



Law Watch

A Quarterly Update from Crivello Carlson, S.C.

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FIRM NEWS

RECENT PRESENTATIONS

Ryan Braithwaite recently presented at the Wisconsin County Mutual Insurance Company's Annual Defense Counsel Forum in Steven's Point, Wisconsin. He presented "Open Records – A Survival Guide in Changing Waters." Ryan also presented at the League of Wisconsin Municipalities' Wisconsin Municipal Assessor's Institute in La Crosse, Wisconsin on assessment issues.

Julie Wilson, Nick Kotsonis and Sam Hall recently presented at the Wisconsin Jail Administrators Conference. Julie presented on First Amendment Publications issues and gave a case update on Civil Rights of the Incarcerated, Nick presented on Workers Compensation Return to Work issues, and Sam presented on Use of Force issues.

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, Pat Brennan, and Ray Pollen were recently selected as 2013 Super Lawyers and **Stacy Luell, Aggie Raynor, and Julie Wilson** were selected as 2013 Rising Stars by Wisconsin Super Lawyers.

Bill Ehrke recently received a favorable jury verdict finding no insurance coverage and eliminating a bad faith claim in Walworth County. The insured was seeking \$1.4 million in insurance coverage and over \$1.6 million in bad faith damages arising out of a 2007 residential fire in Lake Geneva, WI. Prior to the verdict, the court had dismissed a punitive damage claim.

Josh Levy, Aggie Raynor, and Ashley Fale successfully defended a restaurant chain that faced a sexual harassment/discrimination suit in the United States District Court for the Eastern District of Wisconsin. The franchisee was accused of harassment, retaliation and negligent supervision by a part-time employee. After gathering facts through formal written discovery and social media, the plaintiff's story was fully exposed at her deposition and the court granted our motion for summary judgment.

Pat Brennan and Sally Fry Bruch recently won a motion to dismiss a federal court case alleging violation of First Amendment rights of access to the courts, to free speech and to protest or picket and further alleging violation of civil rights under 42 U.S.C. § 1983.

Jeff Nichols recently received a defense verdict in a trial in Washington County. Plaintiff alleged that she went in for a breast MRI and during the MRI sustained nine fractured ribs. The jury sided with the

defense argument that the rib fractures were caused by plaintiff's panic attack and not by improper imaging by the MRI technologists.

Ryan Braithwaite and Tim Johnson recently obtained a defense jury verdict after a trial in the United States District Court for the Eastern District of Wisconsin. The jury found no liability and assessed no damages in a case involving federal civil rights claims relating to an inmate's allegation of improper touching during a strip search by a Waukesha County Corrections Officer.

Amy Doyle and Sally Fry Bruch recently won a dismissal of a certiorari action in favor of a municipal client. The circuit court agreed with our position that the municipal client had properly considered and denied a request from a telecommunications company for a Rezone and Conditional Use Permit to build a 500' communication tower.

Nathan Bayer defeated a subrogation claim submitted by a worker's compensation carrier demanding over \$125,000 it paid in benefits due to the defendant's alleged negligence. The panel found that there was insufficient evidence to establish that the defendant was negligent and further agreed that procedural defenses barred the claim.

Remzy Bitar and Rich Orton obtained dismissal of a suit against a municipal client seeking to prevent the proposed development of a supermarket. The claims alleged a violation of a municipal Boundary Agreement, violations of the village's comprehensive plan and unlawful spot zoning.



Update

RECENT WISCONSIN COURT OF APPEALS DECISIONS

VICARIOUS LIABILITY - Scope of Employment

Milwaukee Transport Services, Inc. v. Family Dollar Stores of Wisconsin, Inc.
2012AP002538

An assistant manager of a Family Dollar store was contacted by her manager at her home on her day off and directed to go to the store, pick up store receipts and deposit them at a local bank.

The employee said this was standard procedure, and while she might not be fired if she didn't comply, she would be reprimanded. While driving to the store to do the "bank run," she was involved in an accident with a Milwaukee County bus. Family Dollar did not pay the employee for bank runs, reimburse her for mileage, pay for gas, send a car for her, or direct her as to which route to take to the store. The court of appeals held that because Family Dollar did not exercise control over its employee's route or method of travel, the Family Dollar employee was not acting within the scope of her employment when the accident occurred and therefore Family Dollar could not be held vicariously liable.

