CRIVELLO • CARLSON S.C.
ATTORNEYS
EST. 1948

Law Watch

A Quarterly Update from Crivello Carlson, S.C.

VOLUME 13, ISSUE 2

RECENT PRESENTATIONS

Sam Hall recently spoke at the national conference of the Public Risk Management Association (PRIMA) in Atlanta, Georgia. Sam's speech was given to a national audience and focused on the implementation of policy body camera programs and various public records, First Amendment and Fourth Amendment implications.

Sam Hall and **Sara Mills** recently presented a webinar CLE entitled, "Navigating Section 1983 Liability for Municipalities: Individual/ Official Capacity, Qualified Immunity and Monell Claims" to a national audience speaking on topics of constitutional provisions and laws commonly invoked in § 1983 claims, recent trends in § 1983 litigation, and municipal *Monell* liability.

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

FIRM NEWS

Kiley Zellner, Marquette '07, recently joined the firm as an associate. Attorney Zellner's practice focuses on bankruptcy litigation, criminal defense, and general civil litigation.

Sam Hall and **Ben Sparks** recently obtained a favorable decision dismissing a case brought under Wisconsin's Open Records Law against a municipal client. The Washington County Circuit Court ruled that the plaintiffs had failed to state a claim under the Open Records Law because the allegations and filed documents showed that the municipality complied with the Open Records Law.

Sara Mills and **Pat Brennan** recently obtained summary judgment dismissal of a legal malpractice case in the U.S. District Court for the Eastern District of Wisconsin. Our client was an attorney and his firm who represented a client on claims under the Telephone Consumer Protection Act. The court granted summary judgment to the defendants on all counts, which included claims of legal malpractice, breach of fiduciary duty, and misrepresentation under Wis. Stat. § 100.18.

Jim Niquet, **Agatha Raynor**, and **Noelle Muceno** prevailed in a summary judgment motion that led to the dismissal of all strict products liability and negligence claims against a manufacturer in a wrongful death action. Our client faced allegations that it was liable as a successor corporation for a company that supplied defective building products and services during the construction of a power plant. The Brown County, Wisconsin judge agreed with argument and supporting evidence produced by the team that the Wisconsin Statute of Repose defense protected the manufacturer for its involvement in the construction in the power plant.

Jeff Nichols recently had a successful result in front of a Milwaukee County jury. Jeff filed an Offer of Judgment after his client was sued for running over the plaintiff with a forklift. Plaintiff was claiming significant injuries to his foot and a herniated disc in his back that would require future surgery. The jury came back with an award that was much less than the Offer of Judgment and found plaintiff 40% at fault, reducing the award even further and allowing Jeff's client to tax costs as a prevailing party.

Eric Carlson was successful in obtaining a dismissal of a products liability claim in Cook County, Illinois based on Forum Non-Conveniens. Eric also recently prevailed in a Milwaukee County trial on an intentional infliction of emotional distress claim brought against a non-profit organization.

Jane Howard was nominated for and attended the Wisconsin Bar Association's 2017 Leadership Summit as part of the Wisconsin Young Lawyers Conference in March. Only 24 attorneys were selected to participate based on their commitment to civic-mindedness and leadership capabilities.

Pat Brennan, **Sally Fry Bruch** and **George Peek** recently obtained dismissal with an award of costs based on Wisconsin's "Long Arm" statute. An advertisement for the sale of the client's out-of-state business on a third-party's website did not create jurisdiction under Wis. Stat. §§ 801.05(4)(a) and 801.05(5)(e) because it did not expressly target Wisconsin or its residents as is required to find jurisdiction under Wisconsin law.

ATTORNEYS
CRIVELLO • CARLSON S.C.
EST. 1948

Update

RECENT WISCONSIN COURT OF APPEALS DECISIONS

LEGAL MALPRACTICE -

Statute of Limitations and Accrual

Bleecker v. Cahill,
2017 WI App 28

Plaintiff Bleeker sought assistance from Attorney Cahill in 2003 to review a lease. Bleeker told Cahill that it was important that the terms of the lease ensured he would recover all of his construction costs through amortization payments and alleged that Cahill assured him the lease would accomplish that.

Cahill alleged that he actually told Bleeker that the amortization payments would cease if the lessee terminated the lease at the end of the initial ten-year term. In 2013, after ten years, the lessee terminated the lease. Bleeker claimed this was the point at which he first learned that the lessee had no obligation to continue making amortization payments. Bleeker sued Cahill in 2014 alleging malpractice.

