COURT OF APPEALS
DECISION
DATED AND FILED

December 21, 2010

A. John Voelker
Acting Clerk of Court of Appeals

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.

Appeal Nos. 2009AP2783
2010AP870

Cir. Ct. No. 2008CV10489

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

RANDY LENZKE AND SHERYL LENZKE,

PLAINTIFFS-RESPONDENTS,

V.

BRINKMANN POOLS, LLC,

DEFENDANT-APPELLANT,

HASTINGS MUTUAL INSURANCE COMPANY,

INTERVENOR-DEFENDANT-RESPONDENT.

RANDY LENZKE AND SHERYL LENZKE,

PLAINTIFFS-RESPONDENTS,

V.

BRINKMANN POOLS, LLC,

DEFENDANT-APPELLANT,

APPEAL from judgments of the circuit court for Milwaukee County: WILLIAM S. POCAN, Judge. *Affirmed.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 KESSLER, J. This case consolidates two appeals brought by Brinkmann Pools, LLC ("Brinkmann").[1] In the 2009 appeal, Brinkman appeals from the trial court order granting summary judgment dismissing Hastings Mutual Insurance Company ("Hastings"). In the 2010 appeal, Brinkmann appeals the order granting judgment on the jury verdict in favor of Randy and Sheryl Lenzke.[2] We affirm both appeals.

BACKGROUND

¶2 In early 2007, Randy and Sheryl Lenzke (collectively "the Lenzkes") contracted with Brinkmann to obtain and install a "Blue Isle" pool, which was manufactured by Blue Hawaiian. The pool's pump was manufactured by Pentair. Soon after the installation of the pool, the Lenzkes observed two cracks on the bottom of the pool. The Lenzkes contacted Brinkmann by phone and wrote a letter about the cracks, but Brinkmann did not send anyone out to the

[1] This court, on its own motion, ordered these appeals consolidated for disposition. *See* WIS. STAT. RULE 809.10(3).

[2] We note that Brinkmann had different counsel for the 2009 and 2010 appeals. We caution counsel for Brinkmann in the 2010 appeal about his failure to follow certain requirements of the rules of appellate procedure. *See* WIS. STAT. § 809.19(1)(d) & (e) (2007-08). Counsel in that appeal morphed much of the procedural history with a distractingly argumentative statement of facts. We were disappointed to discover that in some significant instances, relating to statements attributed to opposing counsel, the record did not fairly support the arguments advanced. We urge counsel, in the future, to accurately report the record, leaving argument as to the correct inferences therefrom only for the argument portion of the brief.

Lenzkes' property for over a month. Brinkmann did not finish repairing the cracks before closing the Lenzkes' pool for the 2007 season. In April 2008, Brinkmann opened the Lenzkes' pool for the season, but did not return to finish repairing the cracks. A side wall of the pool began to bulge and the Lenzkes contacted Brinkmann. Brinkmann said that it would send an inspector out the following week. A few days later, the Lenzkes discovered that water was shooting out of their pool through the pump, spraying water all over the area. Later the following day, when a Brinkmann employee removed the cover from the pool, the Lenzkes observed that the whole bottom of the pool was "one big bubble" and that the cracks had expanded.

¶3 The Lenzkes filed a complaint claiming breach of contract, breach of warranty, violation of WIS. STAT. §100.18 (2007-08),[3] negligence, breach of the Wisconsin Home Improvement Practices Act,[4] violation of WIS. STAT. §895.446,[5] and various forms of misrepresentation against Brinkmann. Hastings, which issued Brinkmann a Commercial General Liability (CGL) policy, initially represented Brinkmann under a reservation of rights, then sought and obtained permission to intervene. Hastings moved for summary judgment on the grounds that, based on the allegations in the Lenzkes' complaint, and subsequent discovery, there was no coverage under the CGL policy it sold to Brinkmann. For reasons discussed more fully in subsequent portions of this opinion, the trial court concluded that there was no coverage under the policy, and thus no duty to defend.

[3] WISCONSIN STAT. § 100.18 (2007-08) discusses fraudulent representations. All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

[4] The Wisconsin Home Improvement Practices Act can be found in WIS. ADMIN. CODE § ATCP 110 and WIS. STAT. § 100.20.

