

Image Custom Homes & Remodeling, LLC v. ACUITY, A Mut. Ins. Co.

Decision Date: 8/4/11

Case No. 09 CV 339

State of Wisconsin/Circuit Court/Washington County

Summary Judgment – Homeowners’ “personal injury” coverage for “defamation” does not cover libel actuated by express malice.

Attorney(s): Thomas J. Binder and Julie K. Vaughn

Plaintiff, a high end home builder, sought more than one million dollars in damages claiming that the Boerners libeled the company on three separate consumer websites. The Boerners were unhappy with the home Image Custom Homes built for them and detailed their criticisms on the internet. ACUITY sought declaratory judgment that the claims were not covered by its homeowners policy’s “personal injury” “defamation” coverage. The trial court agreed, ruling that the only reasonable interpretation of the complaint was that the Boerners acted with express malice in their internet postings. While “implied” malice may be covered, libel actuated by express malice is not an “occurrence” covered by the policy, because it is not an “accident.”

Anderson v. West Bend Mut. Ins. Co.

Decision Date: 7/1/11

Case No. 09 CV 20118

State of Wisconsin/Circuit Court/Milwaukee County

Summary Judgment – Safe Place Law did not apply to condominium association.

Attorney(s): Christine M. Rice and Jenny Yuan

S&D attained partial summary judgment, finding the safe place law did not apply to the condominium association. The plaintiff allegedly slipped on ice or snow, claiming this was caused by the snow plow company’s failure to timely and adequately remove snow from the pavement in front of the plaintiff’s garage. The trial court ruled that the condominium association was not an employer because it was not conducting business for profit, nor was it motivated by profit, and that independent contractors (such as the property management company and the snow plow company) were not employees under safe place law. The trial court further found that the pavement in front of the plaintiff’s garage was not part of “the structure,” and, therefore, ice on the pavement was not an unsafe condition associated with the structure to which the safe place rules would apply.

Baumann v. MAC Properties, LLC

Decision Date: 6/1/11

Case No. 09 CV 2505

State of Wisconsin/ Circuit Court/ Waukesha County

Jury Trial – Defense verdict.

Attorney(s): Thomas J. Binder

S&D obtained a defense verdict in this slip and fall case. The plaintiff broke her leg when she slipped

Baumann v. MAC Properties, LLC (continued)

and fell in the shower in the apartment she leased from the client. The tub surface had been refinished. She claimed the client used an improper coating on the tub that made the surface extraordinarily slippery, and that she was instructed not to use a bath mat in the tub because it would damage the finish. She claimed significant medical expense, wage loss, and pain and suffering. S&D argued that the resurfacing product was appropriate and she had not been told not to use a bath mat. The jury returned a defense verdict, finding no negligence on the client. Of interest is the fact that this 12-person jury took only 11 minutes to choose a foreperson and return the special verdict form with all answers exactly as argued by S&D on closing.

O'Neil v. Community Engineering & Building Services

Decision Date: 6/1/11

Case No. 10 CV 4805

State of Wisconsin/Circuit Court/Waukesha County

Summary Judgment – Governmental immunity applied to contractors.

Attorney(s): Arthur P. Simpson and Jenny Yuan

S&D attained summary judgment, finding no liability for a contractor that provided barricading and signage on a state highway project. The contractor had provided moveable barricades pursuant to a government contract. The trial court ruled that the contractor had met the specifications of the government contract regarding placement of signs and barricades and that there was nothing unique that the government needed to be warned of regarding this particular situation. Essentially, somehow two moveable barricades had been moved. The court found there was no basis for liability because the contract called for moveable barricades.

ACUITY, A Mut. Ins. Co. v. Ross Glove Co.

Decision Date: 4/26/11

Case No. 10 CV 190

State of Wisconsin/Circuit Court/Sheboygan County

Declaratory Judgment finding no insurance coverage.

Attorney(s): Christine M. Rice

This coverage action arose out of California litigation involving allegations of patent infringement and unfair competition against, among others, the insured manufacturing company. The trial court agreed that the initial grant of personal and advertising injury liability coverage in the client's policy did not provide coverage for patent infringement. The court also found no coverage with respect to the trademark infringement claims because the complaint did not allege trademark infringement "in the insured's advertisement."

W.D. Hoard & Sons Co. v. ACUITY, A Mut. Ins. Co.

Decision Date: 2/9/11

Case No. 09 CV 1090

State of Wisconsin/Circuit Court/Jefferson County

Summary Judgment finding no insurance coverage.

