COURT OF APPEALS
DECISION
DATED AND FILED

November 21, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 00-2190

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

JONAS BUILDERS, INC.,

PLAINTIFF-RESPONDENT,

V.

UNITED STATES FIDELITY & GUARANTY COMPANY A/K/A FIDELITY AND GUARANTY INSURANCE UNDERWRITERS, INC.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: STANLEY A. MILLER, Judge. *Affirmed.*

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

¶1 DYKMAN, J. United States Fidelity & Guaranty Company appeals from a judgment of $996,417 plus prejudgment interest and double costs in favor of its insured, Jonas Builders, Inc., and from an order denying its postverdict motions. USF&G challenges the jury's findings that Jonas Builders' claim

involved one "occurrence" within the meaning of the insurance policy, that Jonas Builders did not fail to give timely notice to USF&G, that Jonas Builders took reasonable steps to protect the covered property, and that the actual cash value of the property was $750,000. USF&G also challenges the circuit court's decision to enter judgment based on the replacement cost (rather than actual cash value) of the property, its refusal to apply the policy's coinsurance provision, and its award of statutory interest and double costs under WIS. STAT. § 807.01 (1999-2000).[1] We affirm on all issues.

Background

¶2 United States Fidelity & Guaranty Company provided property insurance coverage to Jonas Builders, Inc., from March 1, 1995, to March 1, 1996. Among the property insured by USF&G was a complex of seven buildings in Milwaukee that had formerly been used for manufacturing, but were used mostly for storage in the Fall of 1995. In late October 1995, Gerald Jonas, owner of Jonas Builders, discovered that one of the insured properties, located at 2784 North 32nd Street, had been vandalized. Three different areas of that property were involved: a mezzanine, a boiler room and an open crane bay area. Anything that was copper or brass in these areas was stripped and taken, including the wiring, the pipes, and the copper from the boiler. The police were called and a police report was made. Gerald asked Christine Jonas, the officer manager for Jonas Builders, to call the insurance company.

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

¶3 In mid-November, Gerald discovered that another insured property, located at 2748 North 32nd Street, had been vandalized. The building at 2748 is approximately one-half city block away from the building at 2784. Again, copper wiring had been cut and stripped, this time from transformers outside the building and from troughs that connected the transformers. In addition, glass insulators on top of the transformers were smashed. Gerald again called the police and another police report was made on November 14, 1995.

¶4 Later in November 1995, Gerald, while he was visiting the property, witnessed someone burning insulation off copper wires there. He called the police and followed the thief to a scrap yard, where Gerald witnessed the thief selling the wires. The police arrived soon after, and arrested Lamar Moore. After this incident, Gerald installed some additional lighting and a video camera.

¶5 Apparently, Moore was released soon after he was arrested. The video camera captured Moore in the act of theft on the property on December 18, 1995. After this, Gerald again witnessed Moore stealing from the property, this time with an accomplice, Mr. Nash. The police were with Gerald this time, and Nash was arrested, though Moore escaped. The video camera had recorded the incident, and Gerald took the tape to the police. Moore, who was on probation at the time, was called in by his probation officer and arrested.

¶6 Jonas Builders provided a written notice of claim to USF&G on January 16, 1996. USF&G sent a claims adjustor to the property who then asked Eugene Coblentz, an electrician, to estimate the amount of damage. Coblentz estimated that the total cost of repair and replacement would be approximately $1 million. In a letter dated May 10, 1996, USF&G denied Jonas Builders' claim

because it concluded that Jonas Builders' covered losses did not exceed its deductible.

¶7 Jonas Builders sued USF&G. At trial, the jury returned a special verdict, finding that the vandalism and theft involved "continuous or repeated exposure to substantially the same general harmful conditions," that Jonas Builders did not fail to notify USF&G of its loss within a reasonable time or take reasonable steps to protect the property, that the replacement cost of the damage was $1,021,417, and the actual cash value of the property was $750,000.