[5] WISCONSIN STAT. § 895.446 discusses property damage or loss caused by crime.

The trial court granted Hastings' motion for summary judgment, dismissing it from the litigation.

¶4 The matter then proceeded to trial without Hastings. On the afternoon of October 8, 2009, the jury was instructed, closing arguments were completed, and the jury was sent to deliberate. The following day, Brinkmann moved for a mistrial based on statements made by the Lenzkes' attorney during his closing argument the previous day, to which Brinkmann objected at the time. Before Brinkmann made the motion, the court told the parties that the jury had reached a verdict. The trial court denied the motion, noting that it should have been made during trial before the jury was sent to deliberate, as the problem could have been handled with a curative instruction.

¶5 The jury returned a verdict finding no breach of contract and no misrepresentation, but that Brinkmann had breached an implied warranty for which $130,000 would fairly and reasonably compensate the Lenzkes. Brinkman moved for reduction of the verdict, arguing that there was no evidence to support a verdict in excess of $109,000, the only estimate of the cost of the pool replacement. The trial court denied the motion and ordered judgment on the verdict.

¶6 Brinkmann appeals from the judgment dismissing Hastings and separately from the judgment on the verdict. We discuss the issues in the appeals separately, with additional facts as necessary to the respective appeals.

DISCUSSION

I. Summary Judgment Denying Insurance Coverage.

¶7 In its first appeal, Brinkmann contends that the trial court erred in granting Hastings' motion for summary judgment, dismissing Hastings, because Hastings still had a duty to defend. We disagree.

¶8 "We review a grant of summary judgment de novo, relying on the same methodology as the circuit court." ***Estate of Sustache v. American Family Mut. Ins. Co.***, 2008 WI 87, ¶17, 311 Wis. 2d 548, 751 N.W.2d 845. Where we must interpret an insurance contract to determine the scope of an insurer's duty to defend its insureds, we determine a question of law that we review *de novo*. ***Id.***, *See also* ***Johnson Controls, Inc. v. Employers Ins. of Wausau***, 2003 WI 108, ¶30, 264 Wis. 2d 60, 665 N.W.2d 257 ("The interpretation of … an insurance contract is a question of law that we review de novo.").

¶9 Brinkmann argues that the trial court was wrong to grant summary judgment dismissing its CGL carrier because Hastings still had a duty to defend.[6]

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[6] Hastings responds that Brinkmann's failure to include an objection to the grant of summary judgment in its WIS. STAT. § 805.16(1) motion after verdict deprives this court of jurisdiction of the summary judgment appeal. We disagree.

WISCONSIN STAT. § 808.03(1), "unless otherwise expressly provided by law," allows appeal as a matter of right to the Court of Appeals of "[a] final *judgment or a final order* of a circuit court." (Emphasis added.) As to summary judgment, WIS. STAT. § 802.08(2) provides that "[t]he *judgment* sought *shall* be rendered if the pleadings, [and discovery] together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a *judgment* as a matter of law." (Emphasis added.) The purpose of WIS. STAT. § 805.16 is not to rehash matters which have already been reduced to judgment, but to give the trial court the opportunity to correct errors of law or of discretion on a jury verdict before entering judgment. *See* ***Ford Motor Co. v. Lyons***, 137 Wis. 2d 397, 417, 405 N.W.2d 354 (Ct. App. 1987). A previously issued *judgment* under § 802.08 can be reviewed by an appellate court pursuant to § 808.03(1) without requiring the expenditure of limited circuit court resources to review under § 805.16 what it has already decided and entered as a judgment.

Although much of the damage was to the pool Brinkmann installed (a clear exclusion under the policy), Brinkmann argues that Hastings nonetheless had a duty to defend under the policy because within the four corners of the plaintiffs' complaint were damages for landscaping costs, which were neither "your work," nor "your product," under the policy, and thus outside the policy exclusions.[7]

¶10 Our supreme court in ***Sustache*** explained the duty to defend:

> An insurer's duty to defend its insured is determined by comparing the allegations of the complaint to the terms of the insurance policy. The duty to defend is triggered by the allegations contained within the four corners of the complaint. It is the nature of the alleged claim that is controlling, even though the suit may be groundless, false, or fraudulent. The insurer's duty to defend is therefore broader than its duty to indemnify insofar as the former implicates arguable, as opposed to actual, coverage.
>
> Courts liberally construe the allegations in the complaint and assume all reasonable inferences.