Attorney(s): Arthur P. Simpson and Julie K. Vaughn

This case arose out of the construction of a manure pit. Manure was leaking from the pit and potentially contaminating groundwater in the area. The trial court granted summary judgment, finding no insurance coverage for the actions of a contractor who was involved in the construction of the pit. The court ruled that the contractor's faulty workmanship would not constitute an "occurrence," which is required for an initial grant of coverage. The court also found that non-pit damages occurred after the policy period had expired. These two rulings by the trial court meant no coverage for the claims asserted in the complaint. S&D also asserted the applicability of the pollution exclusion. The court refused to apply the pollution exclusion as a recent decision by the court of appeals in another case seemed to find that the pollution exclusion would not apply to "waste."

ACUITY, A Mut. Ins. Co. v. Safeco

Decision Date: 8/20/10

Case No. 09 CV 445

State of Wisconsin/Circuit Court/Milwaukee County

Jury Trial - \$1,000,000 subrogation recovery.

Attorney(s): Arthur P. Simpson

This case involved a fire at a large apartment complex. The building sustained \$1,100,000 in damages. S&D represented the insurance carrier for the apartment complex. It was alleged that a 75-year-old tenant had carelessly handled smoking materials starting the fire. The case was based upon circumstantial evidence. The tenant defendant was a known heavy smoker with cigarettes found throughout the apartment after the fire. A government investigation established the area of origin as a sofa, and it was admitted that this was a slow-burning fire. Evidence failed to reveal use of any electrical outlets in the room, and various other causes of the fire were ruled out. The defense argued that there was still not enough evidence to meet the burden of proof.

The parties negotiated a high/low agreement regarding damages. The jury found the tenant defendant (who was killed in the fire) causally negligent. The ACUITY recovery was \$1,000,000 pursuant to the high/low agreement.

Ney v. ACUITY, A Mut. Ins. Co.

Decision Date: 7/7/10

Case No. 08 CV 990

State of Wisconsin/Circuit Court/Racine County

Jury Trial – Low verdict for defense.

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

The plaintiff brought this uninsured motorist lawsuit seeking more than \$250,000 for severe emotional distress. He was driving a loaded Mack dump truck at 55 miles per hour on Highway V in Racine County when a car suddenly pulled out in front of him, causing a collision. The two occupants of the car were ejected into a ditch, and the car rolled into the ditch on top of them, pinning them to the ground. The plaintiff ran to assist them, carrying a fire extinguisher from his truck. As he approached, however, the car burst into flames, burning the two people. The plaintiff claimed Post Traumatic Stress Disorder as a result of witnessing their horrific deaths. He underwent extensive psychotherapy and allegedly attempted suicide on two occasions.

On cross examination of the plaintiff's psychotherapist, S&D was able to establish that the plaintiff had made significant progress with treatment and that his continuing complaints were not consistent with a DSM diagnosis of PTSD. His testimony regarding the suicide attempts with a handgun was inconsistent with his wife's testimony. The jury awarded only \$36,000 for his psychotherapy bills and emotional distress.

Szwaczka v. Top of the Hill Condominium Owner's Association, Inc.

Decision Date: 5/4/10

Case No. 09 CV 293

State of Wisconsin/Circuit Court/Door County

Summary Judgment finding no insurance coverage.

Attorney(s): Michelle D. Johnson

This case arose out of the condo association's approval of the placement of a vent stack on the exterior of a condo building that allegedly obstructed the plaintiffs' view from their condo unit. The plaintiffs alleged this cut back on their enjoyment and reasonable use of their unit as well as the value of it. S&D's client had issued an insurance policy to the condo association. S&D intervened in the case and filed a Motion for Summary Judgment on behalf of its client, arguing the policy did not afford coverage for the plaintiffs' claims because the plaintiffs did not allege bodily injury or property damage caused by an occurrence or personal and advertising injury, two exclusions barred coverage, the plaintiffs did not allege a loss or wrongful act as required for coverage under the directors and officers coverage form, and two exclusions contained in the directors and officers form barred coverage. The condo association argued allegations of interference with the plaintiffs' property interests constituted property damage and that an occurrence could be either an accident or continuous and repeated exposure to substantially the same general harmful conditions. The court found there must be an accident for an occurrence. Since there were no allegations of accidental conduct that fell within the definition of an occurrence, the court found no coverage.

ACUITY, A Mut. Ins. Co. v. Applied Flooring Solutions, LLC

Decision Date: 4/27/10

Case No. 09 CV 334

State of Wisconsin/Circuit Court/Waushara County

Subrogation Settlement.

