CRIVELLO • CARLSON S.C.
ATTORNEYS
EST. 1948

Law Watch

A Quarterly Update from Crivello Carlson, S.C.

VOLUME 13, ISSUE 3

RECENT PRESENTATIONS

Sally Fry Bruch recently presented on the panel discussion *"Cyber Law: A Primer from the Roundtable,"* at the Wisconsin Defense Counsel Summer Conference, on August 3, 2017 in the Wisconsin Dells. **Jasmyne Baynard** and **Jane Howard** contributed to the published outline *"Electronic Discovery in Wisconsin and the Seventh Circuit – 'Nuts and Bolts.'"*

Agatha Raynor and **Nick Kotsonis** chairs of Crivello Carlson's employment law practice group, presented to principals and school administrators with the Archdiocese of Milwaukee on September 12, 14 and 20. They discussed the Family and Medical Leave Act, Americans with Disabilities Act, as well as implications for educational institutions and smaller employers.

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

We are pleased to announce that **Sara Mills** (Marquette, 2010) was recently made a shareholder.

Jasmyne Baynard, Marquette '17, joined the firm this past summer as an associate. Attorney Baynard's practice focusses on municipal litigation, insurance defense, and general civil litigation.

Richard Orton was unanimously elected to serve as a member of the Board of Directors for Wisconsin Lawyers Mutual Insurance Company (WILMIC).

Todd Jex was a visiting faculty member in the Lawyering Skills Program at the University of Wisconsin Law School on "Preparing a Case for Civil Trial".

Pat Brennen was selected to be recognized in the 24th Edition of the Best Lawyers in American.

Jeff Nichols and **Danny Mullins** obtained a summary judgement on a disputed settlement claim. The court agreed with the defense argument that cashing the insurance company settlement check offered in full satisfaction of a disputed claim was deemed accord and satisfaction.

James Niquet and **Laura Schuett** recently obtained a dismissal of an asbestos case venued in the U.S. District Court, Western District of Wisconsin. The dismissal was obtained as a result of a summary judgment motion which demonstrated there was a lack of testimony or other evidence as a matter of law that Plaintiff's alleged illness was caused by exposure to a product manufactured or distributed by our firm's client.

George S. Peek recently served on the faculty at several estate planning seminars sponsored by the National Business Institute, including "The Probate Process from Start to Finish," "Probate Assets: Top Mistakes and Challenges," and "Estate Administration Start to Finish." He will also be a panel presenter on a National Business Institute video webcast entitled "Drafting Wills 101," which will air on October 5, 2017.

Richard Orton recently accepted an invitation to become a Fellow of the Wisconsin Law Foundation. The Fellows of the Wisconsin Law Foundation is an honorary program which recognizes Wisconsin lawyers who are known by their peers for high achievements in the profession and outstanding contributions for the advancement and improvement of the administration of justice in the State of Wisconsin. Membership is limited to less than 2.5% of lawyers in Wisconsin.

Pat Brennan and **Ben Sparks** recently obtained a favorable defense verdict in a low-impact motor vehicle accident case. The defendant driver was stopped behind the plaintiff at a stop sign and rolled into the plaintiff's bumper when it appeared the plaintiff was pulling into a lane of traffic. The jury returned a zero-negligence verdict, and found no fault on the part of the driver.

Get Law Watch Via Email.

To receive electronic versions of ***Law Watch,*** sign up through our online resource center at **crivellocarlson.com**

