

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 21, 2001

Cornelia G. Clark
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 WIS. STAT. § 808.10 and RULE 809.62.

No. 01-0192-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

MONTY BERGER AND SUE BERGER,

PLAINTIFFS-RESPONDENTS,

V.

MISSISSIPPI SPORTS AND RECREATION, INCORPORATED

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Vernon County:
MICHAEL J. ROSBOROUGH, Judge. *Affirmed.*

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

¶1 PER CURIAM. Mississippi Sports and Recreation, Inc. (MSR), a marina operator on the Mississippi River, appeals from a judgment in favor of Monty and Sue Berger. Both sides alleged breaches of two boat slip rental

agreements. After a bench trial, the court found that MSR breached the two agreements, dismissed MSR's counterclaim, and awarded damages to the Bergers. The issue is whether the evidence supports the circuit court's finding that MSR's breaches were material. We affirm.

¶2 The relevant facts are not in dispute. In 1994, the Bergers began renting houseboat slips at the marina MSR now owns. In 1998, needing slips for two boats, they signed slip rental agreements with a five-year term for one slip and a ten-year term for the other. At the time, the Bergers were allowed to maintain their own shower and fish cleaning station on the marina dock.

¶3 In October 1998 and again in January 1999, MSR informed the Bergers that they must stop using the dock area for showering and fish cleaning. Instead, MSR promised that the marina would build on-shore showering and fish cleaning facilities. Consequently, the Bergers removed their personal facilities from the dock. However, MSR never received DNR permission to build the promised shore side facilities. For that and other reasons, the Bergers discontinued using their slips and stopped paying rent and utilities in September 1999. The following February, they commenced this action to rescind the leases and obtain a refund of \$3,050 in pre-paid rent.

¶4 MSR counterclaimed for unpaid rent, alleging that none of its actions constituted a material breach of the lease agreements. After hearing testimony, the circuit court found that MSR's failure to provide the promised fish cleaning and shower facilities was a material breach of the agreements. On appeal, MSR contends that the failure to provide such facilities was not material to the lease agreements.

¶5 One party’s material breach of a contract frees the other party from its contractual obligation. *Management Comp. Servs. Inc. v. Hawkins, Ash, Baptie & Co.*, 206 Wis. 2d 158, 183, 557 N.W.2d 67 (1996). A breach is material if it destroys the essential object of the agreement. *Ranes v. American Family Mut. Ins. Co.*, 219 Wis. 2d 49, 57, 580 N.W.2d 197 (1998) (citing *Appleton State Bank v. Lee*, 33 Wis. 2d 690, 692-93, 148 N.W.2d 1 (1967)). A relatively minor breach, on the other hand, does not excuse the other party from its contractual performance. *Management Comp.*, 206 Wis. 2d at 183. Whether a party’s breach is material is a question of fact. *Id.* at 184. We review the circuit court’s fact findings under the clearly erroneous standard. WIS. STAT. § 805.17(2) (1999-2000)¹.

¶6 The circuit court’s finding of materiality is not clearly erroneous. MSR contends that the essence of the contract “clearly was for rental of slip space and not for what may very well have been unessential services for the plaintiffs.” However, as the Bergers point out, if they had merely wanted a place to keep their boat, they could have put it almost anywhere along the river’s shoreline. The circuit court therefore reasonably found that the amenities promised by the marina, such as showers and fish cleaning areas, were essential and material parts of the contract.²

By the Court.—Judgment affirmed.

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

² MSR suggests in its brief that the Bergers may have had a shower in one of their houseboats, and therefore had no need of a marina showering facility. However, the Bergers presented unrefuted testimony that they extensively used their boats during the summer but had no shower.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5.