Attorney(s): Michelle D. Johnson

S&D successfully settled this subrogation case, recovering 94% of the actual cash value S&D's client paid to its insured for damages resulting from a fire at the insured's residence. The defendant's employee lost control of a vehicle he was operating and struck a power pole in front of the insured's residence. When the power pole was hit and knocked down, wires from the pole to the house were severed causing a short circuit and a fire at the insured's residence. Following some initial discovery, the defendant agreed to settle the case.

Scheder v. Wisconsin Management Company

Decision Date: 3/17/10

Case No. 08 CV 5682

State of Wisconsin/Circuit Court/Dane County

Summary Judgment Motion.

Attorney(s): Stuart R. Deardorff and Jennifer M. Burns

S&D successfully obtained a summary judgment ruling dismissing a slip and fall claim. Plaintiff claimed she fell and sustained a severe leg fracture on an icy sidewalk. The circuit court granted S&D's motion holding that ACUITY's insured had no actual or constructive notice of the icy condition.

ACUITY, A Mut. Ins. Co. v. Blum

Decision Date: 3/12/10

Case No. 09 CV 318

State of Wisconsin/Circuit Court/Clark County

Summary Judgment in favor of plaintiff.

Attorney(s): Julie K. Vaughn

S&D filed a subrogation action against the defendant after he breached his installment agreement with ACUITY, arising out of damage caused by a motor vehicle accident. After reviewing the defendant's responsive pleading, S&D filed a Motion for Judgment on the Pleadings alleging that no material issues of fact existed and judgment should be entered for ACUITY as a matter of law. After oral argument, the court agreed and entered judgment on behalf of ACUITY.

ACUITY, A Mut. Ins. Co. v. Chatham

Decision Date: 3/4/10

Case No. 09 SC 5285

State of Wisconsin/Small Claims/Waukesha County

Judgment in favor of plaintiffs.

Attorney(s): Julie K. Vaughn

This subrogation case arose out of a motor vehicle accident in a shopping mall parking lot. S&D filed suit to recover the amounts ACUITY paid to its insured for property damage sustained in the collision. S&D also asserted a claim for the insured's deductible. After a hearing, the Court Commissioner held that the defendant was 100% liable for the accident. ACUITY was able to recover its damages and ACUITY's insured recovered his deductible interest.

Joiner v. East Pointe Marketplace Limited Partnership

Decision Date: 2/18/10

Case No. 08 CV 16230

State of Wisconsin/Circuit Court/Milwaukee County

Jury trial – Defense verdict.

Attorney(s): Thomas J. Binder

S&D obtained a defense verdict in this trip and fall case. The plaintiff alleged she tripped and fell on uneven pavement on a sidewalk outside a bank located in the client's shopping center. She sustained fractures and a dislocation of fingers of her right hand, requiring surgery and extensive physical therapy. She incurred almost \$20,000.00 in medical bills and a \$2,500.00 wage loss. S&D argued to the jury that the discrepancy between the sidewalk slabs was only three-eighths of an inch, well within the three-quarter inch tolerance utilized by the client. S&D argued that a reasonable person exercising due care for her own safety would not have tripped and fallen on the discrepancy in height between the sidewalk slabs. The jury found that East Pointe Marketplace was not negligent. The trial court dismissed the case and awarded costs to S&D's client.

ACUITY, A Mut. Ins. Co. v. S&K Pump & Plumbing

Settlement Date: 1/27/10

Case No. 08 CV 454

State of Wisconsin/Circuit Court/Ozaukee County

Subrogation Recovery.

Attorney(s): Stuart R. Deardorff

S&D successfully recovered \$190,000.00 for its client. The insured's home sustained significant water damage as a result of frozen water pipes. The general contractor and multiple subcontractors all denied responsibility for freezing pipes. After discovery and expert investigation, all defendants contributed to settlement of the claim at mediation.

Rauch v. Society Ins., A Mut. Co.

Decision Date: 12/15/09

Case No. 08 CV 11339

State of Wisconsin/Circuit Court/Milwaukee County

Jury Trial – Defendant not negligent.

Attorney(s): Jennifer M. Burns

S&D successfully defended a slip and fall on snow-covered stairs outside an apartment building. The plaintiff claimed the apartment owner was negligent in its maintenance of the staircase and violated the safe-place statute. The parties reached a stipulation with respect to past medical expenses and wage loss. Issues of liability and pain and suffering were tried to a jury over two days. The jury returned a verdict in favor of S&D's client finding no negligence on the apartment owner.

Christiansen v. Landquest Builders, LLC

Decision Date: 11/11/09

Case No. 07 CV 1492

State of Wisconsin/Circuit Court/Kenosha County

Summary Judgment holding the Economic Loss Doctrine barred the plaintiffs' Amended Complaint.