Id., ¶¶20-21 (internal citations and emphasis omitted). However, the court also explained that

> [w]here the insurer has provided a defense to its insured, a party has provided extrinsic evidence to the court, and the court has focused in a coverage hearing on whether the insured's policy provides coverage for the plaintiff's claim, it cannot be said that the proceedings are governed by the four-corners rule.

Id., ¶29 (emphasis omitted). Here the insurer, Hastings, represented Brinkmann under a reservation of rights, obtained permission to intervene, and after discovery

[7] We decline to address Brinkmann's argument that the "accident" language in the policy provided coverage for the misrepresentation claim because our resolution of other issues makes that determination unnecessary. *See* ***Patrick Fur Farm, Inc. v. United Vaccines, Inc.***, 2005 WI App 190, ¶8 n.1, 286 Wis.2d 774, 703 N.W.2d 707 (appellate courts should decide cases on the narrowest possible grounds).

moved for summary judgment of no coverage. Hastings followed the process ***Sustache*** explained to permit a court to look beyond the four corners of the complaint to determine coverage.

¶11 The complaint alleges a variety of legal claims against Brinkmann, all of which seek damages because of the Lenzkes' need to "remove the pool, install a new pool and redo their landscaping as well as spend considerable amounts of their own time in the process." In response to a discovery request to the Lenzkes for "an itemization of any and all damages that are not directly attributable to the repair or replacement of the defendant's work," counsel for the Lenzkes responded: "Plaintiffs are not seeking any compensatory damages that are not directly attributable to the repair or replacement of Defendant's work."

¶12 Insurance policies are construed as they would be understood by a reasonable person in the position of the insured. ***Kremers-Urban Co. v. American Emp'rs Ins. Co.***, 119 Wis. 2d 722, 735, 351 N.W.2d 156 (1984). "Exclusions are narrowly or strictly construed against the insurer if their effect is uncertain." ***American Family Mut. Ins. Co. v. American Girl, Inc.***, 2004 WI 2, ¶24, 268 Wis. 2d 16, 673 N.W.2d 65. An insurer has the burden of proving an exception to coverage or that the insured comes within an exclusion. *See* ***Ermenc v. American Family Mut. Ins. Co.***, 221 Wis. 2d 478, 481, 585 N.W.2d 679 (Ct. App. 1998). Reasonable doubts about the meaning of uncertain policy language must be resolved in favor of the insured. ***Mooren v. Economy Fire & Cas. Co.***, 230 Wis. 2d 624, 632, 601 N.W.2d 853 (Ct. App. 1999). Our supreme court explained a three-step coverage analysis, stating:

> Our procedure follows three steps. First, we examine the facts of the insured's claim to determine whether the policy's insuring agreement makes an initial grant of coverage. If it is clear that the policy was not

> intended to cover the claim asserted, the analysis ends there. [Second], [i]f the claim triggers the initial grant of coverage in the insuring agreement, we next examine the various exclusions to see whether any of them preclude coverage of the present claim. Exclusions are narrowly or strictly construed against the insurer if their effect is uncertain. We analyze each exclusion separately; the inapplicability of one exclusion will not reinstate coverage where another exclusion has precluded it. Exclusions sometimes have exceptions[.] [Third], if a particular exclusion applies, we then look to see whether any exception to that exclusion reinstates coverage. An exception pertains only to the exclusion clause within which it appears; the applicability of an exception will not create coverage if the insuring agreement precludes it or if a separate exclusion applies.

American Girl, 268 Wis. 2d 16, ¶24 (internal citations omitted).