¶8 The trial court denied USF&G's motion for judgment notwithstanding the verdict, and entered judgment for Jonas Builders in the amount of $996,417, based on the jury's finding of replacement cost less the $25,000 deductible. In addition, the court awarded Jonas Builders double costs and prejudgment interest at an annual rate of twelve percent. USF&G appeals.

Opinion

¶9 There is no dispute that the USF&G policy provides coverage for the theft and vandalism sustained by Jonas Builders. USF&G, however, alleges that Jonas Builders failed to comply with requirements of the policy regarding notice and protecting the property, invalidating its claim. Alternatively, USF&G asserts that other provisions of the policy work to reduce the amount Jonas Builders is entitled to recover below what the circuit court awarded in the judgment. USF&G argues that the jury made several erroneous factual findings in the special verdict and that the circuit court made a number of incorrect legal conclusions both during the trial and in denying USF&G's postverdict motions, requiring reversal.

A. Jury's Finding that Jonas Builders Gave Timely Notice

¶10 Section E.3.a(2) of the policy provides that Jonas Builders was required to give USF&G "prompt notice" in event of loss or damage to covered property. Question three on the special verdict form asked, "Did Jonas Builders fail to notify USF&G of the vandalism and/or theft damage within a reasonable time?"[2] The jury answered "No." USF&G argues that there is no credible evidence to support this answer. It further asserts that it was prejudiced by Jonas Builders' failure to give timely notice and that the notice requirement was reasonable, making the claim invalid under WIS. STAT. § 631.81(1).[3]

¶11 We conclude that there was sufficient evidence to support the jury's finding that Jonas Builders gave USF&G timely notice. We will overturn a jury's finding only if there is no credible evidence, under any reasonable view, that leads to an inference supporting the jury's finding. ***Morden v. Continental AG***, 2000 WI 51, ¶38, 235 Wis. 2d 325, 611 N.W.2d 659; *see also* WIS. STAT. § 805.14(1). It is therefore our duty to search the record for credible evidence that sustains the jury's verdict, not for evidence to support a verdict that the jury could have reached but did not. ***Morden***, 2000 WI 51 at ¶39.

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[2] USF&G does not challenge the special verdict's use of the phrase "within a reasonable time" rather than the policy's phrase "prompt notice."

[3] WISCONSIN STAT. § 631.81(1) provides:

> TIMELINESS OF NOTICE. Provided notice or proof of loss is furnished as soon as reasonably possible and within one year after the time it was required by the policy, failure to furnish such notice or proof within the time required by the policy does not invalidate or reduce a claim unless the insurer is prejudiced thereby and it was reasonably possible to meet the time limit.

¶12 It is undisputed that Jonas Builders did not provide written notice of its claim to USF&G until January 1996. At trial, however, Christine Jonas, the office manager for Jonas Builders, testified that when she learned that the property had been vandalized in late October 1995, she called Jeff Stecker, who was Jonas Builders' insurance agent, to report the loss. In early November, she had a meeting with Stecker and Robert Lentz, who sold Jonas Builders the USF&G insurance policy. According to Christine, the purpose of the meeting was to discuss both the vandalism and the renewal of the insurance policy, which would expire on March 1, 1996. Lentz testified that he never had a conversation with Christine regarding the vandalism of Jonas Builders and did not recall having a meeting with her and Stecker in Fall 1995. Stecker did not testify.

¶13 USF&G does not argue that the jury was not entitled to believe Christine instead of Lentz, that the policy required that written rather than oral notice be given to satisfy the policy's notice requirement, or that giving notice to Lentz rather than directly to USF&G was insufficient. Instead, it argues that the circuit court erred when it allowed Christine to testify regarding the oral notice she gave to Lentz. In support, USF&G refers us to Jonas Builders' complaint, which alleged that it gave "due" notice of its loss to USF&G on January 16, 1996. Because USF&G admitted this allegation in its answer, it claims that there was no issue of material fact regarding when notice was first given to be decided by the jury, and that any testimony on this issue was irrelevant. *See* ***Savich v. Hines***, 174 Wis. 181, 183, 182 N.W.2d 924 (1921) ("Where a material fact is alleged in the complaint and admitted in the answer, it becomes a veracity in the case, and evidence in respect thereto immaterial to the issues, there being no issue upon that matter.")