Attorney(s): Michelle D. Johnson

This case involved problems with construction and initial construction repairs at the plaintiffs' residence. The Amended Complaint alleged only one cause of action for negligence. S&D moved to dismiss the Amended Complaint on the grounds that the Economic Loss Doctrine barred the negligence claim. The court agreed with S&D and dismissed the plaintiffs' case. The court held the construction and repairs were performed pursuant to a contract and the integrated systems exception applied. Therefore, the Economic Loss Doctrine limited the plaintiffs to remedies in contract and the plaintiffs' negligence claim was dismissed.

Kerr Concrete, LLC v. Advanced Concrete, Inc.

Decision Date: 10/30/09

Case No. 09 CV 1594

State of Wisconsin/Circuit Court/Dane County

Summary Judgment finding no insurance coverage.

Attorney(s): Christine M. Rice

The plaintiff companies brought a lawsuit against a concrete supplier based on alleged concrete driveway and flatwork failures at 21 properties on which the plaintiffs provided their services. S&D intervened on behalf of ACUITY and argued on summary judgment (1) that there was no initial grant of insurance coverage to the supplier because the pleadings failed to allege property damage caused by an occurrence as required by the policy and (2) that the business risk exclusions in the policy applied to bar any arguable insurance coverage. The court agreed with ACUITY's arguments and held ACUITY had no duty to defend or indemnify the supplier with respect to allegations arising out of faulty workmanship.

ACUITY, A Mut. Ins. Co. v. Lee

Settlement Date: 10/09/09

Case No. 09 CV 17

State of Wisconsin/Circuit Court/Waukesha County

Favorable settlement in subrogation case.

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

In this subrogation case, S&D successfully recovered amounts paid by the insurer to repair a residence that was damaged by a fire. The fire was caused by a tenant's negligence in discarding cigarettes over the edge of a deck connected to the residence before the cigarettes were extinguished. The case was resolved following the completion of discovery.

ACUITY, A Mut. Ins. Co. v. B&B Specialized Sales & Service, LLC

Settlement Date: 9/1/09

Case No. 08 CV 2392

State of Wisconsin/Circuit Court/Brown County

Favorable settlement in subrogation case.

Attorney(s): Christine M. Rice

S&D successfully represented the insurer in a subrogation case involving the failure of a trailer extension purchased by its insured to haul wind turbines. ACUITY paid its insured tens of thousands of dollars to repair the trailer and replace the extension after the failure. Early efforts at discovery, mediation, and an offer of settlement brought a favorable settlement without undue expert expense.

Weins v. SJS Enterprises, Inc.

Decision Date: 8/24/09

Case No. 08 CV 15822

State of Wisconsin/Circuit Court/Milwaukee County

Summary Judgment finding no causal negligence as a matter of public policy.

Attorney(s): Thomas J. Binder and Julie K. Vaughn

S&D's client contracted to put a new roof on the plaintiff's residence. The client allegedly failed to tarp the roof after the tear-off, causing water to enter the residence during a rainstorm. The plaintiff took one of the contractor's ladders that had been left on his property and went onto the roof to tarp it. The ladder slipped as the plaintiff descended same and he fell eight feet onto his back, sustaining severe spinal injuries. S&D argued that public policy considerations should preclude liability as a matter of law, as the actions of the plaintiff constituted an intervening cause. The trial court agreed, finding the negligence of the client too remote from the injury to submit the matter to a jury. The lawsuit was dismissed with costs to S&D's client.

ACUITY, A Mut. Ins. Co. v. Pieper Electric, Inc.

Settlement Date: 8/19/09

Case No. 09 CV 6356

State of Wisconsin/Circuit Court/Milwaukee County

Favorable settlement obtained in subrogation case.

Attorney(s): Jennifer M. Burns

In this subrogation case, S&D represented the insurance company that paid its insured for damage to stored papers and records. The damages were the result of basement flooding, which was caused by a failure in a water line joint installed by the defendant. S&D reached a favorable settlement with the defendant before S&D's client began to incur discovery or expert costs.

Neu v. Spiegelhoff's Super Food Market, Inc.

Decision Date: 8/19/09

Case No. 08 CV 2973

State of Wisconsin/Circuit Court/Kenosha County

Motion to dismiss safe place claim granted.

Attorney(s): Jennifer M. Burns and Arthur P. Simpson

S&D filed a motion to dismiss the Safe Place statutory claims against a grocery store when a wayward grape was found near the checkout counters and not in the produce section. There was no evidence of how long the grape had been present. The court granted the motion, holding that the special rule that vitiates the notice requirements applies only in the produce section and only where the produce is openly displayed and not in any type of sealed container. The court declined the invitation to extend the constructive notice waiver to situations where produce is found in other parts of the store, reasoning that requiring no proof of notice throughout the entire store would pose an unreasonable risk upon grocery stores. The court also noted that modern practices no longer include simply leaving product open with the product in the modern grocery store typically sealed. Plaintiff's case was not dismissed as to the negligence claims. However, the court will require some showing of notice and/or substandard practices by the grocery store in order to establish liability.

