



Law Watch

A Quarterly Update from Crivello Carlson, S.C.

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FIRM NEWS

RECENT PRESENTATIONS

Danny Mullin and **Sara Mills** recently presented to the Risk Management Society (RIMS) about cyber liability, including ways to limit liability for damages arising from data breaches and inadvertent disclosure of propriety information and strategies to implement best practices applicable to the use of social media in an employment setting.

George Peek recently presented at a National Business Institute (NBI) seminar entitled "Collection Law: Start to Finish." George discussed topics including Pre-Suit Collection Strategies and the Fair Debt Collection Practices Act.

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

Crivello Carlson is pleased to announce the opening of its newest office in Eau Claire, Wisconsin to better serve our clients in Northern Wisconsin and beyond. Contact information is: 316 N. Barstow Street, Suite F, Eau Claire, Wisconsin 54703. Phone: 715-598-1730.

Jeff Nichols received a favorable verdict on behalf of a Plaintiff in a slip and fall action in Milwaukee County. The jury of 12 found no negligence on the Plaintiff.

Jim Niquet, Travis Rhoades and **Noelle Muceno** prevailed in a motion for summary judgment, obtaining a dismissal for a premises owner in a wrongful death action in Milwaukee County. The judge agreed with our arguments in extensive briefing and oral argument and dismissed all claims against the power plant owner, ruling that the premises owner was entitled to protections of the Wisconsin Construction Statute of Repose.

Pat Brennan was recently selected as a member of the nationally recognized 2015 Irish Legal 100 list of distinguished legal professionals.

Sam Hall and **Tim Johnson** recently obtained a favorable verdict in a federal civil rights trial challenging a Wisconsin sheriff's deputy use of deadly force. The plaintiff, who was shot three times, claimed that the officer used excessive force in responding to a call that began as a call for assistance based on suicidal threats. After the four day trial in the U.S. District Court for the Eastern District of Wisconsin, the jury returned a verdict in favor of the law enforcement officer, finding the shooting legally justified. The plaintiff had sought \$4.5 million in compensatory damages in addition to an unspecified amount in punitive damages.

Jeff Nichols, with the assistance of **Chris Jahncke**, received a defense verdict in Austin, Texas Federal Court on a products liability claim. After a day and a half of deliberations, the seven person jury found the telehandler/forklift was not defectively designed and thus not a cause of plaintiff's injuries.

We are pleased to announce that **Tim Johnson** and **William Keeler** were recently made shareholders.

Eric Andrews was recently nominated to participate in the State Bar of Wisconsin's 2015 Leadership Development Summit. He was one of twenty-five attorneys selected and invited to participate in this event.

Richard Orton recently prevailed in a bench trial in St. Croix County, WI on behalf of a health insurer on its claim for subrogation and reimbursement for medical payments made to the plaintiff. Throughout the litigation, the plaintiff claimed that all of the payments made by the health insurer were related to treatment for injuries caused by the accident. Plaintiff settled with the tortfeasor but after settlement, the plaintiff suddenly reversed course and claimed that none of the payments were related to the accident and therefore the insurer had no right of subrogation or reimbursement. After a bench trial, the court found that the payments were related to injuries sustained in the accident and that the health insurer was entitled to recover.

Sara Mills was recently honored with the Wisconsin Defense Counsel's 2015 Publication Award.

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Update

RECENT WISCONSIN COURT OF APPEALS DECISIONS

CIVIL RIGHTS - Retaliation

Soderlund v. Zibolski,
2014AP002479

Soderlund was employed by the Wisconsin Department of Justice (DOJ) for nineteen years in the state crime lab until his retirement on February 28, 2012. In 2006, he initiated an internal complaint with the DOJ alleging unwarranted deviations from DOJ quality assurance standards. Over the next three years, Soderlund submitted similar requests and complaints to accreditation boards, the crime lab's quality assurance coordinator, and under Wisconsin's whistleblower laws. All entities determined that the allegations were meritless. Eventually, Soderlund was sent a predisciplinary hearing letter stating that he had committed fifty-four violations of six DOJ work rules. Believing he was about to be terminated, Soderlund retired. He then sued Zibolski, the deputy director of DOJ's Division of Law Enforcement Services, for retaliation under 42 U.S.C. § 1983 for exercising his First Amendment rights. The Court of Appeals affirmed summary judgment in favor of Zibolski. Soderlund's speech was not protected by the First Amendment, because he spoke on a matter of personal concern, rather than public concern, and because he spoke in his capacity as a public employee, rather than as a citizen.

