



Law Watch

A Quarterly Update from Crivello Carlson, S.C.

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FIRM NEWS

RECENT PRESENTATIONS

Larry Drabot recently served on the faculty at a National Business Institute continuing legal education seminar, “Applying the Rules of Civil Procedure in Wisconsin” speaking on the topics of Judgments and Final Remedies, and Ethical Practices for Civil Litigation.

Travis Rhoades and **Ashley Webber** presented “Is Your Place Safe? We’ll be the Judge of That!” at Wisconsin Defense Counsel Winter Meeting, December 9, 2016, Marriott Milwaukee West.

For more information or to arrange a presentation on any of these or other legal topics, please contact Crivello Carlson at 414-271-7722.

Don Carlson was recently honored by the State Bar of Wisconsin for his 50-year milestone as a Wisconsin lawyer.

Pat Brennan was once again voted by his peers for inclusion in Best Lawyers’ annual list of Wisconsin’s best lawyers. He was named a Best Lawyer in commercial litigation, personal injury litigation (defense), and professional malpractice law (defense). **Don Carlson** was named a Best Lawyer in product liability litigation.

Jeff Nichols recently prevailed in a Trempealeau County jury trial. The case arose out of a slip and fall at a banquet facility which plaintiff alleged caused permanent neck and shoulder injuries. In spite of Jeff’s client being unavailable for trial (he was incarcerated in Mexico) the jury found Jeff’s client not negligent and further found no damages as a result of the alleged incident in spite of plaintiff asserting special damages in excess of \$50,000. The jury deliberated for 30 minutes before rendering its decision.

Sara Mills recently received a favorable published opinion from the Court of Appeals. The case involved claims of trespass and property damage. The circuit court held that one of the plaintiffs, a property association, lacked standing. It further held that as to the remaining plaintiffs, statutes of limitation and issue preclusion barred the claims. The court of appeals affirmed. See synopsis of *Munger v. Vanderhei* on the following pages for more analysis.

Larry Drabot and **Sally Fry Bruch** recently prevailed on a Motion to Dismiss based on issue preclusion and claim preclusion. The original action began in 2013 when a landlord of a retail space sued the tenant for rent. The tenant counterclaimed, asserting that the landlord did not provide

proper ventilation which caused health issues that prevented the tenant from occupying the space. A directed verdict was rendered for the landlord. The tenant then initiated a lawsuit in 2015 against the landlord, building owner, and the contractor asserting negligence in the design, installation and maintenance of the HVAC system. The court granted defendants’ motion to dismiss finding that the issues and claims had previously been litigated.

Jim Niquet, Travis Rhoades and **Noelle Muceno** prevailed in a motion for summary judgment, obtaining a dismissal for a construction contractor and building materials supplier in a wrongful death action. Crivello Carlson’s client faced allegations that it was strictly liable and negligent in furnishing and supplying defective building materials used during the construction of two power plants. The judge agreed with the team’s arguments, and the judge granted dismissal of all claims against the building contractor based upon the Wisconsin Construction Statute of Repose.

Zachary J. Flood, Marquette ’16, recently joined the firm as an associate. Attorney Flood’s practice encompasses employment law, municipal law, and civil rights litigation.

Jane Howard, UW ’12, recently joined the firm as an associate. Attorney Howard’s practice focuses on civil litigation and employment law.

Travis Rhoades and **Ashley Webber** authored “An Overview of Wisconsin’s Safe Place Statute and Confusion Over its Inconsistent Application,” Wisconsin Civil Trial Journal, Winter 2106, Volume 14, No. 3.



Update

RECENT WISCONSIN COURT OF APPEALS DECISIONS

INSURANCE LAW -

Agents and Employees

Romero v. West Bend Mutual Insurance Co.,

2014AP002882; 2016 WI App 59

Fairview Auto, Inc. buys vehicles at auction and sells them at other auctions for profit. Fairview Auto used Badger State Auto Auction, Inc. (BSAA) to sell its vehicles. An employee of BSAA struck the plaintiffs while driving a vehicle he was preparing to auction off for Fairview Auto and the plaintiffs sued. Addison Insurance Company insured Fairview Auto and West Bend Mutual Insurance Company insured BSAA. The matter settled but Addison refused to contribute. West Bend then filed a cross claim against Addison asserting that the BSAA employee was an insured under the Addison policy and that the Addison policy was primary. The Court of Appeals held that because the BSAA employee was not an officer or employee of Fairview, he was not Fairview's agent and the Addison policy did not apply.

