OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT I/II

February 14, 2018

To:

Hon. Stephanie Rothstein
Circuit Court Judge
Criminal Justice Facility
949 North 9th Street
Milwaukee, WI 53233

John Barrett
Clerk of Circuit Court
Room G-8
901 N. 9th Street
Milwaukee, WI 53233

Breanne F. Lynch
Kasdorf Lewis & Swietlik
11270 W. Park Place
Milwaukee, WI 53224

Shauna Driscoll Manion
Brent D. Nistler
Nistler Law Office
7000 W. North Avenue
Wauwatosa, WI 53213

Jacob E. Miota
Miota Law LLC
1400 E. Olive Street
Milwaukee, WI 53211-1828

Maria DelPizzo Sanders
Peterson, Johnson & Murray, SC
788 N. Jefferson Street, Suite 500
Milwaukee, WI 53202

You are hereby notified that the Court has entered the following opinion and order:

2017AP282 Suzanne Hupy v. Lied's Nursery Company (L.C. #2013CV1783)

Before Reilly, P.J., Gundrum and Hagedorn, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Suzanne Hupy appeals from a circuit court judgment entered after a jury trial. At trial, Underwriters Syndicate No. 4020 d/b/a Certain Underwriters at Lloyd's London (hereinafter Lloyd's London) prevailed on its argument that it does not owe coverage to Lied's Nursery Company, Inc. for damage allegedly caused to Hupy's property by Lied's Nursery's landscaping services. Hupy challenges one of the jury's special verdict answers. Based upon our review of

the briefs and record, we conclude at conference that this case is appropriate for summary disposition. WIS. STAT. RULE 809.21 (2015-16).[1] We affirm because there was sufficient evidence supporting the jury's answer, and the circuit court did not err when it declined to change the jury's answer.

The parties had a jury trial to determine whether Lloyd's London owes coverage to Lied's Nursery for damage it allegedly caused to Hupy's property during landscaping. Coverage was denied after the jury found that Lied's Nursery made untrue representations of fact in its insurance application about the existence of any unresolved compensation dispute and its awareness of any circumstances that might provide grounds for any claim, Rob Lied made the representations based on his personal knowledge or in circumstances in which he necessarily ought to have known the truthfulness of the representations, and Lloyd's London believed such representations to be true and justifiably relied on the representations to its pecuniary damage.

On motions after verdict, Hupy moved the circuit court to change the jury's answer to question seven having to do with Lloyd's London's reliance upon representations in Lied's Nursery's application. Hupy argued that there was no evidence, via testimony from a representative of Lloyd's London, that Lloyd's London (1) relied upon the application which failed to disclose the Hupy dispute and (2) would not have issued Lied's Nursery's policy had the Hupy dispute been disclosed. Lloyd's London countered that the insurance policy, which incorporated the application, was in evidence, and the policy stated that Lloyd's London would rely upon the application in issuing the policy. Lloyd's London further argued that there was

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

sufficient evidence that Lied's Nursery knew of the Hupy dispute at the time it applied for insurance but failed to disclose the dispute in its application. The circuit court upheld the jury's answer to question seven because it was supported by the following credible evidence: the details of the Hupy dispute, Lied's Nursery's knowledge about the Hupy dispute at the time it applied for insurance, Lied's Nursery's application, and the insurance policy.

We independently review the circuit court's decision on a motion to change a jury's answer to a verdict question. *See* ***Reuben v. Koppen***, 2010 WI App 63, ¶19, 324 Wis. 2d 758, 784 N.W.2d 703 (question of law presented). In reviewing the circuit court's denial of a motion to change the jury's answer to a verdict question,

> we view the evidence in the light most favorable to the verdict and affirm the verdict if it is supported by any credible evidence. We search the record for credible evidence that sustains the verdict, and if the evidence gives rise to more than one reasonable inference, we accept the inference the jury reached.

Kubichek v. Kotecki, 2011 WI App 32, ¶14, 332 Wis. 2d 522, 796 N.W.2d 858 (citations omitted). "The standard of review is even more stringent where, as here, the circuit court upheld the jury's findings on motions after verdict. In such cases, we will not overturn the jury's verdict unless 'there is such a complete failure of proof that the verdict must be based on speculation.'" ***Id***., ¶14 (citations omitted).

On appeal, Hupy focuses on the alleged lack of proof that (1) Lloyd's London relied upon Lied's Nursery's application and (2) the role the absence of information regarding the Hupy dispute played in Lloyd's London's decision to issue a policy to Lied's Nursery.

We agree with the circuit court that the jury's answer to question seven is supported by credible evidence. The insurance policy and Lied's Nursery's application were in evidence. The

insurance policy stated, "In consideration of the payment of the premium and reliance upon the Statements in the Application which is deemed a part of this Insurance Policy…." Robert Lied signed Lied's Nursery's application for insurance. Above Lied's signature the application states the following:

> No fact, circumstance or situation indicating the probability of a "Claim" or action for which coverage may be afforded by the proposed insurance is now known by any person(s) or organization(s) proposed for this insurance other than that which is disclosed in this application. It is agreed by all concerned that if there is knowledge of any such fact, circumstances or situation, any "Claim" subsequently emanating therefrom shall be excluded from coverage under the proposed Insurance.
>
> For the purpose of this application, the undersigned authorized agent of the person(s) and organization(s) proposed for this insurance declares that to the best of his/her knowledge and belief, after reasonable inquiry, the statements in this application and in any attachments, are true and complete. The underwriting manager, Company and/or affiliates thereof are authorized to make any inquiry in connection with this application. Signing this application does not bind the Company to provide or the Applicant to purchase the insurance.
>
> This application, information submitted with this application and all previous applications and material changes thereto of which the underwriting manager, Company and/or affiliates thereof receives notice is on file with the underwriting manager, Company and/or affiliates thereof and is considered physically attached to and part of the policy if issued. The underwriting manager, Company and/or affiliates thereof will have relied upon this application and all such attachments in issuing the policy.

Lloyd's London's reliance is set out in the application and the insurance policy. Hupy does not cite to any portion of the record where this evidence is contradicted. Hupy cites no authority for the proposition that the application and policy language are insufficient evidence of reliance. We conclude that there was credible evidence supporting the jury's answer to question seven.

Hupy's reliance on ***Malzewski v. Rapkin***, 2006 WI App 183, 296 Wis. 2d 98, 723 N.W.2d 156, is misplaced. ***Malzewski*** is a summary judgment case, not a jury verdict case. ***Id.***, ¶1. ***Malzewski*** involved representations by a home seller in an offer to purchase and a real estate condition report, not representations in an insurance policy application. ***Id.***, ¶2. We do not find ***Malzewski*** instructive.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of the circuit court is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Diane M. Fremgen
Acting Clerk of Court of Appeals