RECEIVED
03-31-2015
CLERK OF COURT OF APPEALS
OF WISCONSIN

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

New Richmond News
and Steven Dzubay,

Petitioners-Respondents

v.

City of New Richmond,

Respondent-Appellant.

APPEAL NO. 2014AP001938

Appeal from St. Croix County Circuit Court
The Honorable Howard W. Cameron, Presiding
St. Croix County Case No. 2013-CV-000163

Non-Party Brief and Supplemental Appendix of Wisconsin County Mutual Insurance Corporation and Community Insurance Corporation

AXLEY BRYNELSON, LLP

Attorneys for Wisconsin County
Mutual Insurance Corporation and
Community Insurance Corporation
Michael J. Modl, SBN 1011419
Timothy M. Barber, SBN 1036507
Gesina M. Seiler, SBN 1055162

2 East Mifflin Street, Suite 200
Post Office Box 1767
Madison, WI 53701-1767
Telephone: (608) 257-5661
Facsimile: (608) 257-5444
Email: mmodl@axley.com
Email: tbarber@axley.com
Email: gseiler@axley.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Regulations

Other Authorities

ARGUMENT

Wisconsin municipal law enforcement agencies generate accident reports, citations, and incident reports utilizing "personal information" obtained from the DMV on a daily basis. This case requires the Court to determine whether, under the Driver's Privacy and Protection Act (DPPA), 18 U.S.C. § 2721 et seq., a municipality is permitted to re-disclose "personal information" obtained from the DMV to a newspaper in response to a request under Wisconsin's Public Record's Law. Municipalities face significant penalties, including statutory punitive damages and attorney fees, and are exposed to costly class action lawsuits for improperly releasing personal information protected by the DPPA.

The DPPA was enacted as a public safety measure and prohibits any person from knowingly using, obtaining, or disclosing "personal information" from motor vehicle records, subject to limited exceptions for specific uses of information. 18

U.S.C. § 2722(a). There is no exception in the DPPA for news reporting.

The United States Supreme Court and Seventh Circuit Court of Appeals have held that the DPPA disclosure exceptions should be narrowly construed. The Seventh Circuit has held that re-disclosure of each piece of "personal information" in a document must be for a use specifically authorized by statute. *Senne v. Vill. of Palatine*, 695 F.3d 597, 606 (7th Cir. 2012).

Contrary to the dictates of *Senne*, the circuit court below determined that a municipality was required to re-disclose "personal information" contained in police reports based on the reason the *documents* were *generated*. The court failed to analyze the purpose for the re-disclosure of each piece of "personal information" in the police reports. Put plainly, re-disclosure of "personal information" to New Richmond News is not "for" any use authorized by the DPPA.

Moreover, the circuit court created a gaping hole in the DPPA's public safety protections by concluding that any

disclosure of personal information pursuant to Wisconsin's Public Records Law (regardless of its intended use) is justified under § 2721(b)(1) as a governmental function. This conclusion is inconsistent with the purpose of the DPPA and creates a public safety risk by allowing precisely what the DPPA was designed to prevent—unfettered public access to "personal information."

The circuit court decision is contrary to established precedent, flatly inconsistent with the DPPA's purpose, and creates significant liability for Wisconsin municipalities. It must be reversed.

I. The DPPA Provides a Broad Prohibition Against Disclosure and Use of "Personal Information" Obtained From DMV Records To Protect Public Safety.

The DPPA prohibits the disclosure and use of certain information contained in state DMV records. 18 U.S.C. § 2721(a)-(b). It was enacted as "a public safety measure," *Senne*, 695 F.3d at 606, and designed "to protect the personal privacy and safety of all American licensed drivers." 140 Cong. Rec. H2,526 (daily ed. Apr. 20, 1994) (statement of Rep. Goss).

> The DPPA was enacted as a public safety measure, designed to prevent stalkers and criminals from utilizing motor vehicle records to acquire information about their victims. Prior to the law's enactment, anyone could contact the department of motor vehicles in most states and, simply by providing a license plate number and paying a nominal fee, obtain the corresponding driver's address and other pertinent biographical information—no questions asked.

