

Hoffman, LLC v. Community Living Solutions, LLC, 2011 WI App 19, 331 Wis. 2d 487, 795 N.W.2d 62

Decision Date: 12/28/10

Appeal from judgment of the Circuit Court of Outagamie County.

Reversed.

Attorney(s): Arthur P. Simpson and Michelle D. Johnson

This case arose from a business dispute and involved litigation of personal and advertising injury liability coverage. The trial court initially found that ACUITY had a duty to defend and entered judgment in the amount of \$300,000 because of a settlement made by the insured with the plaintiff. The settlement was made without any involvement by ACUITY in settlement discussions. S&D was asked to handle the appellate litigation in this coverage matter. The appellate court found that the conduct alleged did not libel, slander, or disparage the plaintiff, and, therefore, the website publication did not qualify as personal or advertising injury. Since there was no initial grant of coverage, the appellate court reversed the trial court's order and entered judgment, finding that ACUITY had no duty to indemnify its insured. The appellate court noted that in determining an insurer's duty to defend, the fully developed facts are compared to the policy language. The Wisconsin Supreme Court denied a Petition for Review.

Zarnstorff v. Neenah Creek Custom Trucking, 2010 WI App 147, 330 Wis. 2d 147, 792 N.W.2d 594

Decision Date: 10/14/10

Appeal from Judgment of the Circuit Court of Adams County.

Affirmed.

Attorney(s): Arthur P. Simpson and Michelle D. Johnson

The plaintiffs recovered a verdict in excess of the "auto" coverage available under the defendant's policy. After trial, plaintiffs alleged that the defendant's Commercial General Liability policy also provided coverage because there were two acts of negligence, one involving an individual who was walking across the freeway to assist in negotiating a truck under an overpass, and the second in operating the truck near the overpass. S&D was asked to handle the appellate litigation in this matter. S&D successfully argued to the trial court that both acts arose out of the use of a semi and, therefore, the auto exclusion in the CGL policy precluded additional coverage. The appellate court affirmed the trial court ruling. A petition for review is currently pending in the Wisconsin Supreme Court.

Camelot Development Group, LLC v. Jim Karrels Trucking Sand & Gravel, Inc., 2010 WI App 1, 322 Wis. 2d 736, 778 N.W.2d 736

Decision Date: 11/11/09

Case No. 07 CV 542

Appeal from judgment of the Circuit Court of Ozaukee County

Affirmed.

Attorney(s): Stuart R. Deardorff and Christine M. Rice

S&D successfully defended ACUITY in this coverage appeal. The trial court granted ACUITY's motion for declaratory judgment, holding ACUITY had no duty to defend or indemnify the insured excavator for claims brought by a developer arising out of allegedly negligent grading and excavating at a large commercial development. The trial court found no insurance coverage due to an exclusion for damage to real property on which the insured was performing operations. The insured company argued on appeal that the exclusion could not apply to bar coverage because a drain tile on the development was damaged, and the drain tile was not property on which the insured was performing operations. The appellate court affirmed the trial court's decision that the drain tile was so intrinsically tied to the real property on which the insured was performing work that it could not be separated from it for purposes of the exclusion. The appellate court also agreed that the drain tile damage could not be used to invoke insurance coverage, or a duty by ACUITY under the policy, when the only damage claimed by the plaintiffs was damage to the land itself.

Konkel v. ACUITY, A Mut. Ins. Co., 2009 WI App 132, 321 Wis. 2d 306, 775 N.W.2d 258

Decision Date: 8/11/09

Case No. 07 CV 12905

Appeal from judgment of the Circuit Court of Milwaukee County.

Affirmed.

Attorney(s): Arthur P. Simpson and Christine M. Rice

This case arose out of a minor motor vehicle accident. Plaintiff had a normal MRI, and prior physicians indicated that she had a non-surgical condition. Nevertheless, plaintiff underwent a two level surgical procedure at the cervical spine at the recommendation of a surgeon. During discovery, the defense experts indicated the surgical procedure unnecessary. The defendant driver filed suit against the surgeon for reimbursement of any amounts the defendant was required to pay plaintiff pursuant to Hansen v. Am. Family Mut. Ins. Co., 2006 WI 97, 294 Wis. 2d 149, 716 N.W.2d 866. The trial court and the Court of Appeals found that while an ordinary citizen/tortfeasor was responsible for an unnecessary medical procedure, the same ordinary citizen/tortfeasor has no right to sue the healthcare provider/tortfeasor. The courts reasoned that the medical malpractice statutes (Chapter 655) apply to subrogation claims based upon unnecessary treatment and that the citizen/tortfeasor is not a patient or patient's representative entitled to make a claim. The court rejected an argument that the subrogation claim is not a claim for personal injury and should be outside the scope of Chapter 655. It also rejected the concept that the equal protection clause should prohibit allowing the physician immunity and denying the citizen/tortfeasor the right to make a claim for an injury where the citizen/patient is allowed to make a claim. Finally, the court held that the public policy of protecting the medical

Konkel v. ACUITY, A Mut. Ins. Co., (continued)

profession as a matter of judicial policy precluded this type of an action. A petition for review by the state supreme court has been filed.

Broder v. ACUITY, A Mut. Ins. Co., 2009 WI App 128, 321 Wis. 2d 241, 773 N.W.2d 226

Decision Date: 7/7/09

Case No. 06 CV 12634

Appeal from judgment of the Circuit Court of Milwaukee County.