¶14 We disagree with USF&G because Jonas Builders never alleged in its complaint that the written notice it provided in January was the first or only notice it provided to USF&G. Rather, it simply made reference to "due" notice. Due notice in this context has questionable meaning, particularly because the term is not mentioned in either the policy or WIS. STAT. § 631.81. USF&G should not have taken this allegation as a concession that another form of notice had not been given prior to that date. We therefore find its argument that it was unfairly surprised by Christine's testimony unpersuasive.

¶15 Furthermore, even if Jonas Builders had alleged that it had given no notice before January, USF&G has not persuaded us that the circuit court erred in concluding the evidence was relevant. The determination regarding the admissibility of evidence is committed to the circuit court's discretion. ***First Fed. Fin. Serv. Inc. v. Derrington's Chevron, Inc.***, 230 Wis. 2d 553, 566, 602 N.W.2d 144 (Ct. App. 1999). We agree that plaintiffs are generally bound by the allegations in their complaint. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 103, 279 N.W.2d 493 (Ct. App. 1979). This does not necessarily mean, however, that a circuit court erroneously exercises its discretion when it determines that evidence is relevant even though it is inconsistent with a fact that was alleged in the complaint. ***Savich*** recognized this when it noted that a party may amend its complaint to withdraw an allegation and that the complaint may be treated as amended if the circuit court allowed the evidence to be admitted. 174 Wis. at 183-84; *see also* ***Wahnschaff v. Erdman***, 502 S.E.2d 246, 249 (Ga. Ct. App. 1998) (holding that if evidence that contradicts a party's admission in the pleadings is admitted over the objection of the other party, the trial court is deemed to have allowed party to withdraw the admission). At that point, the initial allegation is not conclusive, but remains evidence of the fact admitted.

Savich, 174 Wis. at 184. A copy of the complaint was received into evidence, but the jury decided nonetheless to find that Jonas Builders had met the policy's notice requirement. Because we conclude that there is credible evidence to support this finding, we affirm the jury's answer to question three.[4]

B. Jonas Builders' Duty to Protect the Property

1. Special Verdict Question and Instructions

¶16 In addition to requiring prompt notice of loss, the insurance policy also required Jonas Builders to "[t]ake all reasonable steps to protect the Covered Property from further damage by a Covered Cause of Loss." Regarding this issue, question seven of the special verdict form asked, "Did Jonas Builders fail to take reasonable steps to protect covered (damaged) property from further damage by theft or vandalism?" The jury answered "No." USF&G argues that this question and its accompanying instructions were erroneous as a matter of law because they suggest that Jonas Builders had a duty to protect only the damaged property when the policy required Jonas Builders to protect "the entire insured property." A determination regarding the meaning of a term in an insurance policy is a question of law that we review *de novo*. ***Smith v. Atlantic Mut. Ins. Co.***, 155 Wis. 2d 808. 810, 456 N.W.2d 597 (1990).

[4] USF&G in its reply brief provides an additional reason for overturning the jury's finding that timely notice was given. USF&G argues that there was no evidence that Jonas Builders gave oral notice regarding the vandalism to the *transformers* since Jonas Builders did not report this to the police until November 14, 1995, which was one week after Christine testified she had a meeting with Lentz. Because USF&G did not raise this issue in its brief in chief, we decline to address it. *See* ***In re Estate of Bilsie***, 100 Wis. 2d 342, 346 n.2, 302 N.W.2d 508 (1981).