¶13 As material to this litigation, the CGL policy provides coverage for "those sums that the insured becomes legally obligated to pay as damages because of … 'property damage' to which this insurance applies."[8] "Property damage" is defined in the policy as "physical injury to tangible property." However, under "Section I.2. Exclusions," the policy specifically states that it does not apply to:

> j. Damage To Property
>
> (6): That particular part of any property that must be restored, repaired or replaced because "your work" was incorrectly performed on it.
>
> ….
>
> Paragraph (6) of this exclusion does not apply to "property damage" included in the "products-completed operations hazard."
>
> ….
>
> l. Damage To Your Work

[8] The policy also requires that the property damage be the result of an "occurrence." No party here argues that the pool failure was not an occurrence within the policy. The dispute is whether the pool failure was subject to a coverage exclusion.

> "Property damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard."

The definition of "Products-completed operations hazard" includes:

> [A]ll … "property damage" occurring away from premises you own or rent and arising out of "your product" or "your work." [9]

The policy explains that "your work" means "[w]ork or operations performed by you or on your behalf" and "[m]aterials, parts or equipment furnished in connection with such work or operations." Warranties and representations made with respect to "your work" are also excluded under the policy.

¶14 We agree with the trial court that both the actual labor Brinkmann performed and the "materials and equipment furnished in connection with such work" are specifically excluded from coverage as "your work" under the policy. The installation of the pool, as well as the pool itself and the pump, are excluded from coverage under the policy language as part of "your work." Property that must be "restored, repaired or replaced" because Brinkmann's work was incorrectly performed is specifically excluded, unless it is included in the products-complete operations hazard. Therefore, coverage for collateral damage such as that caused by removing failed equipment, or landscaping damaged during the replacement of the failed pool, would initially be part of the "your work" exclusion. The products-completed operations hazard definition, however, excepts such collateral damage from the initial exclusion, thus returning collateral property damage coverage but still excluding damage to "your work."

[9] The definition of "products-completed operations hazard" includes several exceptions to the basic definition, none of which appear relevant to this case.

¶15 However, by the time of the summary judgment motion, the Lenzkes had specifically disavowed any claim for compensatory damages beyond those expenses "directly attributable to the repair or replacement of Defendant's work." Hastings sent the following request, described as an interrogatory by the trial court, to the Lenzkes' counsel:

> As you know, the damages sought by your clients are for the repair or replacement of defendant Brinkmann Pools work or product. Please provide an itemization of any and all damages that are not directly attributable to the repair or replacement of the defendant's work. Please describe the work and/or products and the corresponding damage. Please consider this an interrogatory pursuant to Wis. Stats. § 804.11.

The Lenzke's counsel responded:

> In response to your August 17th letter, Plaintiffs are not seeking any compensatory damages that are not directly attributable to the repair or replacement of Defendant's work.

¶16 Thus, by the time of summary judgment, the trial court found that the Lenzkes did not assert any claims for collateral damage. The Lenzkes do not appeal this finding.[10] This left only the Lenzkes' claim for the repair and replacement of "your work" that is, the pool, as the subject of the litigation. Repair or replacement of "your work" was specifically excluded from coverage and was not excluded from exclusion by the definition of "products-completed operations hazard." The "products-completed operations hazard" reinstates coverage not for "your work," but for damages to other tangible property caused by "your work." Hence, by the time summary judgment was requested, Hastings

[10] Brinkmann does not directly dispute this finding, but instead argues that even at summary judgment the court may not look beyond the complaint to determine coverage by stating that "[t]he trial court also erred when it considered Hastings' extrinsic evidence in ruling that the insurer had no duty to defend."

properly demonstrated that there was no factually supported theory of coverage which escaped the exclusions of this policy.

¶17 In addition, the jury essentially confirmed the correctness of the trial court's conclusion that there was no factual basis for coverage when it found the *only* basis for Brinkmann liability was breach of an implied warranty. The policy expressly *excludes* coverage for "'[p]roperty damage' to 'your work' arising out of it or any part of it and included in the 'products-completed operations hazard'" unless the work was performed by a subcontractor. The policy *includes* "warranties or representations … with respect to … your work" as part of "your work." Thus, the only basis the jury found for liability was part of "your work" under the policy, for which coverage is expressly excluded under the policy.