Affirmed.

Attorney(s): Stuart R. Deardorff, Arthur P. Simpson, and Christine M. Rice

S&D successfully represented the defendant insurer in this coverage appeal. The plaintiff insureds sustained substantial bodily injuries in an automobile accident. The plaintiffs' insurance policy, which included automobile liability coverage and underlying underinsured motorists benefits, contained a one million dollar personal umbrella endorsement. There was no dispute that the personal umbrella endorsement did not contain an initial grant of excess underinsured motorists coverage. However, the plaintiff insureds argued for a declaratory ruling that the policy provisions in the personal umbrella endorsement created "contextual ambiguity," and, therefore, the personal umbrella should provide one million dollars in excess underinsured motorists benefits. The trial court denied the plaintiffs' motion for declaratory judgment, finding that the policy was not "contextually ambiguous" and did not provide excess underinsured motorists coverage. The appellate court affirmed and determined (1) the coverage grant in the personal umbrella was clear and that no other provision in the policy could upset an otherwise clear grant of liability coverage and (2) a reasonable insured reading the policy would not expect the umbrella policy to cover damages the insured incurred as a result of an accident with an underinsured motorist.

Quality Addiction Mgmt. v. Zocher-Burke, 2009 WI App 56, 317 Wis. 2d 731, 768 N.W.2d 63

Decision Date: 3/4/09

Appeal from judgment of the Circuit Court of Ozaukee County.

Affirmed.

Attorney(s): Thomas J. Binder and Christine M. Rice

Quality Addiction Management, Inc. sued Ms. Zocher-Burke and her employer, Wisconsin Community Mental Health Counseling Centers, Inc. d/b/a Addiction Recovery Treatment Center alleging that Ms. Zocher-Burke breached an employment confidentiality agreement by providing proprietary materials to Addiction Recovery Treatment Center for use in an application it made to the state licensing agency to open a new clinic. This lawsuit was tendered to ACUITY, as business liability insurer of Addiction Recovery Treatment Center, for defense and indemnity. S&D successfully argued at the trial court level that the ACUITY policy did not provide insurance coverage because the Complaint did not allege bodily injury, property damage, personal injury, or advertising injury to which the insurance applied. S&D also argued that the insureds failed to notify ACUITY of the claim as required by ACUITY's policy and such failure prejudiced ACUITY and abrogated its duty to defend. Ms.

Quality Addiction Mgmt. v. Zocher-Burke (continued)

Zocher-Burke argued on appeal that the Complaint alleged misappropriation of "style of doing business" and "trade dress," both of which constitute advertising injury within the meaning of ACUITY's policy. S&D argued that submitting an application for licensing is not an activity done "in the course of advertising" as required by Wisconsin law for advertising injury coverage. The appellate court agreed with S&D that the claim against Ms. Zocher-Burke was for breach of contract by theft, not for an advertising injury as defined in the policy.

Sass v. ACUITY, A Mut. Ins. Co., 2009 WI App 32, 316 Wis. 2d 752, 765 N.W.2d 582

Decision Date: 2/25/09

Appeal from judgment of the Circuit Court of Racine County.

Affirmed.

Attorney(s): Arthur P. Simpson and Christine M. Rice

S&D successfully represented the insurer in this coverage dispute. Plaintiff-passenger was injured when a boat the driver was towing came loose and an impact occurred with the cab of the vehicle. The driver's automobile policy provided insurance coverage for the passenger's injury claim. However, the plaintiff moved the trial court for declaratory judgment that a separate watercraft liability endorsement to the driver's homeowners policy also covered the loss because the boat was "in use" at the time of the accident and was negligently loaded onto the trailer before departure. The trial court denied the plaintiff's motion, finding no watercraft liability because the boat was not "in use" when being towed and the driver was not "actively engaged" in any loading, unloading, or other activity at the time of the loss. The appellate court affirmed and determined (1) that there is no "use" of a boat when it is merely cargo at the time of the loss and (2) that any negligent act of loading or unloading would have been with respect to loading or unloading of the motor vehicle and trailer, which was barred from coverage by the motor vehicle exclusion in the homeowners policy.

Sisson v. Hansen Storage Co., 2008 WI App 111, 313 Wis. 2d 411, 756 N.W.2d 667

Decision Date: 6/24/08

Appeal from judgment of the Circuit Court of Milwaukee County.

Affirmed.

Attorney(s): Stuart R. Deardorff

S&D represented the commercial general liability carrier for a warehouse. S&D filed a Motion for Declaratory Judgment, contending that the insured's employee was a permissive user of a semi-trailer he was unloading with a forklift and, therefore, was an insured under the truck's commercial auto policy. The circuit court denied the motion based on the worker's compensation exclusion in the auto policy, since the injured party was an employee of the trucking company. S&D appealed, contending that the exclusion was invalidated by Wis. Stat. § 194.41. For the first time, on appeal, the insurance carrier that issued the commercial auto policy presented evidence that its insured was not subject to the statute because of a federal motor carrier filing. Despite arguments on waiver and judicial notice,

Sisson v. Hansen Storage Co. (continued)

the Court of Appeals took judicial notice of the filing and held that the statute did not apply to invalidate the exclusions, thereby affirming the trial court’s ruling.