Dahlstrom v. Sun-Times Media, LLC, No. 14-2295, slip op., 2015 U.S. App. LEXIS 1941 at 14-15 (7th Cir., Feb. 6, 2015).

By default, DMVs are prohibited from "knowingly disclos[ing] or otherwise mak[ing] available to any other person or entity" "personal information" and "highly restricted personal information," as defined by the statute, "about any individual obtained by the department in connection with a motor vehicle record . . . ." 18 U.S.C. § 2721(a)(1)&(2). "Personal information" means "information that identifies an individual, including an individual's photograph, social security number, driver identification number, name, address . . . telephone number, and medical or disability information . . . ." 18 U.S.C. § 2725(3). "Highly restricted personal information" means "an individual's

photograph or image, social security number, medical or disability information[.]" 18 U.S.C. § 2725(4).

The DPPA also regulates what is at issue here—"the separate activity that occurs when the *recipient* of a record from the DMV [such as a law enforcement agency] is responsible for a secondary disclosure to a third party." *Senne*, 695 F.3d at 602. "An authorized recipient of personal information . . . may resell or redisclose the information only for a use specified under subsection (b)." 18 U.S.C. § 2721(c). It is illegal "for any person knowingly to obtain or disclose personal information from a motor vehicle record, for any use not permitted under section 2721(b) of this title." 18 U.S.C. § 2722(a).

A. Municipalities Face Significant Liability For DPPA Violations.

Section 2724 creates a civil cause of action against any "person who knowingly obtains, discloses or uses personal information from a motor vehicle record, for a purpose not permitted under this chapter." Section 2724(b) sets forth the remedies for DPPA violations, including actual damages (not less

than $2500), punitive damages, reasonable attorney fees, litigation costs, and other equitable relief.

Judge Posner's dissent in *Senne* explained how even a relatively mundane act, such as printing extraneous information on a parking ticket, can result in significant DPPA liability for a municipality:

> So little Palatine (its population roughly one-fortieth that of Chicago) faces, in this class action suit filed on behalf of everyone who has received a parking ticket in the Village within the period of the statute of limitations, a potential liability of some $80 million in liquidated damages—more than $1,000 per resident.

Senne, 695 F.3d at 611 (Posner J., dissenting).

A search of PACER case coding and Lexis CourtLink reveals that since 2000, there have been 57 DPPA cases filed across the country, 30 of which have been class action lawsuits.[1] Indeed, because DPPA violations generally stem from common official policy or practice relating to the release and redaction of personal information, such cases are amenable to class

[1] A list of these cases in included in the Appendix to this Brief.

treatment. Thus, the potential liability exposure for a municipality for DPPA violations is enormous.

B. The DPPA Contains Limited Exceptions For Specified Uses of Personal Information That Are Narrowly Construed.

The DPPA contains 14 specific exceptions when "personal information" may be disclosed by a DMV and re-disclosed by recipients of such information. 18 U.S.C. § 2721(b) & (c). Four of these exceptions apply to disclosure of "highly restricted personal information." 18 U.S.C. § 2721(a)(2). The exceptions at issue here are the exceptions found at § 2721(b)(1) ("for use by any governmental agency . . . in carrying out its functions"), § 2721(b)(2) ("for use in connection with matters of motor vehicle or driver safety"), and § 2721(b)(14) (for any other use authorized by state law "related to the operation of a motor vehicle or public safety"). Note that there is no exception for use of personal information in connection with news reporting. *See Dahlstrom*, 2015 U.S. App. LEXIS 1941 at 23 (rejecting newspaper's

argument that DPPA prohibition on use and disclosure of personal information violated the First Amendment).

Both the United States Supreme Court and Seventh Circuit Court of Appeals have instructed that DPPA exceptions should be narrowly construed. "The default rule of the statute is that the DMV, and any person or entity authorized to view its records, is *prohibited* from sharing the information." *Senne*, 695 F.3d at 603. *See also Maracich v. Spears,* 133 S. Ct. 2191, 2200 (2013) ("[a]n exception to a general statement of policy is 'usually read . . . narrowly in order to preserve the primary operation of the provision") (internal quotes omitted).