¶18 Brinkmann also contends that summary judgment was improper because questions of fact existed regarding whether Brinkmann was a subcontractor, and therefore exempt from the "your work" exclusion in the CGL policy, as the exclusion does not apply to work performed by subcontractors. Brinkmann does not claim he contracted with any other entity to install the Lenzkes' pool on his behalf. Brinkmann argues that because the term "subcontractor" is not defined in the policy, a question of fact exists as to whether Brinkmann acted as a subcontractor because the pump was obtained by a supplier, rather than manufactured by Brinkmann itself. We disagree. Brinkmann's argument essentially makes Brinkmann its own subcontractor. The damages arose

as a result of the pool's condition and the parts installed and serviced by Brinkmann itself, not by Brinkmann acting as a subcontractor for another party.[11]

II. Discretionary Decisions of the Trial Court.

¶19 In its second appeal, Brinkmann argues that the trial court erred in denying its motion for a mistrial based on improper statements made by the Lenzkes' counsel, and in denying its motion for remittitur. We disagree.

¶20 "The conduct of a trial is subject to the exercise of sound judicial discretion by the trial court and its determinations will not be disturbed unless rights of the parties have been prejudiced." ***Valiga v. National Food Co.***, 58 Wis. 2d 232, 253, 206 N.W.2d 377 (1973). "Likewise, a motion for mistrial is addressed to the sound discretion of the trial court and the [appellate court] will not intrude in the absence of abuse of such discretion." ***Id.*** at 253-54. If there is any credible evidence that, under any reasonable view, fairly admits of an inference that supports the jury's finding, the finding may not be overturned. ***General Star Indem. Co. v. Bankruptcy Estate of Lake Geneva Sugar Shack Inc.***, 215 Wis. 2d 104, 115, 572 N.W.2d 881 (Ct. App. 1997).

A. *Brinkmann's Motion for a Mistrial.*

¶21 Brinkmann contends that the trial court improperly denied its motion for a mistrial because statements made by the Lenzkes' counsel during closing arguments pertaining to Michael Bowers, a witness for the Lenzkes, improperly suggested that Brinkmann influenced Bowers' opinion of the Lenzkes.

[11] Brinkmann also asks us to consider whether Hastings breached its contract with Brinkmann by not representing Brinkmann at trial. Brinkmann acknowledges that this issue is being raised for the first time on appeal. We decline to consider it. *See* ***Segall v. Hurwitz***, 114 Wis. 2d 471, 489, 339 N.W.2d 333 (Ct. App. 1983).

¶22 After their pool failed, the Lenzkes contacted Bowers, the only other dealer in Wisconsin who sells "Blue Isle" pools, and asked for an estimate of the cost to install a pool identical to the pool that had failed. In August 2008, Bowers visited the Lenzkes' property and after examining the pool, provided a written estimate of approximately $109,000 as the cost to replace the existing pool. Sometime later, Brinkmann and Bowers spoke by phone. At some point after his conversation with Brinkmann, Bowers sent Mrs. Lenzke a letter accusing her of misleading him, and said he would have nothing more to do with the Lenzkes. Eventually, the Lenzkes' attorney subpoenaed Bowers for a deposition. The jury saw Bowers' videotaped deposition, heard about this series of events, and saw Bowers' 2008 estimate of $109,000 as the cost of replacing the pool.

¶23 Before the attorneys made their closing arguments, the jury was instructed that the attorneys' arguments, conclusions, and opinions were not evidence and that it should draw its own conclusions and inferences.

¶24 During his closing argument, in response to Brinkmann's characterization during trial of Bowers as the Lenzkes' hired expert, the Lenzkes' counsel told the jury:

> Let's look at what the witnesses say. They keep talking about this Bowers guy up north that we had. I had to go up there. I had to subpoena him for that deposition to get him to talk. He didn't want to talk. They call him our witness. Well, he was – he was fine with us until he talks to Mr. Brinkmann, as you got out of the deposition. I don't know what Mr. Brinkmann says, but all of a sudden he's against us, he's against our clients. Somehow Mr. Brinkmann got to that guy.

