessary to] excuse subsequent performance by the other." *See* ***Management Computer Servs.***, 206 Wis.2d at 183, 557 N.W.2d at 77. The Mosses correctly point out that the question posed by the circuit court did not allow the jury to resolve the issue of the materiality of refusing to provide the furnace until the court ordered the Mosses to do so. Therefore, the answer to Question No. 1 was insufficient, in and of itself, to provide a defense to the Mosses' claims. *See, e.g.,* ***Simonds v. Bouton***, 87 Wis.2d 302, 308, 274 N.W.2d 666, 669 (1979) (holding that an insurer must show material harm from a breach to support the denial of a claim under a policy). Therefore, the circuit court's judgment "on the verdict" was improperly granted. The court's ruling in Mt. Morris's favor actually constituted judgment notwithstanding the verdict, and we will analyze it as such.[3]

Mt. Morris first claims that it was unnecessary for the circuit court to submit the question of materiality to the jury because this court had already implicitly decided in ***Moss I*** that if the insurer's request to remove the furnace was reasonable, the denial of the request constituted a material breach as a matter of law. However, its reading of our opinion is incorrect. ***Moss I*** presented to us as an appeal from summary judgment against the Mosses. Our opinion decided only

[3] The Mosses also appeal the denial of their own motion for judgment on the verdict, which requires the same analysis as if the court had granted JNOV to Mt. Morris. *See* § 805.14(2)(b), STATS. (directing trial courts to consider mislabeled motions as if they had been correctly designated).

that there was at least one factual scenario under which the plaintiffs could prevail, thus precluding summary judgment for Mt. Morris. It did not purport to enumerate every factual dispute which might exist, and it did not address the materiality issue as a question of law.

Mt. Morris next asserts that, even if this court did not decide the materiality issue as a question of law, it was appropriate for the circuit court to do so. The insurer relies upon ***Kurz v. Collins***, 6 Wis.2d 538, 546, 95 N.W.2d 365, 370 (1959), for the proposition that the materiality of the breach of a cooperation clause is always a question of law to be resolved by the court rather than the jury.[4]

Mt. Morris's argument overlooks more recent supreme court precedent which holds that "[t]he issue of whether a party's breach excuses future performance of the contract by the non-breaching party presents a question of fact." ***Management Computer Servs.***, 206 Wis.2d at 184, 557 N.W.2d at 78. Since an insurance policy is to be interpreted under contract principles, ***Sprangers v. Greatway Ins. Co.***, 182 Wis.2d 521, 536, 514 N.W.2d 1, 6 (1994), ***Management Computer Servs.*** is dispositive. Materiality is a factual question.

Moreover, Special Verdict Question No. 2. specifically asked the jury to decide whether the Mosses had materially breached their duty to cooperate, but in so deciding, not to consider the furnace removal issue. In conjunction with Question No. 2 and pursuant to WIS J I—CIVIL 3116, the circuit court instructed the jury that it was to determine whether the Mosses' conduct was harmful, injurious or damaging to Mt. Morris to the extent that it was unable to make a

[4] No one disputes that what constitutes a lack of cooperation is a question of fact. ***Modl v. National Farmers Union Property & Cas. Co.***, 272 Wis. 650, 657, 76 N.W.2d 599, 602 (1956).

thorough investigation sufficient to prepare an adequate defense or to make a just settlement. None of the parties objected to submitting the materiality issue to the jury with regard to other possible breaches, thereby implicitly recognizing its factual nature.

Finally, while Mt. Morris presented evidence that there had been some corrosion in the joint which affected its ability to accurately determine the leak rate of the gas, its experts were nonetheless able to form conclusions about the cause of the explosion. There was conflicting evidence as to whether, or to what extent, Mt. Morris had been harmed by the seven-month delay in testing the furnace. This conflict is indicative of materiality being a factual issue, not a legal one.

Therefore, in accord with ***Management Computer Servs.*** and the facts of this case, we conclude that the materiality of the Mosses' breach with regard to failing to provide the furnace to Mt. Morris was a factual question for the jury.[5] The special verdict form and instructions submitted to the jury failed to encompass the issue of whether the Mosses' refusal to allow the removal of the furnace for testing was material. To find it a material breach, the jury would have to find that the Mosses' breach was so substantial as to destroy the essence of the

[5] Therefore, we do not address the Mosses' alternate argument that their refusal to allow the removal of the furnace could be held immaterial as a matter of law.

contract and thereby excuse Mt. Morris from subsequent performance. Because it was not given the opportunity to do so, JNOV in favor of Mt. Morris was error.[6]

The error in the form of the special verdict left the issue of materiality unresolved. The matter must be remanded for a new trial to have a jury decide: (1) whether the Mosses' refusal to allow the removal of their furnace constituted a breach of the cooperation clause of their insurance policy;[7] and, if so, (2) whether that breach was material in that it prevented Mt. Morris from conducting an adequate investigation and preparing an adequate defense.