Maracich held that the DPPA "exceptions ought not [to] operate to the farthest reach of their linguistic possibilities if that result would contravene the statutory design[.]" 133 S. Ct. at 2200. Likewise, *Senne* was clear that each of the DPPA exceptions "has a limited object and limited class of recipients[,]"and that "the statute's purpose, clear from its language alone, is to prevent *all but a limited range of authorized*

disclosures of information contained in individual motor vehicle records." *Id.* at 603, 605 (emphasis added). A narrow construction is particularly justified when the exception at issue applies both to "personal information" and "highly restricted personal information"—as is the case here. *Maracich*, 133 S. Ct. at 2198, 2202; *Senne*, 695 F.3d at 606.

II. The Circuit Court Decision is Contrary to *Senne,* Which Requires That Re-Disclosure of Each Piece of Personal Information To The Public Must Be For an Authorized Use.

In *Senne*, 695 F.3d 597, the Seventh Circuit held that re-disclosure of each piece of "personal information" must be for a use authorized by a specific DPPA exception. *Senne* involved a law enforcement officer who placed a parking citation on a vehicle windshield, containing "personal information." The municipality argued that the exceptions for use by governmental agencies, § 2721(b)(1), and for use in connection with service of process, § 2721(b)(3), applied. 695 F.3d at 605.

Senne ruled that courts must analyze the purpose of the final disclosure at issue, not the original disclosure by the DMV

to the law enforcement agency that generated the report. *Id.* at 602 ("[W]e are concerned with the secondary act of the Village's police department in placing the citation, which included Mr. Senne's personal information on the windshield.") Next, the court held that it was not sufficient to look merely at the purpose of the parking citation; rather, it needed to determine whether the *disclosure of each piece of personal information* contained on the parking citation fell within a statutory exception. *Id.* at 605 (rejecting argument that so long as "*some* disclosure is permitted, *any* disclosure of information otherwise protected by the statute is exempt, whether it serves an identified purpose or not") (emphasis in original).

The court was explicit that in order for a statutory exception to apply, "the disclosure as it existed in fact—must be information that is *used* for the identified purpose. When a particular piece of disclosed information is not *used* to effectuate that purpose in any way, the exception provides no protection for the disclosing party." *Id.* at 606 (emphasis in original). *See also*

Maracich, 133 S. Ct. at 2206 (ruling, consistent with *Senne,* that in determining whether a recipient of personal information violated the DPPA, the "proper inquiry" is the "predominant purpose" the recipient had in utilizing the information).

Senne's interpretation of the DPPA is binding authority in all federal courts in the Seventh Circuit. Thus, any lawsuit filed against a Wisconsin municipality under the DPPA will be analyzed by a federal district court under the standards set forth in *Senne.* A DPPA plaintiff cannot avoid the *Senne* analysis by filing in state court, since such cases are readily removable. And, *Maracich* is binding on all state and federal courts.

Here, the circuit court's analysis is entirely inconsistent with *Senne.* The court concluded that the law enforcement reports at issue in this case fell under the "umbrella" of the exception in § 2721(b)(1) for use by government agencies, reasoning: "[I]t is an official act of the City to respond to such records requests in compliance with the Open Records Law." (Cir. Ct. Op. at 7.) The circuit court also concluded that the §2721(b)(1)

exception applied because "[t]he records all relate to the official acts of police officers responding to and reporting on specific events in the City." (*Id.*) Next, it ruled that the "broad" exception in § 2721(b)(14) applied because the disclosure of uniform traffic accident reports is "related to public safety." (*Id.*) Finally, the court stated that uniform traffic accident reports "do not fit the statutory definition of 'personal information.'" (*Id.*)

This rationale is completely backwards. *Senne* emphasized that the DPPA addresses the disclosure of *information*, not documents. There is no dispute here that the law enforcement reports at issue contain personal information obtained from the state DMV.