The circuit court held that the claim accrued when the lease was signed in 2003 and dismissed the claim as untimely. The court of appeals reversed. It held that for a malpractice claim to accrue, it must be capable of present enforcement and a claim cannot be enforced until the plaintiff has suffered actual damage. Because Bleeker had not suffered harm and was not reasonably certain to suffer harm in the future when he signed the lease in 2003, the claim did not accrue at that time. Only when the lessee notified Bleeker in 2013 that it was not going to extend the term of the lease did financial loss become reasonably certain to occur in the future.

INSURANCE LAW -

Timeliness of Notice of Claim

Shugarts v. Mohr,
2016AP000983

Shugarts was injured in an auto accident in 2010 when his vehicle was struck by a vehicle driven by Mohr. At the time of the accident, Shugarts had personal auto coverage through Allstate.

Shugarts filed suit in June, 2013 against Mohr and Mohr's insurer, Progressive. In October, 2014, Progressive offered to settle Shugarts's claim for policy limits. Two weeks later, Shugarts finally sent notice of retainer to Allstate regarding the 2010 accident. In March 2015, Shugarts formally added Allstate as a defendant and asserted a claim for UIM benefits, but Allstate asserted that there was no coverage due to Shugarts's failure to provide timely notice. Shugarts argued that his notice was timely because it was sent only two weeks after Progressive offered policy limits to settle and because it complied with the principles of *Vogt* notice.

The court of appeals disagreed and held that *Vogt* pertains to notice required before entering into a settlement. *Vogt* does not address what notice might be required to the UIM insurer based on the date of the underlying accident rather than the date of the settlement offer. Because the issue was not when Allstate's subrogation rights were triggered but whether Shugarts provided Allstate notice of the claim pursuant to the insurance contract, the appellate court agreed with Allstate and held that Shugarts was not entitled to UIM coverage.

RECREATIONAL IMMUNITY -

Supervision of Child Engaged in Recreational Activity

Wilmet v. Liberty Mutual Ins. Co.,
2017 WI App 16; 2015AP002259

Wilmet dropped off her grandchildren at the VFW Swimming Pool owned and operated by the City of De Pere. After dropping them off, Wilmet remained outside the premises watching them through the fenced perimeter as they swam. Her grandson shouted to her that he was going to jump off the high dive. Concerned for her grandson due to the lack of lifeguards, Wilmet re-entered the premises without paying the fee and walked straight toward the high dive. She testified that her only purpose in re-entering the premises was to ensure her grandson's safety and supervise his jump off the high dive. As she walked toward the diving board, she tripped and was injured. Wilmet sued the City and its insurer under the Safe Place statute. The City and its insurer invoked the recreational immunity statute, Wis. Stat. § 895.52 and sought dismissal of the claim. The circuit court and court of appeals sided with the City and held that the recreational immunity statute applies to the supervision of a child engaged in a recreational activity.

INSURANCE LAW -

Breach of Contract Exclusions

Great Lakes Beverages, LLC v. Wochinski,
2017 WI App 13; 2016AP000386

Defendant Wochinski worked in the beverage industry manufacturing specialty sodas and juices. He entered

into a purchase agreement, which included a covenant not to compete, to sell his beverage distribution business. Eventually, a distributor sued to enforce the non-compete agreement and also asserted other claims including unfair competition. Wochinski counterclaimed and filed a third-party complaint against multiple parties that included a claim for tortious interference with contracts or prospective contracts.

AMCO issued a business owners policy and a commercial CGL policy to the plaintiff. AMCO took the position that the third-party claims against the plaintiff asserted by Wochinski were not covered under its policies. The circuit court and the court of appeals agreed. The courts held that the policies' breach of contract exclusions barred coverage for the tortious interference claim because that claim "arose from" a contractual relationship. Although the tortious interference claim sounded in tort, the policy language was broad enough to exclude coverage for tort-based claims that arise out of a breach of contract.