¶17 We disagree with USF&G that the language of the policy clearly supports its interpretation of the policy. The policy defines covered property as both real and personal property "for which a Limit of Insurance is shown in the Declarations." One reading of the provision, then, would require that Jonas Builders take steps to protect *all* the property listed in the declarations, even though this would encompass fifteen different buildings across the city, many of which were not involved in the theft and vandalism. The provision's use of the word "further," however, suggests that Jonas Builders had a duty to protect only property *that was damaged* from *further* damage. USF&G suggests a third interpretation: that Jonas Builders was obligated to take steps to protect all the property at the locations in which the vandalism and theft occurred. Although this is a reasonable interpretation, it is not the only reasonable one, and it is the interpretation supported least by the language of the provision. Because the provision is fairly susceptible to more than one meaning, we conclude that it is ambiguous. *See* ***Sukala v. Heritage Mut. Ins. Co.***, 2000 WI App 266, ¶10, 240 Wis. 2d 65, 622 N.W.2d 457. Further, because the exclusion is ambiguous it must be narrowly construed against USF&G. *See* ***Meyers v. City of Amery***, 185 Wis. 2d 537, 543, 518 N.W.2d 296 (Ct. App. 1994). We therefore conclude that the circuit court did not err in phrasing question seven the way it did.[5]

¶18 However, even if we were to conclude that the circuit court erred in including the word "damaged" in question seven and its accompanying instructions, this would not be reversible error. When a circuit court gives an

[5] USF&G also suggests that question seven was erroneous because "it is impossible to determine what the jury's answer responded to, given this ambiguous wording." USF&G devotes only one sentence to this contention and cites no authority in support. The argument was therefore waived. *See* ***State v. Pettit***, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992).

erroneous instruction, a new trial is not warranted unless the error affected the appellant's substantial rights. ***Nommensen v. American Cont'l Ins. Co.***, 2001 WI 12, ¶51, 246 Wis. 2d 132, 629 N.W.2d 301. For an error to affect the substantial rights of a party, there must be a reasonable possibility that the error contributed to the outcome of the action. ***Id.*** at ¶52. As will be discussed further in ¶19, the steps Jonas Builders took to protect the property were directed just as much at protecting the as-of-yet undamaged property at 2748 and 2784 North 32nd Street as they were at protecting the already damaged property from further harm. We therefore fail to see how removing the reference to damaged property would have changed the jury's answer to question seven.

2. Sufficiency of the Evidence

¶19 USF&G argues next that, even if question seven and the accompanying jury instructions were not erroneous, the jury's answer must still be changed because there is no credible evidence to support the jury's finding that Jonas Builders took reasonable steps to protect the property. Jonas Builders disagrees and points to a number of acts it took to protect the property, including installing additional lighting and a video camera, putting alarms and watchdogs in some of the buildings, visiting the property to try to catch the vandals, notifying the police and their insurance agent, and putting plastic bags over the transformers to keep moisture from getting inside them.

¶20 USF&G disputes that these actions were sufficient, arguing that Jonas Builders should have hired security guards and monitored the videotapes in real time. Although we agree these would have been reasonable responses, this does not support USF&G's contention that there is no credible evidence supporting the jury's finding that Jonas Builders' actions were reasonable as well.

Because we cannot conclude that the steps Jonas Builders took to protect the property were unreasonable as a matter of law, we affirm the jury's finding on this question.

C. Replacement Cost and Actual Cash Value

¶21 The jury found that $1,021,417 would compensate Jonas Builders. USF&G claims that the circuit court was prohibited from entering judgment based on this amount because the policy states that USF&G will not pay on a replacement cost basis until the property is actually replaced or repaired, and Jonas Builders had not yet replaced the property. Therefore, USF&G contends, judgment should have been entered based on actual cash value. USF&G concedes that it did not raise this issue before the circuit court. It argues, however, that we should exercise our authority under WIS. STAT. § 752.35 and order a new trial regardless because the real controversy was not fully tried.