Next, the fact that a municipality has an obligation to produce documents under the Public Records Law does not answer the question of whether re-disclosure of each piece of specific "personal information" contained in any document is for a use that falls within a DPPA exception. Also contrary to *Senne* and *Maracich*, the circuit court focused on the initial disclosure of

personal information by the DMV to The City of New Richmond when the records were generated instead of the subsequent re-disclosure of the information to New Richmond News. The circuit court was required to determine that re-disclosure of each piece of personal information contained in the law enforcement reports at issue to New Richmond News was for a use specified in one of the DPPA exceptions.

Under *Senne* and *Maracich*, it is clear that none of the exceptions asserted by New Richmond News apply. First, disclosure of personal information for news reporting does not fall within the "governmental function" exception to the DPPA, 18 U.S.C. § 2721(b)(1). Simply put, the **re-**disclosure of "personal information" *to New Richmond News* is not "for use by any governmental agency . . . in carrying out its functions[.]" New Richmond News is not a government agency, so the exception cannot apply. The argument that re-disclosure is part of New Richmond's "governmental functions" ignores the statutory language that the *disclosure* must be "for use by any

governmental agency." Yet, even under the circuit court's rationale, disclosing "personal information" to a news agency is not necessary for New Richmond to "carry[] out its functions," as the documents requested (police reports) can be produced with the personal information redacted. And, as explained below, allowing any member of the public to obtain "personal information" via a request under the Public Record Law, without any regard for reason why the information is obtained, frustrates the entire point of the DPPA.

Second, the exception in § 2721(b)(2)—"for use in connection with matters of motor vehicle or driver safety and theft"—does not apply. Under *Senne,* the fact that the initial disclosure of information from the DMV to New Richmond to generate the police reports was for purposes of motor vehicle safety does not satisfy the exception. Rather, the disclosure of the personal information contained in the reports *to New Richmond News* must be "for use in connection with matters of motor vehicle or driver safety." It is not.

Third, and for the same reason, the exception in § 2721(b)(14) does not apply. Disclosing personal information in a police report to a newspaper is not a "use related to the operation of a motor vehicle or public safety." 18 U.S.C. § 2721(b)(14).

III. The Circuit Court Decision Creates a Categorical Exception for Personal Information Obtained Via Public Records Requests That is Contrary to Supreme Court Precedent And Entirely Inconsistent With The DPPA's Purpose.

The circuit court's decision also undermines the very purpose of the DPPA. Under the court's rationale, *any* disclosure of personal information made by a municipality under the Public Records Law falls within the government use exception in § 2721(b)(1), *regardless of the end-user's intended use* of the information. The circuit court's decision thus creates a gaping hole in the DPPA for information obtained via a state's public records laws.

This result is contrary to the United States Supreme Court's decision in *Maracich*, 133 S. Ct. 2191. That case involved a lawsuit brought against a group of plaintiffs' attorneys who obtained "personal information" by submitting "a state Freedom

of Information Act (FOIA) request to the South Carolina's DMV to determine if charging illegal administrative fees was a common practice so that a lawsuit could be brought as a representative action under [state law]." *Id.* at 2196. The issue was whether the defendants' use of the information fell within the litigation exception in § 2721(b)(4). The Court ruled that the defendants' use did not fall within the exception because they "had the predominant purpose to solicit" clients. *Id.* at 2206. In other words, *Maracich* examined the end-user's intended use of the information. This is consistent with the analysis in *Senne*.

There was no argument in *Maracich* that disclosure of the information was permissible simply because the defendants obtained it via a FOIA request to a state DMV. Indeed, nearly every state has some form of a FOIA or public records law. A categorical exception for information obtained from state DMVs via such laws would result in the exception swallowing the general rule of non-disclosure.

The circuit court's decision also undermines the purpose behind the DPPA. Recall that the DPPA was enacted to end the common practice of state DMVs providing personal information to anyone who walked in and paid a fee—a practice that created a public safety hazard. The DPPA sought to eliminate this hazard by allowing disclosure of personal information only for very narrow specified uses. Importantly, Wisconsin's Public Records Law does not require that a requester identify himself or the purpose for which public records are sought. Wis. Stat. § 19.35(1)(i). The requester simply pays the custodian's reasonable and customary copying fee. Wis. Stat. § 19.35(3).