Pember v. Ruiz

Decision Date: 8/3/09

Case No. 08 CV 1249

State of Wisconsin/Circuit Court/Rock County

Declaratory Judgment finding no insurance coverage.

Attorney(s): Stuart R. Deardorff and Jennifer M. Burns

S&D successfully intervened and obtained declaratory judgment finding no insurance coverage in this construction defect case. The plaintiffs were homeowners who purchased a newly constructed home that was allegedly built without drain tile and had other building defects. The circuit court agreed with S&D that there was no initial grant of insurance coverage because faulty workmanship was not an

Pember v. Ruiz (continued)

“occurrence” and there was no “property damage” sustained to other property during the policy period. The circuit court granted the motion holding that S&D’s client had no duty to defend or indemnify the insured with respect to the plaintiffs’ claims.

ACUITY, A Mut. Ins. Co. v. Whirlpool Corp.

Settlement Date: 8/09

Case No. 2:08-cv-79

United States District Court for the District of North Dakota

Favorable settlement in subrogation case.

Attorney(s): Thomas J. Binder and Jennifer M. Burns

In this subrogation action, S&D represented the insurer of a company whose warehouse was damaged by fire. S&D filed suit against Whirlpool Corporation alleging the fire was caused as the result of a malfunctioning air conditioner unit. S&D retained an expert who examined the unit and was able to offer an opinion as to the cause of the malfunction and fire. After receiving the expert report, Whirlpool agreed to a very favorable settlement for S&D’s client.

Brumfield v. Glisson Glass & Emergency Boarding Services, LLC

Decision Date: 7/13/09

Case No. 08 CV 17978

State of Wisconsin/Circuit Court/Milwaukee County

Summary Judgment finding no insurance coverage for faulty workmanship.

Attorney(s): Stuart R. Deardorff and Michelle D. Johnson

In this faulty workmanship case, S&D successfully obtained summary judgment finding no insurance coverage for any of the claims asserted against the defendant. The case involved allegations of negligent workmanship and performance associated with a storefront window replacement project at the property of the plaintiff. S&D argued there was no initial grant of coverage because there was no “property damage” or “occurrence” alleged and any damage occurred outside the policy period. S&D further argued the “intentional act”, “your work”, and “impaired property” exclusions precluded coverage. The circuit court agreed with S&D finding no initial grant of coverage and dismissing S&D’s client with prejudice.

Kopacka v. ACUITY, A Mut. Ins. Co.

Decision Date: 5/15/09

Case No. 07 CV 7330

State of Wisconsin/Circuit Court/Milwaukee County

Jury Trial: Low verdict for defense

Attorney(s): Christine M. Rice

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

This case involved a motor vehicle accident in which the plaintiffs, driver and passenger, alleged injury. The plaintiffs alleged that the defendant driver failed to yield the right-of-way from a stop sign at the subject intersection. The plaintiff driver alleged an elbow injury and claimed approximately \$1,600.00 in medical bills. His settlement demand at the time of mediation was \$15,000.00. The plaintiff passenger alleged numerous injuries including, but not limited to, head injury, loss of consciousness, seizures, loss of balance, loss of memory, tremors, bruising, lacerations, and musculoskeletal complaints. The plaintiff passenger incurred medical bills totaling approximately \$11,000.00. Her last demand at the time of mediation was \$40,000.00. The plaintiff driver refused to stipulate to liability at 90/10 in his favor and argued that the defendant driver should be held 100% accountable for all damages.

S&D argued that both drivers' negligence were substantial factors in causing the accident despite the defendant's failure to yield the right-of-way at the intersection. S&D also argued that the injuries claimed by both were not substantiated by the medical records and testimony of their own physicians. The jury returned a verdict finding the defendant 85% negligent and the plaintiff driver 15% negligent in causing the accident. They awarded \$500.00 in damages to the plaintiff driver and \$11,500.00 to the plaintiff passenger.

Tolbert v. Georgia-Pacific Consumer Products, LLC

Decision Date: 4/30/09

Case No. 08 CV 1109

State of Wisconsin/Circuit Court/Brown County

Intervenor-Defendant's Motion for Summary Judgment granted.