¶22 USF&G's assertion that the real controversy was not fully tried is unpersuasive. We will exercise our power of discretionary reversal only in exceptional cases. *See* ***Beacon Bowl, Inc. v. Wisconsin Elec. Power Co.***, 176 Wis. 2d 740, 794, 501 N.W.2d 788 (1993). We may conclude that the real controversy was not fully tried when, for example, a special verdict question leads jurors to focus their attention on the wrong issue, ***Vollmer v. Luety***, 156 Wis. 2d 1, 22, 456 N.W.2d 797 (1990), or if the jury was prevented from considering important testimony on an important issue or certain evidence that was improperly received clouded a crucial issue, ***State v. Cleveland***, 2000 WI App 142, ¶21, 237 Wis. 2d 558, 614 N.W.2d 543. Regarding the replacement cost issue, USF&G cannot argue successfully that the jury received evidence that it should not have, was prevented from considering important testimony, or was misled by a special

verdict question. Rather, the only error that USF&G alleges in this context is the circuit court's decision to enter judgment on replacement cost. USF&G insists that this error was "fundamental," but does not explain why. At most, USF&G's failure to raise the replacement cost issue at trial subjected it to a higher damage award than it otherwise might have. We are therefore unpersuaded that USF&G's failure to read its own policy prevented the real controversy from being tried and decline to reverse the circuit court's decision under WIS. STAT. § 752.35 and grant a new trial on all issues.

¶23 USF&G also argues that, even if the circuit court was correct in entering judgment based on replacement cost, the judgment must be reduced because the policy required the court to make a coinsurance calculation, which the court failed to do. The circuit court denied USF&G's postverdict motion requesting the court to enter a judgment notwithstanding the verdict in favor of USF&G on these grounds because it concluded that USF&G failed to raise the coinsurance provision as a defense before trial. Further, USF&G had the burden of proving the coinsurance provision applied but failed to request that the jury make the factual findings needed to support the defense.

¶24 USF&G does not address the waiver argument in its brief in chief. In its reply brief and citing ***Shannon v. Shannon***, 150 Wis. 2d 434, 442 N.W.2d 25 (1989), USF&G contends that the coinsurance provision was a "coverage defense," and therefore it could not be waived. In ***Shannon***, the supreme court held that a "coverage clause of either an inclusionary or exclusionary nature going to the scope of the coverage assumed cannot be waived." ***Id.*** at 454. In contrast, "a forfeiture clause furnishing a ground for forfeiture of coverage or defeasance of liability or a no-action clause can be waived." ***Id.*** In explaining this rule the ***Shannon*** court quoted ***Ahnapee & Western Railway Co. v. Challoner***, 34 Wis. 2d

134, 140-44, 148 N.W.2d 646 (1967), which stated: "[Waiver is a concept] not available to broaden the coverage of a policy so as to protect the insured against risks not included therein or expressly excluded therefrom. The theory underlying this rule seems to be that the company should not be required by waiver … to pay a loss for which it charged no premium." ***Shannon***, 150 Wis. 2d at 452.

¶25 Prohibiting USF&G from relying on the coinsurance provision is not forcing it to pay a loss for which the insurance policy provided no coverage. In ***Shannon***, the insurance company had been prohibited from arguing that the policy did not provide coverage for the injury. Here, it is undisputed that the insurance policy provided coverage for the loss. The coinsurance provision is merely a way that the amount of compensation is calculated. We therefore agree with the circuit court that USF&G waived its right to assert a defense based on the coinsurance provision.

¶26 Next, USF&G challenges the jury's finding that the actual cash value of the property was $750,000. Because we have affirmed the circuit court's decision to enter judgment based on replacement cost, we need not decide whether a judgment based on an actual cash value of $750,000 would be correct.

D. Multiple vs. Single Occurrences

1. Definition of "Occurrence"

¶27 The next issue is whether the circuit court used the correct definition of "occurrence" in the special verdict form. USF&G's policy provides: "We will not pay for loss or damage in any one occurrence until the amount of loss or damage exceeds the Deductible shown in the Declarations." The deductible for each "occurrence" is $25,000. In the general liability section, occurrence is

defined as "continuous or repeated exposure to substantially the same general harmful conditions." Relying on this definition, question one on Jonas Builders' proposed special verdict asked, "Did the vandalism and theft damage for which Jonas Builders seeks insurance coverage involve 'continuous or repeated exposure to substantially the same general harmful conditions?'" The circuit court later substantially adopted this question in the special verdict form that was given to the jury.