ISSUE PRECLUSION -

Issues "Actually Determined"

Munger, et al. v. Vanderhei, et al.,

2014AP2594

In 2007, the DNR received a complaint of illegal dredging of an outlet creek between two feeder lakes in Langlade County. Defendants had allegedly trespassed on plaintiff's land to remove a log, some grass clippings, and other natural debris from the creek that was blocking the flow of water to the lower

lakes in the chain. The DNR cited the defendants for trespass. In 2009, the DNR received a report of illegal riprap being placed by the plaintiff at the mouth of the feeder creek beyond the area allowed by his permit. Plaintiff was issued citations for obstructing navigable waters. In 2010, plaintiff applied for a DNR permit to place fill in the creek in an effort to "repair damages" caused by the defendants. The DNR denied the permit and in so doing issued detailed findings of fact and conclusions of law. It found that the various natural and man-made changes to the creek over the years could not be separated from one another with any certainty and it determined that plaintiff's proposed use of fill would materially obstruct navigation. Plaintiffs went through a contested case hearing with an administrative law judge, who agreed with the DNR. Plaintiffs appealed that decision to the circuit court, which further affirmed the findings.

Plaintiffs then brought suit against defendants in 2011 alleging trespass and damage to property as a result of the 2007 actions. The circuit court dismissed the trespass claim under the statute of limitations governing intentional torts and dismissed two claims that were directed against the DNR. On summary judgment on the property damage claim, the court held that plaintiffs could not because the DNR's finding about the inability to determine causation was binding under the theory of issue preclusion. The court of appeals affirmed in all respects. It confirmed that, as a matter of first impression, the statute of limitations for intentional torts, Wis. Stat. § 893.57, applies to claims of trespass. It further held that it was irrelevant that the plaintiffs had different objections in initiating the DNR proceedings and the civil lawsuit. The DNR clearly determined in 2011 it would be impossible—not just difficult—for plaintiffs to establish causation.

INSURANCE LAW -

Accident or Occurrence

Oddsden v Henry,

2015AP765; 2016 WI App 30

In 2010, Jason Oddsden went to a party at a friend's home. During the course of the party, Oddsden, who was a regular abuser of drugs, consumed a mixture of heroin, methadone, oxycodone, and alprazolam that proved fatal early the next morning. At some point during the evening, another party guest, Elizabeth Henry, became concerned and brought Oddsden to her mother's house. It was there that Oddsden "began to show signs of having overdosed." Oddsden was pronounced dead at the hospital at 7:28 a.m. Oddsden's parents and his estate brought suit against Henry (and other party guests), alleging that she was negligent in failing to render or obtain aid for Oddsden. The suit also named State Farm, because Oddsden ended the night at Henry's mother's home, and State Farm had issued a condominium unit owner's insurance policy to Henry's mother. State Farm argued that it had no duty to defend or indemnify Henry based on the lack of an "occurrence." Despite two distinct versions of events, State Farm argued that Henry had committed a series of volitional acts that led to Oddsden's death and therefore, there was no "occurrence" or "accident." The Court of Appeals held that because there were disputed issues of material fact regarding whether Henry acted intentionally and intended some harm or injury to follow from her acts, summary judgment on State Farm's coverage motion was improper.