CRIVELLO • CARLSON S.C.
ATTORNEYS
EST. 1948

Update

RECENT WISCONSIN COURT OF APPEALS DECISIONS

INSURANCE LAW -

The Four Corners Rule

Stimac Family Trust v. Power & Light,
2017 WI App 33

Stimac, a homeowner, alleged that Wisconsin Power and Light, while performing trenching work near his home, severed a sewage line causing waste to back up onto his property. Wisconsin Power and Light hired Acquire Contracting and Restoration to fix the problem. Unfortunately, Acquire allegedly failed to eradicate the problem which caused a mold contamination in the Stimac home. A suit was then brought and Aquire's insurer was named. The insurer initially denied coverage to Acquire under policy exclusions, filed a motion to bifurcate and stay the proceedings pending the resolution of the coverage issue. In response, both the plaintiff and Acquire submitted extrinsic evidence regarding the damage to the Stimac house as well as the scope of the work done. The insurer objected to the use of extrinsic evidence, citing to the four-corners rule. The Circuit court agreed and dismissed the insurer from the suit. The Court of Appeals reversed and, in doing so, effectively limited the four-corners rule to situations where the insurer denies a defense outright.

The Court explained the procedure as follows: if an insurer alleges that is has no duty to defend, then the four-corners rule applies and the only documents utilized by the court are the insurance policy and the complaint. No extrinsic evidence may be used. On the other hand, if an insurer alleges that its policy does not provide coverage, but provides a defense to its insured and bifurcates the matter while converge is contested, then the court considered the complaint, the policy, and any extrinsic evidence to determine whether coverage exists.

MEDICAL MALPRACTICE -

Statutory Caps on Noneconomic Damages

Mayo v. Wisconsin Injured Patients & Families Comp. Fund

Plaintiff, Ascaris Mayo visited the ER at Columbia St. Mary's hospital in Milwaukee complaining of abdominal pain and high fever. The treating physician determined that Mrs. Mayo met the criteria for Systematic Inflammatory Response Syndrome, but failed to inform Mayo about the diagnosis and instead instructed her to follow up with her gynecologist. Mayo's symptoms worsened and she visited a different ER where she was diagnosed with a septic infection caused by the untreated infection. Unfortunately, that diagnosis was too late and Mayo contracted gangrene in all four of her limbs requiring quadruple amputation. Mayo sued the treating physicians, her respective insured, as well as the Wisconsin Injured Patients and Families Compensation Fund (the Fund) for medical malpractice and failure to provide informed consent.

The Jury awarded the Mayo's $16.5 Million in pain and suffering. After the verdict, the Fund moved to reduce the damages based on the $750,000 statutory cap on noneconomic damages as imposed by Wis. Stat. § 893.55. The 1st District Court of Appeals ruled that the cap was unconstitutional on its face. The Court said the cap imposes an illogical burden on catastrophically injured patients, denying them equal protection. The majority noted that the record did not demonstrate any correlation between medical malpractice premiums and caps on noneconomic damages. Because the majority held the statutory cap is facially unconstitutional, it did not reach the question of whether the cap was unconstitutional as applied to the plaintiffs.

RECENT WISCONSIN SUPREME COURT DECISIONS

INSURANCE LAW -

Costs of Medical Records

Moya v. Healthport Technologies, LLC,
2017 WI 45

Moya was involved in a car accident, after which, she hired an attorney to represent her and provided a HIPPA authorization to that attorney to obtain her medical records, and sent the medical records request to Healthport. Moya filed a class action lawsuit after Aurora Healthcare Inc., through medical records administrator Healthport Technologies LLC (Healthport), billed her lawyer an $8 certification and $20 retrieval fee pertaining to the lawyer's medical records request. Moya believed that because she had authorized her lawyer to collect her medical records, her was not subject to additional fees. In 2015, a state appeals court ruled that the attorney seeking a Moya's medical records was subject to the fees despite have written authorization from the client to request the records. The crux of the issue was statutory interpretation.

Healthport argued for a strict interpretation and that the Moya's attorney was subjected to the fees under Wis. Stat. 146.83(f), which allows

healthcare providers to charge additional fees for retrieval of medical records only if the person requesting the records is not a parent or a custodian. In contrast, Moya argued that under a plain meaning of this provision, attorneys clearly fall within the exemption if they have written authorization, because Wis. Stat. 146.81(5) enumerates that "person[s] authorized by the patient," including parents or guardians of minor patients, the personal representative or spouse of a deceased patient, and "any person authorized in writing by the patient or a health care agent designated by the patient as a principal … [is exempt from the fees]." The Wisconsin Supreme Court held (4-1) "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 exempt from the fees.