¶28 USF&G argues that the definition of "occurrence" contained in the liability section of the policy does not apply to the use of the same word in the building and personal property section. Instead, USF&G asserts that the common meaning of occurrence should have been used. Jonas Builders responds that USF&G waived this argument because it never disputed the definition before the trial court. We agree.

¶29 Under WIS. STAT. § 805.13(3) objections to jury verdict questions or instructions are waived unless they are made at conference before the case is given to the jury. Further, the court of appeals has no power to consider waived errors regarding verdict questions or instructions. *See* ***State v. Schumacher***, 144 Wis. 2d 388, 409, 424 N.W.2d 672 (1988).

¶30 USF&G insists that it did not waive the issue, stating that it "filed motions in limine to prevent the use of this definition." USF&G's motion, however, does not support this assertion. Although we agree with USF&G that it asked the circuit court to conclude as a matter of law that there were multiple occurrences, USF&G never argued that the policy's definition of occurrence did not apply. Rather, its motion assumes that the policy's definition would apply as it also requested that the court preclude Jonas Builders from alleging to the jury that

"the multiple incidents of theft and/or vandalism which are alleged to have occurred constitute 'continuous or repeated exposure to substantially the same general harmful conditions' within the meaning of the policy." Further, when Jonas Builders proposed what later became question one on the special verdict form, USF&G did not object but instead asked for a clarifying instruction to be read with the question.[6] We therefore agree with the circuit court that this issue was waived, and that we therefore have no power to consider it.

2. Number of Occurrences

¶31 The jury answered "Yes" to question one on the special verdict form and therefore did not answer question two, which asked how many occurrences took place between March 1, 1995, and March 1, 1996. USF&G asserts that the jury's answer to question one must be changed because there were multiple occurrences as a matter of law.[7] Alternatively, it contends that no credible evidence supports the jury's finding "that a single scheme caused all the damages."

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[6] The proposed instruction, which the circuit court later read to the jury provided:

> For the acts of vandalism and theft to constitute continuous or repeated exposure to substantially the same general harmful conditions all of the acts of vandalism and theft must be part of a common scheme to cause injury to Jonas Builders. A common scheme requires that the damage was caused by the same individual or individuals using the same or similar methods.

[7] In addition, USF&G asserts that the circuit court should have given it more time to conduct discovery on this issue because Jonas Builders did not introduce its "single occurrence" theory until opening arguments. We disagree with USF&G because it has not demonstrated that additional discovery was needed. Both before and during trial, USF&G argued that there were at least twenty-five occurrences. Therefore, regardless whether Jonas Builders' theory of the case asserted one or three or ten occurrences, USF&G's argument was still the same, and it did not need more time to develop it.

¶32 In asserting that there were multiple occurrences as a matter of law, USF&G relies on ***Olsen v. Moore***, 56 Wis. 2d 340, 202 N.W.2d 236 (1972), and ***Voigt v. Riesterer***, 187 Wis. 2d 459, 523 N.W.2d 133 (Ct. App. 1994). These cases both defined "occurrence" in the context of an insurance policy in a way suggesting that a series of events must be continuous in order to be considered one occurrence. The insurance policies in those cases did not define occurrence, however, so the courts used the plain meaning of the word. ***Olsen*** and ***Voigt***, therefore, fail to support USF&G here, when occurrence is defined in the policy to include not just "continuous" but also "*repeated* exposure to substantially the same general harmful conditions."