Note the exception under § 2721(b)(1) applies to *both* "personal information" and "highly restricted personal information." § 2721(a)(2). This means that under the circuit court's rational, any would-be thief, stalker, or other criminal can use a Public Records Request to obtain someone's "photograph or image, social security number, medical or disability information[,]" § 2725(4), in addition to their "driver

identification number, name, address . . . [and] telephone number." § 2725(3). No objective reading of the legislative history behind the DPPA can support such a result.

Imagine the liability a municipality would face if it re-disclosed "personal information" to a stalker who files a Public Records request after noticing his ex-girlfriend received a speeding ticket and then uses that information to locate and murder her. In short, the circuit court's decision allows a person to circumvent the DPPA's protections and accomplish precisely what Congress sought to prevent. And, it exposes municipalities to significant liability by requiring disclosures that do not meet the standards in *Maracich* and *Senne*.

CONCLUSION

For these reasons, the circuit court decision must be reversed.

Dated this 31st day of March, 2015.

AXLEY BRYNELSON, LLP
Attorneys for Wisconsin County
Mutual Insurance Corporation and Community
Insurance Corporation

s/ *Timothy M. Barber*
Michael J. Modl, SBN 1011419
Timothy M. Barber, SBN 1036507
Gesina M. Seiler, SBN 1055162
2 East Mifflin Street, Suite 200
Post Office Box 1767
Madison, WI 53701-1767
Telephone: (608) 257-5661
Facsimile: (608) 257-5444
Email: mmodl@axley.com
Email: tbarber@axley.com
Email: gseiler@axley.com

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) & (c) as to form and certification for a non-party brief produced with a proportional serif font (Century 13 pt for body text and 11 pt for quotes and footnotes). The length of this brief is 3000 words.

Dated this 31st day of March, 2015.

AXLEY BRYNELSON, LLP
Attorneys for Wisconsin County Mutual Insurance Corporation and Community Insurance Corporation

s/ *Timothy M. Barber*
Michael J. Modl, SBN 1011419
Timothy M. Barber, SBN 1036507
Gesina M. Seiler, SBN 1055162
2 East Mifflin Street, Suite 200
Post Office Box 1767
Madison, WI 53701-1767
Telephone: (608) 257-5661
Facsimile: (608) 257-5444
Email: mmodl@axley.com
Email: tbarber@axley.com
Email: gseiler@axley.com

ELECTRONIC FILING CERTIFICATION

I further certify, pursuant to Wis. Stat. § 809.19(12)(f) that the text of the electronic copy of this brief is identical to the text of the paper copy of the brief.

Dated this 31st day of March, 2015.

AXLEY BRYNELSON, LLP
Attorneys for Wisconsin County Mutual Insurance Corporation and Community Insurance Corporation

s/ *Timothy M. Barber*
Michael J. Modl, SBN 1011419
Timothy M. Barber, SBN 1036507
Gesina M. Seiler, SBN 1055162
2 East Mifflin Street, Suite 200
Post Office Box 1767
Madison, WI 53701-1767
Telephone: (608) 257-5661
Facsimile: (608) 257-5444
Email: mmodl@axley.com
Email: tbarber@axley.com
Email: gseiler@axley.com

ELECTRONIC APPENDIX FILING CERTIFICATION

I further certify, pursuant to Wis. Stat. § 809.19(12)(f) that the text of the electronic copy of the Supplemental Appendix to this brief is identical to the text of the paper copy of the appendix.

Dated this 31st day of March, 2015.

AXLEY BRYNELSON, LLP
Attorneys for Wisconsin County Mutual Insurance Corporation and Community Insurance Corporation

s/ *Timothy M. Barber*
Michael J. Modl, SBN 1011419
Timothy M. Barber, SBN 1036507
Gesina M. Seiler, SBN 1055162
2 East Mifflin Street, Suite 200
Post Office Box 1767
Madison, WI 53701-1767
Telephone: (608) 257-5661
Facsimile: (608) 257-5444
Email: mmodl@axley.com
Email: tbarber@axley.com
Email: gseiler@axley.com