Brinkmann's counsel, in the presence of the jury, interrupted the Lenzkes' counsel's argument, saying: "Judge, there's no -- What is that? There's no evidence to that. That's improper." The court responded by telling the Lenzkes'

counsel to "move on," and that he didn't "think any of that [was] in the record." The Lenzkes' counsel then defended the propriety of his argument and referred back to the videotape, saying:

> I think it goes to this -- The reason -- I think what's important about that is this. I asked him: After you talked to Mr. Brinkmann -- After you talked to Mr. Brinkmann -- And he said, oh, I was fine with the Lenzkes. And then he talks to Mr. Brinkmann. All that's on the videotape.

Thereafter, during his own closing argument, Brinkmann's lawyer responded to the comments by stating:

> Now all of a sudden they have hired this individual and he is their expert and now all of a sudden they're saying, well, he's not really our expert anymore, we don't really like him anymore and, oh -- oh, Brinkmann got to him. What nonsense. That is -- That's not only nonsense, it's down right slanderous to Mr. Brinkmann. And to say somehow that Mr. Brinkmann did something improper in this case and somehow communicated improperly to their expert is dog gone down right slanderous. And it's shameful. It's shameful. He says in his report, Mike Bowers: "Pool was installed correctly."

Brinkmann's counsel did not move for a mistrial at the conclusion of closing arguments. He also expressly declined to put anything on the record after the case had been submitted to the jury.

¶25 A mistrial motion must be brought promptly, while there is at least the opportunity for the court to fix the problem short of a new trial. *See* ***Shawver v. Roberts Corp.***, 90 Wis. 2d 672, 689-90, 280 N.W.2d 226 (1979), *relying on* ***Chart v. General Motors Corp.***, 80 Wis. 2d 91, 108, 258 N.W.2d 680 (1977). In ***Kink v. Combs***, 28 Wis. 2d 65, 72, 135 N.W.2d 789 (1965), our supreme court emphasized the importance of promptly moving for a mistrial so that the trial court had a reasonable opportunity to cure the problem if possible. The court held that

"[b]y failing to move for a mistrial at that time defendant waived his right to assert prejudice later." ***Id.*** In determining whether mistrial is appropriate, "[t]he trial court must determine … whether the claimed error [is] sufficiently prejudicial to warrant a new trial." ***Jensen v. McPherson***, 2004 WI App 145, ¶29, 275 Wis. 2d 604, 685 N.W.2d 603. "[T]he [trial] court is in a particularly good 'on-the-spot' position to evaluate factors such as a statement's 'likely impact or effect upon the jury.'" ***Schultz v. Darlington Mut. Ins. Co.***, 181 Wis. 2d 646, 657, 511 N.W.2d 879 (1994) (citations omitted).

¶26 The record shows that the jury began deliberations at 4:30 p.m. After the jury was sent out, the trial court asked whether anyone wanted to put anything on the record. Counsel for both Brinkmann and the Lenzkes declined. The jury was dismissed for the day sometime after 5:00 p.m. The mistrial motion was not brought until the following day, after the trial court told the parties that the jury had reached a verdict. The trial court found that the Lenzkes' counsel's remark was "a relatively forgettable moment" in the context of the overall argument, and was met with the court's direction to the Lenzkes' counsel to "move on." The trial court concluded that the motion should have been made during trial, before the jury began deliberations, because it was "exactly the type of thing that [could have been] cured by a curative instruction." The trial court concluded that "a new trial [was] not warranted on that point."

¶27 In ***Wausau Underwriters Ins. Co. v. Dane County***, 142 Wis. 2d 315, 329-30, 417 N.W.2d 914 (Ct. App. 1987), we dealt with a claim of attorney misconduct during *voir dire* and a mistrial request immediately following the *voir dire*. We explained what must be established to merit a new trial based on improper remarks by counsel.

> For us to order a new trial for improper remarks by counsel, *it must "affirmatively appear" that the remarks prejudiced the complaining party*. We must be convinced that *the verdict reflects a result which in all probability would have been more favorable to appellants but for the improper conduct*. The test for showing prejudice is most stringent when the trial court has found that the improper argument did not have a prejudicial effect and did not grant a new trial.