Attorney(s): Christine M. Rice

The plaintiff was injured after a slip-and-fall while in the course of employment for ACUITY's insured, JDC Logistics, Inc., and while on premises owned by the defendant companies. The plaintiff brought negligence and safe place claims against the defendant companies arguing that their failure to maintain stairs at the subject premises and their failure to maintain the premises in a dry and safe condition were substantial factors in causing his injuries. ACUITY intervened in the lawsuit for a determination of its duties to defend and/or indemnify the defendant companies based on a Georgia Contract Carriage Agreement, which all parties agreed would govern the insurance coverage dispute. S&D argued (1) that ACUITY's insured was not required by contract to defend or indemnify the defendant companies for personal injury caused by their own acts or omissions and (2) that the defendant companies were not listed as additional insureds under ACUITY's policies and would not qualify as additional insureds (even if they were listed as same) for the acts or omissions of the defendant companies in causing plaintiff's injuries. The defendant companies argued that the indemnification language in the contract required ACUITY to defend even though it may not have required ACUITY to indemnify. The trial court agreed with S&D that interpretation of the contract based on Georgia law provided that neither JDC nor ACUITY had a duty to defend or indemnify the defendant companies based on the allegations of the plaintiff's Complaint.

Mantz Automation, Inc. v. Craft Masonry, Inc.

Decision Date: 4/16/09

Case No. 08 CV 180

State of Wisconsin/Circuit Court/Waukesha County

Intervenor-Defendant's Motion for Summary Judgment granted.

Attorney(s): Christine M. Rice

The plaintiffs brought a lawsuit against a general contractor and a masonry contractor for failure of a concrete floor in a manufacturing facility. ACUITY's insured, American Concrete & Supply, LLC, was brought into the suit based on a Third-Party Complaint alleging that it failed to prepare, provide, and/or deliver the appropriate and proper concrete mix to the job site and project. S&D intervened on behalf of ACUITY and argued on summary judgment (1) that there was no initial grant of coverage under the policy because the pleadings failed to allege property damage caused by an occurrence as required by the policy and (2) that the business risk exclusions in the policy applied to bar any arguable insurance coverage. The trial court agreed that the factual basis of all claims alleged was faulty workmanship, which does not qualify as an "occurrence" necessary for an initial coverage grant. The court also determined that the "damage to your product," "damage to your work," and "damage to impaired property" exclusions applied to bar any arguable coverage under the policy.

Zarnstorff v. ACUITY, A Mut. Ins. Co.

Decision Date: 3/31/09

Case No. 06 CV 249

State of Wisconsin/Circuit Court/Adams County

Post verdict motion granted limiting judgment to the insurance available under a commercial auto policy.

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

S&D entered this case after a trial was concluded. The jury verdict was in excess of the coverage available under the commercial auto policy issued by S&D's client. The plaintiffs sought additional coverage, arguing a commercial general liability policy also provided coverage. S&D moved the court for an order entering judgment for the amount of coverage available under the commercial auto policy only. The case involved a motor vehicle accident. The insured was transporting a logging skidder from one job site to another. The driver of the tractor/trailer transporting the skidder slowed as he neared an overpass because he was concerned about clearance. The insured's employee that was following the tractor/trailer in his personal vehicle got out to check for clearance. One driver slowed his vehicle when he saw the insured's employee in the roadway. The plaintiff was unable to slow his vehicle and collided with the vehicle in front of him as well as the tractor/trailer. The circuit court agreed with S&D that only the commercial auto policy applied and the commercial general liability policy provided no coverage for the damages arising out of this motor vehicle accident. The court limited the judgment against S&D's client to the amount of coverage available under the commercial auto policy.

Rafel v. ACUITY, A Mut. Ins. Co.

Decision Date: 2/11/09

Case No. 08 CV 177

State of Wisconsin/Circuit Court/Jefferson County

Summary judgment finding no coverage.

Attorney(s): Thomas J. Binder

In this coverage dispute, the insured, a builder, tendered the defense of a lawsuit alleging faulty workmanship in pouring the foundation, concrete footings, and walls of a new residence. The trial court agreed with S&D's argument that there was no "occurrence" within the meaning of the policy, and the business risk exclusions applied. The court followed the rationale of the Court of Appeals in *Glendennings v. Reimer*, 2006 WI App 161, and granted summary judgment finding no duty to defend or indemnify.

Matelski v. Am. Fam. Mut. Ins. Co.