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CONTRACT LAW -

Deceptive Representation

Fricano v. Bank of America NA,
2016 WI App 11, 2015AP20

Bank of America acquired a home in foreclosure. After acquiring the home, the bank's real estate agent discovered that the property had suffered severe water damage. The bank's asset manager said that "quick clean up would save the property from any mold issues." The real estate agent had warned the bank throughout the process that mold could develop, although by the time the remediation was complete and the house was listed, the real estate agent had not seen or smelled any signs of mold.

After the house was listed for sale, plaintiff made an offer to purchase. The bank emailed plaintiff the Bank of America Real Estate Purchase Addendum (Addendum) and the Water Damage, Toxic Mold Environmental Disclosure, Release and Indemnification Agreement (the Agreement). The Addendum and the Agreement contained an "as is" clause, along with a number of disclaimers or exculpatory clauses.

The documents included a representation that the bank acquired the property by foreclosure and consequently it had "little or no direct knowledge about the condition of the [p]roperty." Upon discovering extensive mold in the home, plaintiff sued the bank under Wis. Stat. § 100.18. Plaintiff prevailed in a jury trial and the Court of Appeals affirmed and held that contractual disclaimers, waivers, and "as is" provisions do not relieve a party from liability under Wis. Stat. § 100.18 for making a deceptive statement. "A falsely induced 'as is' clause does not preclude liability."

DEFAMATION -

Statute of Limitations

Laughland v. Beckett,
2015 WI App 70, 14AP002393

January 10, 2010, Beckett created a Facebook page using the name Stephen Laughland II. Beckett used the email address consumer.advocate.WI@gmail.com for the Facebook account. At the time, Laughland was an adjunct lecturer at multiple Milwaukee-area colleges and happened to be engaged in a custody dispute with the mother of his child. Beckett was the woman's boyfriend. On the fake Facebook profile, Beckett's inaugural post stated that he considered the Facebook account to be "a public service for anyone that [sic] is not aware of Mr. Laughland's total disregard for the financial freedoms we as consumers cherish." He also referred to Laughland as a "preying swindler," implied that Laughland was engaged in some kind of banking manipulation. He sent friend requests to many of Laughland's friends. Laughland was eventually alerted to the fake profile by friends and Beckett stopped posting on it in April, 2010.

In July 2012, Laughland sued Beckett for defamation. At the time the page was created in 2010, the statute of limitations for defamations claims was two years. See Wis. Stat. § 893.57 (2008-2009). However, that statute was amended to three years in February 2010. "Active use" of the social media account, which included "actively publish[ing] material" on the fake account, constituted a "continuing course of conduct" for purposes of the statute of limitations. The trial court held that because Beckett's last post, or active use, was made in April, 2010, the three year statute of limitations applied and the suit was not barred.

Full Service Litigation Attorneys Trial, Appellate, Mediation and Arbitration

CIVIL PROCEDURE - Personal Jurisdiction

Salfinger, et al. v. Fairfax Media, Ltd.,
2015AP150

The plaintiff was an Australian citizen living in Shorewood, Wisconsin. He brought a defamation claim against the Sydney Morning Herald for an article it ran about the family behind Yellow Tail wine, which noted his connection to them and contained other individuals' descriptions and opinions about him which were "less than flattering." The article was published in print within Australia and online via the newspaper's website. The parties from Australia and New Zealand with ties to the newspaper moved to dismiss for lack of personal jurisdiction. The Court of Appeals affirmed the trial court's dismissal on that basis. The appellate court held that exercising jurisdiction would not comport with constitutional due process requirements. Neither the newspaper's online subscriptions in Wisconsin nor the fact that the paper had a small subsidiary in Wisconsin (individually or collectively) were sufficient to establish the requisite minimum contacts. Additionally, although the newspaper received online advertising revenue from the Wisconsin users who accessed its website, the court held that online advertising is not necessarily part of a concerted effort to "drum up" business in Wisconsin.