Id. (Emphasis added; internal citations omitted.) The party seeking a mistrial based on misconduct of counsel must immediately object and move for a mistrial. ***Sanders v. State***, 69 Wis. 2d 242, 263, 230 N.W. 2d 845 (1975) ("'It is necessary to make immediate objection and to move for a mistrial if the issue is misconduct of counsel.'") (citation omitted).

¶28 The trial court concluded that Brinkmann was not prejudiced by the disputed closing argument because the jury found in favor of Brinkmann on two of the three claims, including the claim for fraudulent misrepresentation. Thus the jury was not inflamed against Brinkmann by the comment in closing argument. We conclude that these inferences are supported by evidence the trial court found credible. *See* ***Balz v. Heritage Mut. Ins. Co.***, 2006 WI App 131, ¶22, 294 Wis. 2d 700, 720 N.W.2d 704.

B. Sufficiency of evidence to support the damage award.

¶29 Brinkmann also challenges the jury verdict in the amount of $130,000, arguing that no evidence supports a verdict in excess of $109,000, and the verdict must be reduced to that amount obtained from Bowers' estimate. We disagree.

¶30 The trial court's authority to change an answer in a jury verdict is established in WIS. STAT. § 805.14(1):

> TEST OF SUFFICIENCY OF EVIDENCE. No motion challenging the sufficiency of the evidence as a matter of law to support a verdict, or an answer in a verdict, shall be granted unless the court is satisfied that, considering all credible evidence and reasonable inferences therefrom in the light most favorable to the party against whom the motion is made, there is no credible evidence to sustain a finding in favor of such party.

Thus a jury finding which is based on an inference supported by any credible evidence may not be overturned. *See* ***Reuben v. Koppen***, 2010 WI App 63, ¶19, 324 Wis. 2d 758, 784 N.W.2d 703 ("On appeal, we view the evidence in the light most favorable to the jury's verdict, and we will sustain the jury's verdict if there is any credible evidence 'under any reasonable view, that leads to an inference supporting the jury's finding.'") (citation omitted).

¶31 In order to change the damage answer from $130,000 to $109,000, the trial court must (a) consider all credible evidence and reasonable inferences in favor of the jury verdict and (b) grant the motion only if there is no credible evidence to support the jury's conclusion. *See* ***Coryell v. Conn***, 88 Wis. 2d 310, 315, 276 N.W.2d 723 (1979). The court observed that the $109,000 cost figure came from a replacement estimate obtained by the Lenzkes in August 2008. The estimate was two-pool-seasons-old by the time the replacement work could be done after trial in 2010. The jury heard evidence of additional variables and unknown costs which would increase the cost of replacement.[12] Because the increase of approximately $20,000 in excess of the two-year-old estimate was supported by reasonable inferences from the evidence, because it did not shock the

[12] Brinkmann's expert witness estimated the cost to replace the Lenzkes' pool. He also acknowledged that there were other charges the owner would incur, which were not included in his estimate. These included such things as blueprints, application and permit fees, certified engineering and architectural stamps, and additional work that might be necessary for either contractor or subcontractors.

judicial conscience, and because there was no evidence that the increase was a result of passion, prejudice or corruption, the trial court denied the request to reduce the verdict. The trial court reasonably exercised its discretion and explained its rationale for its decision. *See* ***Allstate Ins. Co. v. Konicki***, 186 Wis. 2d 140, 149, 519 N.W.2d 723 (Ct. App. 1994) (In determining whether the trial court properly exercised its discretion, we look to the court's explanation on the record and whether it considers the facts of the case, is consistent with applicable law, and is one that a reasonable judge could reach.) We affirm.

CONCLUSION

¶32 For all the foregoing reasons, we conclude that the trial court was correct in its determination at summary judgment that coverage did not exist under the CGL policy and therefore Hastings had no further duty to defend. We also conclude that the evidence supports the trial court's findings and inferences upon which it denied Brinkmann's motions for a mistrial and remittitur.

By the Court.—Judgments affirmed.

Not recommended for publication in the official reports.