Decision Date: 1/22/09

State of Wisconsin/Circuit Court/Milwaukee County

Jury Trial – Defendant not negligent

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

S&D successfully defended a driver alleged to have stopped too quickly in the roadway in order to make a u-turn. The plaintiff also alleged the defendant driver failed to use her turn signal. The plaintiff stopped behind the defendant driver, but was then rear-ended by a third driver and pushed into the defendant driver. The third driver settled out of the case and the plaintiff proceeded against S&D's client. The plaintiff claimed a three level cervical fusion and a shoulder surgery were accident-related. The plaintiff sought over two million dollars in damages. The parties reached a stipulation with respect to damages just prior to trial. The liability issues were tried to a jury over the course of three days. The jury returned a verdict in favor of S&D's client, finding she was not negligent. The jury found the accident was caused solely by the negligence of the third driver that settled out of the case prior to trial.

Constantineau v. AJR Industrial

Decision Date: 1/12/09

Case No. 08 CV 867

State of Wisconsin/Circuit Court/Milwaukee County

Summary judgment granted.

Attorney(s): Thomas J. Binder

Constantineau suffered a broken leg requiring surgery in a slip-and-fall accident in the parking structure at Mitchell International Airport. S&D's client, AJR, had a contract with Milwaukee County for snow and ice removal at the airport. The plaintiff alleged that the safe place statute applied to AJR and that its contract made it responsible for the area where the plaintiff fell. S&D argued successfully on

Constantineau v. AJR Industrial (continued)

summary judgment that the safe place statute did not apply because AJR was not an "owner of a place of employment" under the statute. In addition, the contract was not specific enough to impose responsibility for the area on AJR. AJR was dismissed as a defendant.

Birmingham v. Thompson Corp.

Decision Date: 1/8/09

Case No. 08 CV 10759

State of Wisconsin/Circuit Court/Milwaukee County

Summary Judgment granted by the trial court finding no duty to defend or provide coverage.

Attorney(s): Stuart R. Deardorff and Jennifer M. Burns

S&D successfully represented the insurer in this coverage dispute. The insured allegedly misrepresented the condition of a condominium during its sale to the plaintiffs. The complicated complaint mentioned issues of economic loss, water damage, loss of use, mental distress, and medical damages. S&D argued that the claims against the insured arose from misrepresentations during the sale of the condominium and any claimed damages were the result of the pre-existing faulty conditions of the property. S&D contended the misrepresentations did not qualify as "property damage" caused by an "occurrence." Further, coverage would be excluded under the intentional acts exclusion. The trial court agreed, granting summary judgment finding that ACUITY owed no duty to defend or provide coverage with respect to the claims of the plaintiff against the insured.

Schwartz v. Beres

Decision Date: 11/21/08

Case No. 08 CV 7587

State of Wisconsin/Circuit Court/Milwaukee County

Defendant's Motion for Summary Judgment granted

Attorney(s): Christine M. Rice and Jennifer M. Burns

S&D was successful in arguing to the trial court that plaintiff, Schwartz, failed to exercise due diligence in service of process upon ACUITY's insured. Schwartz filed her lawsuit days before the statute of limitations expired. ACUITY's insured, Beres, moved to Florida shortly thereafter. S&D answered on Beres' behalf prior to service. Although Schwartz learned on several occasions through her process server that Beres had moved to Florida, she did not exercise formal discovery means to determine Beres' whereabouts. Schwartz published the summons against Beres in Milwaukee after public record searches failed. The court found that this did not constitute reasonable efforts at making personal service possible. Schwartz's cause of action against Beres was dismissed for lack of jurisdiction.

Factory Mut. Ins. Co. v. ACUITY, A Mut. Ins. Co.

Decision Date: 10/3/08

Case No. 07 CV 1514

State of Wisconsin/Circuit Court/Milwaukee County

Attorney(s): Arthur P. Simpson and Jennifer M. Burns

S&D successfully represented J.M. Brennan and its insurance carrier with respect to claims arising from the explosion at Falk Corporation on December 6, 2006. This case proceeded to trial in September of 2008. The case went to trial with a 70 million dollar subrogation property damage claim of Factory Mutual Insurance Company along with damages, which were ultimately stipulated at 1.2 million dollars, of the Falk Corporation. The principal issue in the case related to the failure of Falk to annually inspect the cathodic protection of the pipe. Cathodic protection, as a process, is designed to prevent corrosion of underground pipe. Falk claimed that the cathodic protection would not have made any difference in this case. Factory Mutual claimed that J.M. Brennan should have performed a host of safeguards that would have detected the failure to maintain the cathodic protection.

The trial began September 8, 2008 in Milwaukee County Circuit Court before Judge David Hansher. Listen to news coverage of the opening statements as reported by WISN.