**Election of Remedies.**

The Mosses also claim that, by obtaining a court order to remove the furnace, Mt. Morris elected specific performance as the remedy for any cooperation clause breach, and should not now be allowed to rely on the Mosses' refusal which the court order remedied. However, the Mosses' contention, if true, would have defeated Mt. Morris's original motion for summary judgment, and therefore, should have been raised to this court on the prior appeal of the matter. We will deem waived any argument which could have been, but was not made. ***Cathey v. Industrial Comm'n***, 25 Wis.2d 184, 188, 130 N.W.2d 777, 779 (1964) ("A litigant is concluded by the mandate of this court as to all matters actually

[6] The Mosses also argue that Mt. Morris waived the right to have a jury address whether the Mosses materially breached the cooperation clause by refusing to allow removal by not requesting an instruction on that issue or objecting to the special verdict as posed. ***Sheldon v. Singer***, 61 Wis.2d 443, 453, 213 N.W.2d 5, 10 (1973). However, we find this argument somewhat disingenuous in light of the fact that the Mosses themselves now object to the form of the special verdict and request a new trial.

[7] This question will resolve the Mosses' alternate argument that—however reasonable its request—Mt. Morris was not entitled to remove the furnace under the policy.

presented or which might consistently with legal rules have been presented to this court upon appeal.") (citation omitted).

**Recovery of Settlement with Mortgagee.**

After the fire, Mt. Morris paid Valley Bank $30,000 in settlement of the bank's claim as an additional insured under the Mosses' policy.[8] In exchange, the bank did not assign all of its mortgagee rights, but purported to conditionally assign up to $30,000 of those rights to Mt. Morris, based on language in the policy that stated:

> Whenever [Mt. Morris] shall pay the mortgagee (or trustee) any sum for loss under this policy, and shall claim that, as to the mortgagor or owner, no liability therefor existed, [Mt. Morris] shall, to the extent of such payment, be thereupon legally subrograted to all the rights of the party to whom such payment shall be made, under all securities held as collateral to the mortgage debt; or may at [Mt. Morris's] option pay to the mortgagee (or trustee) the whole principal due or to grow due on the mortgage, with interest accrued and shall thereupon receive a full assignment and transfer of the mortgage and of all such other securities; but no subrogation shall impair the right of the mortgagee (or trustee) to recover the full amount of said mortgagee's (or trustee's) claim.

At the time of the purported partial assignment, Valley Bank had already foreclosed on the property, sold it and obtained a deficiency judgment against the Mosses.

Mt. Morris acknowledges that an insurer may claim subrogation against its own insured only in cases of fraud, in order to place the responsibility

[8] Valley Bank was entitled to payment under the policy regardless of the Mosses' actions, because the policy provided that "insurance as to the interest of the mortgagee … shall not be invalidated by any act or neglect of the mortgagor or owner of the within described property."

for damages upon the one who caused the loss. *See* ***Madsen v. Threshermen's Mut. Ins. Co.***, 149 Wis.2d 594, 604-05, 439 N.W.2d 607, 610 (Ct. App. 1989). Nonetheless, Mt. Morris bases its claim for recovery of $30,000 from the Mosses on its subrogation of "Valley Bank's rights against the Mosses under the mortgage" and a partial assignment.

We begin by noting that this is not a situation such as that found in ***Ensz v. Brown Ins. Agency, Inc.***, 66 Wis.2d 193, 223 N.W.2d 903 (1974), where an insurer received an assignment of an entire mortgage obligation, which would have permitted it to foreclose against a non-compliant insured/mortgagor. Indeed, Valley Bank had already foreclosed on the mortgage. Mt. Morris received an assignment of an interest in a part of a mortgage *which had already been satisfied*. This purported "assignment" was nothing more than a disguised subrogation of the sort which is permissible in Wisconsin only upon a finding of wrongdoing by the insured. Once the jury determined that the Mosses had not engaged in any fraudulent activity, there was no basis to require them to pay Mt. Morris for its independent obligation to an additional insured.

**Special Verdict Question No. 2.**

Mt. Morris also claims that the answer to Question No. 2 should have been changed from "no" (that the Mosses did not materially breach the cooperation clause without considering the Mosses' refusing to release their furnace for testing) to "yes," based on considerable evidence that the Mosses refused to allow Mt. Morris adequate access to the property for adjustment purposes. However, Moss testified he had barred only Fenske from his property due to the personal conflict between them, and that any other Mt. Morris representative would have been allowed on the property. In short, there was

credible evidence in the record to support the answer to Question No. 2, and it will not be disturbed.

## CONCLUSION

The answer to Special Verdict Question No. 1 was insufficient to support judgment for either the Mosses or Mt. Morris, because it failed to resolve a material factual dispute between the parties. The case must be remanded for a new trial on the issue of whether the Mosses materially breached the cooperation clause of their policy by refusing to allow the removal of their furnace for testing. However, the other verdict answers stand, and they preclude recovery by Mt. Morris of the $30,000 which it paid to an additional insured under the policy.

*By the Court.*—Judgment affirmed in part; reversed in part and cause remanded for further proceedings.

Not recommended for publication in the official reports.