EMERGENCY DOCTRINE - Dog Bite Statute

Kelly v. Berg,
2015 WI App 69, 2014AP001346

Kelly was drawn outside on the evening of June 16, 2011 when she heard her chocolate lab, Moosie, screeching and yelping. Kelly found Moosie under attack by her neighbor's pitbull, Princess.

Kelly screamed for Princess's owners, Amanda Berg and Adam Finkler, to come help but they did not respond. When it became apparent to Kelly that Princess would likely kill Moosie if she did not intervene, Kelly grabbed Princess's jaws and pried them open, releasing Moosie's neck and allowing Moosie to escape toward the back door of Kelly's home. Princess pursued Moosie and Kelly had to continue her rescue efforts. Eventually Moosie made it inside, but Princess then attacked Kelly. Kelly sued Princess's owners, Berg and Finkler, under Wis. Stat. § 174.02, Wisconsin's strict liability dog bite statute. The dog bite statute is subject to Wis. Stat. § 895.045, the contributory negligence statute.

The jury was instructed on the emergency doctrine and returned a verdict in favor of Kelly, but the Court of Appeals remanded for a new trial. The appellate court focused on the time in which action is required. For the doctrine to apply, "the person's reaction to the danger must be 'practically instinctive or intuitive.'" The record demonstrated that Kelly had sufficient time to make a deliberate and intelligent choice whether to intervene in a fight between her dog and the defendants' dog. The court also held that "when considered as a whole," the instructions together did not convey the correct legal standard and therefore the erroneous instruction was prejudicial.

RECENT DECISION FROM THE SEVENTH CIRCUIT COURT OF APPEALS

INSURANCE LAW - Bad Faith

**Advance Cable Co., LLC v.
Cincinnati Insurance Co.,**
14-2620

Advance had a policy of insurance through Cincinnati covering two

properties in Middleton, Wisconsin. After a hailstorm in 2011, Advance submitted a claim to Cincinnati reporting damage to its property. Cincinnati's adjuster inspected the roof and "spotted some dents, but he saw little other evidence of damage." The estimate sent to Advance by Cincinnati noted "some dents to soft metal roof vents and AC fins" but stated that the adjuster "did not observe any damage to roofing." After Advance's \$1,000 deductible, Cincinnati issued Advance a check for damage to both its buildings totaling \$1,512.70.

Six months later, a potential buyer of one of Advance's buildings had the roof inspected. The buyer's inspector came to a different conclusion about the extent of the damage. He observed that there was "definitely hail damage" to the roof. Based on this report, Advance asked Cincinnati to reopen the claim. Cincinnati inspected the roof again, and again it concluded that while some denting existed on the metal roof panels, the denting would "not affect the performance of the panels (roofs)" or reduce the roof's life expectancy. Advance wanted the roof replaced, but Cincinnati believed that the damage was cosmetic and therefore not a covered "direct physical loss." Ultimately, whether the damage was cosmetic was irrelevant, because the policy of insurance did not exclude cosmetic damage from its coverage.

The Seventh Circuit held that if Cincinnati wished to exclude cosmetic damage from coverage, it should have written the policy that way. As for Cincinnati's decision to deny coverage, the Seventh Circuit agreed with the district court that there was no bad faith. "[T]he undisputed material facts showed that it was reasonable, even if incorrect, for Cincinnati to refuse to pay Advance's claim because it did not believe Advance suffered 'loss or damage' from the hail damage."

Upcoming Decisions



Following the recent holiday season, 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 2015 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. This year, 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, Cupid's Run, Toys 4 Tots, the American Heart Association, Milwaukee Tennis & Education Fund, Milestones Programs for Children, the Hunger Task Force, Parkinson's Association of Southwest Florida, Wisconsin African American Lawyers (WAAL) Education Foundation, Milwaukee Young Lawyers Association, MACC Fund, Camp Hometown Heroes, Ronald McDonald House, the Multiple Sclerosis Bike Tour, the Vince Lombardi Cancer Foundation, and many more.

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