On October 3, 2008, the jury returned a verdict finding Falk 95% causally negligent and J.M. Brennan 5% causally negligent. The jury found damages for Factory Mutual at 61 million dollars and a stipulation was reached as to Falk's damages at 1.2 million dollars, for total damages of slightly over 62 million dollars. The verdict finding 95% of the negligence rests with Falk means J.M. Brennan will not be responsible for these damages. The media reports of the verdict may be found at:

The Business Journal -

"Jury Verdict: J.M. Brennan Won't Pay for Falk Blast"

NBC Channel 4 and WTMJ radio -

"Jury Finds Falk Responsible For Explosion"

ABC Channel 12 WISN -

"Jury Rules on Who is Responsible for Falk Explosion"

J.M. Brennan issued a statement to the press following the verdict in which Brennan thanked Art Simpson for his work on this case.

American Family Mut. Ins. Co. v. Ansay

Decision Date: 8/27/08

Case No. 07 SC 34187

State of Wisconsin/Small Claims Court/Milwaukee County

Judgment in favor of Defendant.

Attorney(s): Jennifer M. Burns

American Family Mut. Ins. Co. v. Ansay (continued)

S&D successfully represented the insured-defendant in this small claims matter. The case arose out of water damage to a condominium. The defendant had performed air duct cleaning prior to the loss and plaintiff alleged the insured had negligently removed the humidifier, activating the sprinkler system. S&D presented testimony from the defendant establishing its work did not involve the humidifier and that defendant had not been in the utility closet for several months before the accident. S&D argued the plaintiff failed to provide expert testimony on causation or establish no other party had access to the humidifier. The Commissioner found the defendant was not negligent.

Osegard v. Forward Management, Inc.

Decision Date: 8/22/08

Case No. 06 CV 323

State of Wisconsin/Circuit Court/Dane County

Case dismissed for failure to prosecute.

Attorney(s): Arthur P. Simpson

The plaintiffs filed this action against S&D's client alleging mold in their apartment caused personal injuries. The plaintiffs failed to offer proof of their alleged injuries. The lack of medical testimony could not be overcome by a toxicologist opinion that mold could have health impacts. The court granted summary judgment in favor of S&D's client with respect to the personal injury claims. The plaintiffs then abandoned much of their personal property and S&D's client sold it at auction. The plaintiffs then sought to recover the value of their personal property. There was a dispute about the value of the property. The plaintiffs' counsel was compelled to withdraw at the final pretrial due to disagreement with the plaintiffs. The plaintiffs were given 60 days to find new counsel. They did not find new counsel within that period of time and requested more time. The court dismissed the action pursuant to Wis. Stat. § 805.03 based upon failure to prosecute.

Allen v. W.O.S., Inc.

Decision Date: 8/18/08

Case No. 05 CV 1237

State of Wisconsin/Circuit Court/Winnebago County

Settlement reached in complex toxic tort case.

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

This was a complex toxic tort case in which the plaintiffs filed suit against various respirator manufacturers that supplied respirators to the foundry where the plaintiffs were employed. The plaintiffs claimed they were afflicted with silicosis. They blamed the respirator manufacturers, alleging theories of liability including negligence, concerted action, and misrepresentation. S&D successfully defended one of the respirator manufacturers. The case involved extensive depositions and written discovery. Following the completion of some of the discovery, S&D achieved a minimal cost of defense settlement for its client.

ACUITY, A Mut. Ins. Co. v. Cegers

Decision Date: 7/28/08

Case No. 08 SC 5279

State of Wisconsin/Small Claims Court/Milwaukee County

Judgment in favor of Plaintiff

Attorney(s): Julie K. Vaughn

This case arose out of a motor vehicle collision. The defendant failed to yield the right of way, striking the plaintiff's vehicle and causing property damage. S&D filed suit to recover the amounts paid for the property damage to the plaintiff's vehicle. S&D presented the case to a Court Commissioner in Small Claims Court. The Commissioner agreed that the defendant was negligent and wholly responsible for the property damage to the plaintiff's vehicle.

Burback Builders, LLC v. Anton Keller d/b/a Zig's Heating & Cooling

Decision Date: 7/14/08

Case No. 07 CV 2100

State of Wisconsin/Circuit Court/Waukesha County

Summary Judgment granted by the trial court finding no duty to defend or provide coverage

Attorney(s): Thomas J. Binder

The insured was a HVAC contractor who allegedly improperly installed HVAC systems in two buildings, causing a "loss of use" of the buildings and requiring the general contractor to repair the systems. S&D contended that there was insufficient "loss of use" to qualify as "property damage" under the policy. The repair costs were excluded by the business risk exclusions. The trial court agreed, granting summary judgment finding that ACUITY owed no duty to defend or provide coverage with respect to the claims of the plaintiff against the insured.