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RECENT WISCONSIN SUPREME COURT DECISIONS

INSURANCE LAW - Duty to Defend

Burgraff v. Menard, Inc.,
2016 WI 11

Plaintiff was injured when a Menard employee loaded materials onto Plaintiff's trailer with a forklift. Plaintiff's vehicle and trailer were insured under an automobile insurance policy issued by Millers First. Defendant contended that it was entitled to coverage under the Millers First policy as a permissive user of Plaintiff's vehicle and tendered defense of the claim to Millers First. Millers First conceded that Defendant was entitled to coverage. Defendant was also insured for excess coverage under a CGL policy issued by CNA with a self-insured retention amount of \$500,000. Defendant was required to pay the first \$500,000 of damages and defense costs arising from an occurrence. During mediation, Millers First and Plaintiff settled the claim against Millers for \$40,000 and the settlement agreement stated that Plaintiff and Millers First agreed to "fully discharge Miller First and one-sixth of any liability that Defendant may have to Plaintiff." Defendant did not settle with Plaintiff at mediation. Millers First then moved for summary judgment arguing that it no longer had a duty to defend Defendant. The supreme court held that the self-insured retention constituted "other applicable liability insurance" under the Millers First policy language and would be treated as primary coverage. However, Millers First breached its duty to defend because it withdrew representation before exhaustion of the policy limits. Although the settlement might have represented Millers First's maximum potential liability

based on its proportionate share of the claim, the policy language did not limit its duty to defend based on maximum potential liability or alter the duty to defend if it shared responsibility for providing coverage with another insurer such as CNA.

INSURANCE LAW - Occurrence and Property Damage

**Wisconsin Pharmacal Co., LLC
v. Nebraska Cultures of
California, Inc.,**
2016 WI 14

Plaintiff is a probiotic supplement supplier. The supplement is in the form of a chewable tablet and contains various ingredients, including a probiotic bacterial species known as Lactobacillus rhamnosus (LRA). Plaintiff contacted an entity to manufacture supplement tablets containing LRA, and that entity procured LRA from Defendant. The manufacturing process required blending other ingredients that were obtained from other vendors with LRA and then compressing everything into tablet form. Once mixed and compressed into tablet form, none of the ingredients could be separated from one another. The material supplied by Defendant was defective because it constituted a different species of bacteria, not LRA. The supreme court held that under Wisconsin law, incorporation of the defective material was not "property damage" under the Defendant's CGL policy because the manufacturing process formed an integrated system and the injury was to the system itself. Further, under California law, supplying the defective ingredient was not an "occurrence" because even if provision of the defective ingredient was negligent, the Defendant deliberately supplied the ingredient.

INSURANCE LAW - Recreational Immunity

**Roberts v. T.H.E. Insurance
Company,**
2016 WI 20

Plaintiff was injured at a charity event as she waited in line for a hot air balloon ride. The owner and operator of the hot air balloon company, which had donated hot air balloon rides to promote the event, was neither the sponsor of the event nor the owner of the property on which the event was held. While plaintiff waited in line, strong winds caused one of the hot air balloon's tether lines to snap. As a result, the untethered balloon moved toward the spectators in line and plaintiff was struck and knocked to the ground. Plaintiff sued the balloon operator and the operator moved for summary judgment dismissal based on recreational immunity under Wis. Stat. § 895.52. The supreme court held that the operator was not an "occupier" of the land and the hot air balloon was not "property" because it was not a "structure." For those reasons, the operator was not an "owner" entitled to immunity under the statute. It further concluded that a waiver of liability signed by plaintiff violated public policy and was unenforceable because it was so broad as to absolve the operator of liability for any activity for any reason.

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Upcoming Decisions



As we wrap up the 2016 holiday season and consider the successes of the past year, Crivello Carlson would like to take a moment to recognize the amazing generosity its employees demonstrated throughout the year. At Crivello Carlson, social responsibility and good citizenship are a central part of our commitment to the needs of not only our clients and employees, but also the communities in which we live and work. We strive to actively better our communities through participation in several charities and events each year, and 2016 was no exception.

Since 2004, Crivello Carlson employees have partnered with the United Way to raise funds supporting community-based programs promoting education, healthy living, and income stability. For the second year in a row, we

partnered with Blu at the Pfister, where several of our attorneys tried their hands at bartending during a happy hour benefit to raise additional funds for the United Way. Other events and organizations with which the firm and its employees participated in the past year include: March of Dimes, Jewish Family Services, Camp Hometown Heroes, Wisconsin African American Lawyers (WAAL) Education Foundation, Milestones Programs for Children, Centro Legal, James R. Murphy Classic, the American Heart Association, Marquette University Gold Athletic Scholarship Fund, Greendale High School Marching Band, Stars & Stripes Memorial, the Eastern District of Wisconsin Bar Association, and many more.

Crivello Carlson wishes everyone a healthy, happy and prosperous New Year!

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