STRICT LIABILITY - Dog Bites

Augsburger v. Homestead Mutual Insurance Company
2012AP000641

Janet Veith lived in a home owned by her father, George Kontos. Janet had five dogs that lived with her in the home as well. In June 2008, Janet's friend Julie Augsburger came by the property to visit. During that visit, several of the Janet's dogs attacked Augsburger. Augsburger

then sued the owner of the property, George Kontos. Under Wis. Stat. § 174.02, an "owner" of a dog is subject to strict liability for injuries caused by the dog. An "owner" is defined as "any person who owns, harbors or keeps a dog." The court of appeals held that although Kontos did not exercise custody or control over or care for the dogs, he was strictly liable because he "harbored" the dogs by allowing them to live on a property that he owned.

TORTS - Invasion of Privacy

Dumas v. Koebel and Journal Communications, Inc.
2013AP365

In 2012, Milwaukee's NBC affiliate, TMJ-4, aired a report about Milwaukee Public School bus drivers who also had criminal records. TMJ-4's reporter explained that pursuant to public records supplied by the school district, the station received a list of over one thousand bus drivers working for the ten or so companies hired by the district to provide busing services to school children. The station then searched public records, police reports, and mugshots for matches to each name on the list to ferret out "convicted criminals turned bus drivers." The report featured Melissa Dumas in its broadcast, who was convicted of misdemeanor prostitution eight years earlier and who had been arrested for "drugs and driving on a suspended license." Dumas sued for invasion of privacy, intentional infliction of emotional distress, and intentional interference with a contractual relationship. The Court of Appeals dismissed her claims because the reports were based on truthful information protected by the First Amendment. Further, the focus of the broadcast was not to present Dumas' history without context, but to use it to illustrate a perceived problem.

RECREATIONAL IMMUNITY - Wood Cutting

WEA Property & Casualty Insurance Company v. Krisik
2011AP001335

Ronald Krisik agreed to help his brother-in-law, John Beam, trim a tree that had branches stretching over a portion of Beam's private driveway. Krisik was seriously injured. Beam's homeowner's insurance carrier, WEA, filed a declaratory action seeking a judgment that it was immune under Wisconsin's recreational immunity statute, Wis. Stat. § 895.52, which states that "no owner and no ... agent of an owner is liable for ... any injury to ... a person engaging in a recreational activity on the owner's property." The statute also lists several examples of recreational activities. "Recreational activity" is statutorily defined as "any outdoor activity undertaken for the purpose of exercise, relaxation or pleasure, including practice or instruction in any such activity." The Court of Appeals held that trimming the branches of the tree was a recreational activity because "cutting or removing wood" is listed in the statute as a recreational activity.

TORTS - Defamation

Terry v. Journal Broadcast Corporation
2012AP001682

In 2006, Milwaukee's NBC affiliate, TMJ-4, reported about a local wedding videographer, Angela Terry, who left a couple waiting seven months for their wedding video despite her promise that it would be finished in 10 to 12 weeks. The couple said they felt like they had been "robbed." TMJ-4 also went to interview Terry at her home, which resulted in Terry's adult son forcibly trying to remove the reporter and Terry making a throat-cutting

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gesture with her hand. Terry sued TMJ-4 alleging defamation and objected to the use of the terms “rob,” “ripped off,” “cheat,” “victim” or “scam.” The Court of Appeals held that these statements were opinions based in fact and were therefore not actionable. The appellate court explained that a plaintiff cannot maintain a defamation action for how she feels she was portrayed because of music and video editing.