¶33 In contrast, cases involving polices that define "occurrence" to include "continuous or repeated exposure to conditions," similar to USF&G's policy, recognize that an occurrence can be "ongoing" and span a large amount of time, but still be one occurrence within the meaning of the policy. *See* ***Society Ins. v. Town of Franklin***, 2000 WI App 35, ¶9, 233 Wis. 2d 207, 607 N.W.2d 342; ***Wisconsin Elec. Power Co. v. California Union Ins. Co.***, 142 Wis. 2d 673, 419 N.W.2d 255 (Ct. App. 1987).

¶34 Therefore, accepting the definition of "occurrence" as provided in the policy, we cannot conclude that there were multiple occurrences as a matter of law. The instructions the court read to the jury regarding question one, which were proposed by USF&G, stated: "For the acts of vandalism and theft to constitute continuous or repeated exposure to substantially the same general harmful conditions all of the acts of vandalism and theft must be part of a common scheme to cause injury to Jonas Builders."

¶35 There was evidence presented at trial that the acts of vandalism and theft between October 1995 and January 1996 were part of a common scheme. Gerald witnessed the same person, Lamar Moore, in the act of theft on more than one occasion. The videotape also showed Moore on the property at different times. Further, each act involved the theft of copper and other valuable materials that could be sold for scrap. This evidence suggests that the same people were causing damage to the property for the same purpose. A reasonable jury could conclude that the acts of theft and vandalism were part of a common scheme, and therefore constituted "repeated exposure to substantially the same general harmful conditions" within the meaning of the policy.[8] We therefore reject USF&G's contention that there were multiple occurrences as a matter of law and that there was no credible evidence showing that the acts of theft and vandalism were one occurrence within the meaning of the policy.

E. Award of Interest and Double Costs under WIS. STAT. § 807.01

¶36 Two years before trial, Jonas Builders made an offer of settlement to USF&G for $575,000, which USF&G rejected. Under WIS. STAT. § 807.01(3) and (4), the prevailing party is entitled to double costs and twelve percent interest if the judgment exceeds the amount of the settlement offer. Here, the circuit court entered judgment in favor of Jonas Builders for $996,417. USF&G argues that the

[8] USF&G refers us to the testimony of William Styler, an electrician who worked for Coblentz, that there was evidence that more theft and vandalism occurred in February 1996. USF&G argues that this proves that others besides Moore and Nash were involved in the theft since they were both in jail at the time, and therefore the damage was not caused by a common scheme. Styler's testimony is contradicted by Gerald's, however, who testified that there were no more acts of vandalism after Nash and Moore were arrested, until the policy expired March 1. The jury was entitled to believe Gerald rather than Styler. Further, even if a third individual was involved, this does not necessarily mean he or she was not also part of the same scheme as Nash and Moore, but was just never caught.

statute does not apply, however, because it was Jonas Builders that made the settlement offer rather than the actual owner of the property, Jonas Builders, Inc. Restated Pension Plan, who, pursuant to a party stipulation and an order of the court, will be the actual recipient of the award. Because the party who made the offer is not the same party who is recovering the judgment, USF&G asserts that it is not obligated to pay statutory interest and double costs.[9]

¶37 We find this argument to be without merit. Although it is true the circuit court ordered Jonas Builders to hold any sums it recovered from the judgment in a trust for the benefit of the Pension Plan, this does not change the fact that the judgment was entered in favor of Jonas Builders. In essence, USF&G is arguing that there is no way that WIS. STAT. § 807.01 could be applied in this case. Had the Pension Plan made the settlement offer rather that Jonas Builders, USF&G would undoubtedly assert that its offer did not trigger the statute because the Pension Plan was not a party to the suit. Jonas Builders made a settlement offer, USF&G rejected it, and Jonas Builders was awarded a judgment that exceeded the settlement offer. Therefore, Jonas Builders is entitled to statutory interest and double costs under WIS. STAT. § 807.01.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

[9] USF&G also argues that Jonas Builders is not entitled to statutory interest and double costs because the judgment should have been reduced pursuant to the coinsurance provision. Because we have concluded that USF&G waived its right to assert a defense based on that provision, this argument is moot.