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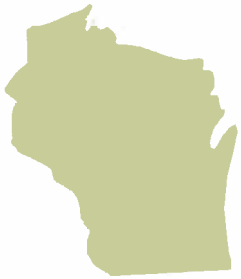

AMERICAN FAMILY INS. V. GOLKE BROTHERS: NASP TO APPEAR AS AMICUS CURIAE BEFORE THE WISCONSIN SUPREME COURT IN SPOLIATION CASE

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On February 12, 2000, a fire destroyed a home owned by David Ronaldson. As a result of the fire, his property insurer, American Family Mutual Insurance Company, incurred at least $165,000.00 in costs for rebuilding the home. However, prior to rebuilding, American Family retained two cause and origin experts to investigate the loss, who documented their inspection with photographs. The experts were able to determine that the fire was caused by faulty roofing work done by Golke Brothers Roofing and Siding, LLC.

American Family immediately notified Golke Brothers of the loss through its principals, David Golke, Charles Golke and Joseph Golke. Both Golke Brothers and its insurer had actual notice of the loss and were afforded opportunity to inspect the fire site. Neither Golke Brothers nor its insurer inspected the site or instructed it be preserved for any specific evidence. Approximately two months after the fire, American Family authorized Mr. Ronaldson to raze and rebuild his home.

At trial, on the subrogation case, the defendants raised a spoliation defense, arguing that American Family had a duty to preserve significant amounts of physical evidence from the fire and, lacking this tangible evidence, the case should be dismissed. Although American Family's experts had documented the scene with photographs, the trial court found that American Family failed to adequately preserve the evidence and dismissed the action based on spoliation.

The court determined that American Family owed a duty to preserve much of the physical debris from the fire, despite giving defendants notice and opportunity to inspect the entire scene for two months. Specifically, the trial court held:

"American Family failed to preserve the scene in ways that were possible, taking adequate photographs, perhaps taking a videotape, I don't know; but clearly all, everyone agreed that it was possible to remove the dog house, the chase, and the appropriate chimney element; and since those weren't done, I'm satisfied that this is a clear case of spoliation every bit as bad, and I would argue the conduct of American Family is far worse than Sentry engaged in which led to the dismissal of the claim, of Sentry's claim...So at this point and time I am going to dismiss the action based on spoliation."

American Family appealed the dismissal of its case.

The Wisconsin Court of Appeals immediately certified the case to the Wisconsin Supreme Court. Specifically, the Court of Appeals asked, "under what circumstances may evidence crucial to a potential legal claim be destroyed and what notice must be given to a civil litigant before evidence is destroyed?"

The Wisconsin Supreme Court will have an opportunity to create clear guidelines for subrogation professionals regarding what steps can be taken to avoid a claim of "spoliation." NASP felt that this was an important issue for its members and we volunteered to prepare the Amicus Curiae Brief.

Under current Wisconsin law, dismissal as a sanction for the destruction of evidence "requires the finding of egregious conduct, which, in this context, consists of a conscious attempt to affect the outcome of litigation or a flagrant knowing disregard of the judicial process." *Garfoot v. Fireman's Fund Ins. Co.*, 228 Wis.2d 707, 724, 599 N.W.2d 411 (Ct. App. 1999). On appeal, the Wisconsin Supreme Court must determine if American Family's actions satisfy this test

NASP asked the Wisconsin Supreme Court to reverse the trial court, arguing that a subrogated insurer should be able to rebut the allegation of egregious conduct in destroying evidence by demonstrating actual notice and a reasonable opportunity to inspect to the defendant. NASP seeks to have the court enunciate the procedure which is required by a subrogated carrier to avoid a "spoliation" defense at trial.

Although American Family's experts had documented the scene with photographs, the trial court found that American Family failed to adequately preserve the evidence and dismissed the action based on spoliation.

Leading subrogation practitioners and scholars agree that a subrogated plaintiff discharges its burden once notice and an opportunity to inspect are provided. *Touchstone for Insurers Pursuing Subrogation: Save the Evidence*, 70 Defense Counsel Journal 365 (July, 2003). The article states in relevant part:

"If the responsible parties can be put on notice before the destruction of the fire scene, the subrogee will not be put in the position of defending whether destruction of the fire scene >>

was within its control or contained relevant evidence. As long as potentially responsible parties are put on notice and given an opportunity to inspect, they cannot effectively pursue a claim that they were prejudiced. In analyzing whether to impose sanctions following the destruction of evidence, courts will look at the efforts taken by the defendant in attempting to investigate the claim. If it is determined that the defendant did not make a reasonable effort, sanctions will not be imposed against the plaintiff."

As property subrogation professionals know all too well, residential or commercial fire losses pose unique concerns, especially if you have to retain all possible relevant debris. Although the costs associated with photographing and/or videotaping the defective construction is minimal, the costs of retaining part or all of the structure can be prohibitive. While one party may want limited physical evidence near the area of origin, another party may claim spoliation where every piece of physical evidence is not retained so that all possible alternative theories can be pursued. NASP hopes this case will help delineate what steps subrogation professionals need to do to prevent a "spoliation" argument.

NASP hopes this case can further clarify what the obligation of a defendant is with request to failing to engage in the inspection. Does their failure to inspect mean they essentially waive their "spoliation" claim? NASP hopes the court will use the case to place some obligation on a party defendant who elects not to engage in the inspection.

To read the brief which was filed, you can visit the NASP website at http://www.subrogation.org/news_amicus.asp under "Amicus Briefs Filed" at the bottom of the page. The case was set for oral argument in December, 2008. NASP's Amicus Committee will continue to monitor the case, advising all members once a decision is reached.