INSURANCE LAW -

Negligent Training and Supervision

Talley v. Mustafa,
2015AP002356

Defendant Mustafa owned a business at which an altercation allegedly occurred between Plaintiff Talley and one of Mustafa's employees. Plaintiff's complaint alleged that Mustafa negligently trained and supervised this employee and also claimed personal injury against the employee. Auto Owners, which insured Mustafa, filed a motion for summary judgment arguing that it had no duty to defend or indemnify Mustafa because, according to Auto Owners, the complaint and factual record indicated that if the employee struck plaintiff, it was done intentionally. Auto Owners argued that because the injury to plaintiff was caused by an intentional act, the claim for negligent training and supervision was excluded. The circuit court agreed but the court of appeals reversed. The appellate court held that a reasonable person in Mustafa's position would expect the claim for negligent training and supervision of an employee to be covered, regardless of whether that claim was founded on the employee's negligent or intentional act.

RECENT WISCONSIN SUPREME COURT DECISIONS

COMMERCIAL PROPERTY -

Former Possessors and Caveat Emptor

Brenner v. Amerisure Mutual Ins. Co.,
2017 WI 38

A contractor's employee sued a commercial property owner, the property's previous owner, and the property's former long-term tenant, alleging negligence and safe-place statute claims after he fell through a large hole in the floor of the building. The long-term tenant and the previous property owner moved for summary judgment on the doctrine of caveat emptor (buyer beware). The plaintiff urged the court to adopt the Restatement of Torts, which subjects a former possessor to the ordinary duty of care when the possessor created a risk of harm while in possession of the property.

The Wisconsin Supreme Court declined to adopt this exception to caveat emptor and held that caveat emptor applies in the commercial tenancy context. A former possessor stands in the same position as a vendor in a vendor-vendee relationship. Therefore, a former possessor is immune from liability absent some narrow exception to the caveat emptor doctrine.

GOVERNMENTAL IMMUNITY -

Private Contractors and Subcontractors

Melchert v. Pro Electric Contractors,
2017 WI 30

Pro Electric was a subcontractor working on a DOT-approved project in Waukesha County. While working on the project, Pro Electric severed a sewer lateral during excavation. This caused flood damage to several properties and the property owners sued. Pro Electric argued that it was entitled to immunity and the court agreed as to its excavation work but not its backfilling. The specifications in the DOT's excavation plans were reasonably precise and Pro Electric complied with the specifications exactly. Because the specifications were adopted by the DOT as an exercise of its legislative or quasi-legislative function, Pro Electric was entitled to the same level of immunity under § 893.80 as would be accorded to the DOT had it been sued directly. However, Pro Electric was not entitled to immunity for an allegation of negligently backfilling its excavation because the DOT work proposal assigned responsibility for coordinating with local utilities and was not reasonably precise as to how that responsibility should be fulfilled. Nevertheless, because Pro Electric complied with its duties to coordinate with local utilities related to backfilling, it was entitled to summary judgment.

Stay connected.

Stay connected with Crivello Carlson and Wisconsin legal news through our firm blog, **www.crivellocarlson.com/blog** and by following us on **Facebook** and **Twitter**!

710 North Plankinton Avenue
Suite 500
Milwaukee, WI 53203

PRESORTED
FIRST-CLASS MAIL
U.S. POSTAGE PAID
MILWAUKEE, WI
PERMIT NO. 3707

Upcoming Decisions

Will it soon cost less to obtain plaintiffs' medical records? That scenario appears at least somewhat more likely in the wake of a recent Wisconsin Supreme Court decision, *Moya v. Healthport Technologies, LLC*, 2017 WI 45. In *Moya*, the plaintiff signed a HIPAA authorization and her attorney obtained her records. When processing the authorization, Healthport assessed certification charges and retrieval fees totaling $294.70 and billed Moya's attorney. Section 146.83(3f), Wis. Stats., permits a records provider to charge certain specified amounts for copies of medical records as well as certification charges and retrieval fees. However, the certification and retrieval fees may only be assessed if "the requester is not the patient or a person authorized by the patient." Moya filed a class action against Healthport asserting that her attorney was a "person authorized by the patient" to collect her records who should not be subject to the certification and retrieval fees.

The court agreed with Moya but was careful to use precise language in its holding: "We hold that **an attorney authorized by his or her client** in writing via a HIPAA release form to obtain the client's health care records is a 'person authorized by the patient' under Wis. Stat. § 146.83(3f)(b)4.-5...." ¶ 38, emphasis added. Despite the limiting language, the *Moya* Court's analysis and reasoning may potentially be extended to defense counsel armed with a HIPAA release signed by a non-client. We expect this question will be tested in the very near future.

CONTACT US

If you would like:

- Additional information
- Copies of decisions
- To subscribe to *Law Watch* electronically

Please contact us by calling **(414) 271-7722**.