INSURANCE LAW - Indemnification

FABCO Equipment, Inc. v. Kreilkamp Trucking, Inc. 2012AP001864

FABCO leases construction equipment to customers, and Kreilkamp is a transportation company hired by FABCO to transport FABCO equipment to and from its customers. In 2008, a Kreilkamp employee died when a large piece of FABCO rental equipment he was attempting to unload with a forklift fell on him. The employee’s estate and his widow sued FABCO for negligence. Pursuant to an indemnification provision in their Agreement for Transportation Services, FABCO tendered its defense to Kreilkamp, but Kreilkamp and its insurer denied the tender. Based on that denial, FABCO sued Kreilkamp alleging that Kreilkamp failed to fulfill its obligations to defend and indemnify. The Court of Appeals held that Kreilkamp had breached its duty to defend and indemnify because within the four corners of the Complaint, the plaintiff had alleged facts that arguably showed the employee’s death was at least in part the result of Kreilkamp’s actions. The fact that the Complaint also alleged that FABCO’s own negligence contributed, at least in part, to the employee’s death did not eliminate Kreilkamp’s duties under the indemnification agreement.

AUTO INSURANCE - Endorsements

Botdorf v. Krebsbach 12AP00204

On October 9, 2009, the Botdorfs renewed an automobile insurance policy through Allstate. Included in their policy was \$100,000 in underinsured motorist coverage. The policy contained a reducing clause that reduced the amount of underinsured motorist coverage, and this reducing clause was valid because it was issued prior to the effective date of 2009 Wisconsin Act 28. On November 10, 2009, the Botdorfs contacted Allstate to request insurance for a newly acquired vehicle. Allstate processed a policy endorsement for the existing policy and informed the Botdorfs that the new vehicle would have coverage effective November 11, 2009. Rather than issuing an entirely new policy, Allstate chose to add the new vehicle to the Botdorfs’ existing policy by endorsement. The Botdorfs were in an accident on November 28, 2009, and Allstate denied the Botdorfs’ claim for underinsured motorist coverage based on the reducing clause in the original policy. The Court of Appeals held that Allstate owed coverage and reasoned that “Wis. Stat. § 600.03(35) defines “[p]olicy,” in relevant part, as “any document ... used to prescribe in writing the terms of an insurance contract, *including endorsements.*”

PROBATE - Survivorship Marital Property

Droukas v. Estate of Gregory F. Felhofer 13AP147

In 1999 while dating, Mary Lynch and Gregory Felhofer purchased a vacant

lot. The warranty deed for the lot listed the grantees as “Gregory F. Felhofer and Mary L. Lynch, both single persons.” Later in 1999, Gregory and Mary closed on a construction loan in the amount of \$199,500 to construct a home on the lot. While construction of the home was still ongoing, Gregory and Mary got married. Once construction of their new home was completed and they received a Certificate of Occupancy/Completion, they moved into the home and lived there together until Gregory’s death in 2011. When he died, Gregory had three adult children from previous relationships and did not have a will. In 2012, Mary filed an Inventory of the estate’s assets that did not include the value of the property. Gregory’s children filed an objection to the omission of the property, arguing that because the property was purchased prior to Mary and Gregory’s marriage, the property was not survivorship marital property and was therefore subject to probate administration. The circuit court held that the property was survivorship property and the Court of Appeals agreed. Because the couple did not “acquire” a “homestead” until the city issued a permit for occupancy, and because the couple was married by the time they received that permit, the property was survivorship marital property pursuant to Wis. Stat. § 766.605.

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Upcoming Decisions



This holiday season, we would like to take a moment to recognize the amazing generosity our 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 serve our communities through participation in several charities and events each year, and 2013 was no exception. One of the firm's most eagerly anticipated charitable events was the yearly food drive for the Hunger Task Force of Southeastern Wisconsin. This year, employees were split into three teams who competed against each other in an attempt to bring in the most food (as measured in pounds of food collected). In only two weeks, Crivello Carlson employees donated two and a half tons of food: 5,495 pounds!

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. Other events and organizations with which the firm and its employees participated include the Eastern District of Wisconsin Bar Association Book Drive, Sojourner Family Peace Center, Big Brothers Big Sisters, Toys 4 Tots, Light the Night Walk, St. Francis Children's Center, Howard B. Eisenberg Lifetime Achievement Dinner, WAAL Educational Foundation, Wisconsin Equal Justice Fund, the Shorewood Foundation, the American Heart Association, the Multiple Sclerosis Bike Ride, and more.

Crivello Carlson wishes everyone a healthy, happy and safe holiday season!

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