MUNICIPAL LAW -
Open Meetings

State ex rel. Krueger v. Appleton Area Sch. Dist. Bd. of Educ.,
2017 WI 70

Parent of public school student brought action against school board and school district's curriculum materials review committee, alleging that committee violated open meetings law by holding meetings that were not open to the public. The Circuit court granted summary judgment in favor of the committee on the grounds that that it was not subject to open meetings law as it was not a "governmental body" as required by Wis. Stat. § 19.82(1). The Wisconsin Supreme Court reversed and concluded the committee was formed on the basis of rules spelled out in the district's handbook, making it subject to the meetings law.

PERSONAL JURISDICTION -
Registered Agents

Segregated Account of Ambac Assurance Corp. v. Countrywide Home Loans Inc.,
2017 WI 71

Plaintiffs filed this suit against Defendant, alleging that Defendant fraudulently misrepresented the quality of mortgages underlying certain securities. Defendant moved to dismiss the complaint for lack of personal jurisdiction. The circuit court dismissed the complaint, concluding that Wisconsin courts could not exercise general jurisdiction over Defendant. The court of appeals reversed, holding that by maintaining a Wisconsin agent to receive service of process, Defendant subjected itself to the general jurisdiction of Wisconsin courts and actually consented to personal jurisdiction. The Supreme Court reversed, holding that Defendant's compliance with section 180.1507 did not, on its own, confer general jurisdiction in Wisconsin. In sum, appointing a registered agent under Wis. Stat. 180.1507 does not signify consent to general personal jurisdiction in Wisconsin.

WORKERS COMPENSATION -
Payment of Disability Benefits

Flug v. Labor & Indus. Review Comm'n,
2017 WI 72

Tracie L. Flug suffered from two medical conditions—a soft-tissue strain, and a degenerative disc disease. The first was work-related (and has since resolved), the second is not. She underwent surgery believing that it was necessary to treat her work-related soft-tissue strain. In actuality, it was treating the unrelated degenerative disc disease. The procedure left her with a permanent partial disability. Ms. Flug asserts that Wal-Mart (her employer) must compensate her for this permanent partial disability because she believed, in good-faith, that the disability-causing surgery was necessary to treat her work-related condition.

The Labor and Industry Review Commission (LIRC) denied Ms. Flug's claim for permanent partial disability benefits and held that the need for treatment was not due to an injury compensable under the Worker's Compensation Act. In upholding the commission's decision, the Court held that an employee is not eligible for benefits under Wis. Stat. § 102.42(1m) if the disability-causing treatment was directed at treating something other than the employee's compensable injury. Because Ms. Flug's surgery treated her pre-existing condition, not her compensable injury, her claim must be disallowed.

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

Jeff Nichols and **Rich Orton** recently obtained a defense verdict in Sonoma County, California on behalf of a manufacturer of rough terrain fork lifts (a/k/a "telehandlers") and other equipment. The lawsuit arose out of a June 22, 2012 incident at the Sonoma Raceway in which Plaintiff was attempting to maneuver the telehandler on the racetrack grounds in preparation for an upcoming NASCAR event. Operating the telehandler on a steep side slope and with the boom raised (contrary to all warnings and training), the telehandler tipped over.

As the telehandler tipped, plaintiff either jumped or fell out of the telehandler, resulting in the telehandler landing on his right arm and right leg, ultimately resulting in amputation. Plaintiff alleged the machine was defective in design due to the lack of an enclosed cab and the lack of a seat belt interlock device, and asked the jury to award him $26 million in total damages. Defendant asserted the machine was safe in its designed and intended use, and that Plaintiff violated all operating safety manuals and training, including failing to wear his seat belt and attempting to jump when the machine tipped. After a five week trial; and three days of deliberation, the jury returned a defense verdict finding no design defect and no negligence.

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**.