TRI-COUNTY BAR

Buffalo, Jackson, Pepin & Trempealeau

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TRICOUNTY BAR NEWS

We note with sadness the recent passing of Justice Thomas Fairchild's wife. The thoughts and prayers of our bar association are with you and your family, Tom.

The MidWinter meeting of the Tri-County Bar Association will be held on Friday, January 13, 2006 at the Valley Golf Course in Mondovi. The Waumandee House was seriously considered and rejected as a once in a lifetime experience. There are plowed roads running to Mondovi. The educational portion will start at 12:30, business meeting at 4:30, and then a social hour followed by a lutefisk dinner put on by the Lutheran church women. Pass the rutabagas please.

Two items of breaking news for our bar association. First, the Executive Board met! Second, they did something, even though those attending had a different memory of what had been decided. But police officers can rely on the collective knowledge of every officer in their department, even if they don't know anything themselves. So, even though the board members individually know nothing, collectively they know the following action was taken.

The Board approved starting a closed listserv for the TriCounty Bar using the state bar services. This would allow any member to post a message that would be received by all TCB members with email. This newsletter could be sent out by email attachment, saving the annual copying and postage cost of about $200.00 per year. Funerals and meetings could be announced easily. If any TCB member had a question, he/she could post it to the TCB listserv and anyone in the TCB could respond with ridicule, useless suggestion and/or recipes. The cost is $10.00/mo, plus a one time $120.00 set up cost. This could be used only by TCB members. Make sure your email with the state bar is correct, or send a short message promising good news or money to Jaime Duvall at james.duvall@wicourts.gov

The agenda will include the new bankruptcy reform act as it affects nonbankruptcy attorneys, WI Consumer Act pleading issues, new trust account rules (should get us an ethics credit), the developing economic loss doctrine, recent case update and other subjects more fascinating than beverages at the bar.

A group photograph taken at the Winter meeting, so that everyone will come and look good. Comb your hair, those that have it.

Chris Bloom (UW 2000) has joined Seifert and Schultz at their Mondovi office. He recently left the Weld Riley firm in Eau Claire to work in his family business but he decided to return to the practice of law. A native of Mondovi, he says he experienced a moment of epiphany when driving through the Buffalo County bluffs and he decided he had found his place, a spot called home. Single, two dogs, an avid outdoorsman, how could he not be happy? He is active in the jail ministry. Jon and Steve are proud to have Chris join them because Chris can now shovel

snow from the sidewalk.

Keith Pilger is leaving Kostner Koslo and Brovold on November to join the firm of Anderson, O'Brien et al in his home town of Stevens Point. He is taking his wife and child with him. He will concentrate his practice in estate planning. Keith says he will miss the unique experience of being part of the Tri-County Bar and says no one in Stevens Point will believe the TCB stories. We hope that is true. Good luck, Keith.

Justin Silcox (Hamline 2000) has joined Kostner, Koslo and Brovold after practicing with the Twin Cities area firm of McCloud and Boedigheimer in the area of litigation. Despite the fact that his wife is also an attorney, they are expecting their first child in April. He is such a Viking fan that he says he bleeds purple, a fact some of the Packer fans in the TCB may attempt to verify. My notes contain the statement "work for three weeks" but now I can't recall whether that meant he has worked for KKB for three weeks or if he plans to work there that long.

At judge school, Jaime Duvall learned how rulings are really made. Never put anything in writing. If you must, have the attorneys draft proposed findings and circulate them for comment. That way you know what part you actually have to read. Always destroy your notes. Read something out of the statutes because it sounds authoritative. Then apply the SWAG rule (systematic wild ass guess). If either side has trouble following your logic, scowl, say "So appeal me" and leave the bench quickly, preferably for the rest of the day.

The boat trip got off to a good start at the summer meeting. John Newton's attempt to back the boat down the ramp looked like a guy trying to be amorous after age 50, or, as Vern Langhorst has described it, like shooting pool with a rope. Finally when the insertion was nearly complete and Walleye John was feeling pretty good about the whole deal, Al Morgan, who had watched the entire process patiently and quietly, turned to Jon Seifert and said "Do you think we should have told them to take the straps holding the boat to the trailer off before he put it in the water?" But at least it ended well, with the boats arriving with approximately the same number of passengers as at departure and two out of three blades of the propeller intact.

CIVIL

The economic loss doctrine does not bar a claim for intentional misrepresentation. A party to a business transaction has a duty to disclose a fact where the fact is material, the party with knowledge of the fact knows the other party is about to enter into a transaction under a mistake as to the fact, the fact is peculiarly and exclusively within the knowledge of one party and the mistaken party could not reasonably be expected to discover at, and the mistaken party would reasonably expect disclosure of the fact. *Kaloti Enters. v. Kellogg Sales*, 2005 WI 111.

The economic loss doctrine does not preclude a product purchaser's claim of damage to property other than the product itself, the "other property" exception. In this case, the plaintiffs allege in tort that the object of the contract, a milk replacer intended for livestock nourishment, did not adequately nourish their calves and that some died. Because the court found that this claim is, at bottom, based on disappointed performance expectations, it did not fit within the "other property" exception and is therefore barred by the economic loss doctrine. *Grams v. Mild Products*, 2005 WI 112.

Allowing a homeowner to assert a tort claim against a negligent subcontractor for services rendered to the general contractor would undermine the distinction between contract law and tort law that the economic loss doctrine seeks to preserve. Further, it would undermine the warranties

and remedies bargained for between the home owner and their general contractor. Finally the "integrated systems limitation" of the "other property exception" to the economic loss doctrine bars a negligence claim against a subcontractor providing services in the construction of a house because the roof shingling has no independent value or use apart from the functional component of the house. *Linden v. Cascade Stone*, 2005 WI 113.

The Wisconsin Consumer Act requires that a complaint include the figures necessary to compute what is owed. The Court of Appeals held that this issue may be raised for the first time on appeal because such information is a requirement of the complaint and a judgment may not be entered upon a complaint which fails to comply with this section. *Bank One v. Ofojebe*, 2005 WI App 151.

§767.23(3) allows a Court to grant a separate judgment for attorneys fees when dismissing an action, vacating a judgment or "upon substitution of counsel". In *Kohl v. DeWitt, Ross & Stevens*, 2005 AP 328 (filed 8-11-05, recommended for publication), the Court of Appeals held that an Order to Withdraw, without the immediate substitution of another attorney, is a "substitution of counsel" allowing an attorneys fee judgment to be taken and a lien placed upon an investment account to ensure payment. There was also a good discussion of a common law lien for attorneys fees and also whether there is a right to jury trial in attorney fees disputes.

Even though the work was performed more than six years before filing, because the billing first came out within the six year period and payment was not expected before the billing, the action was not barred by the six year statute of limitations. *Anderson v. Forde*, 2004 AP 3030 (8-25-05, unpublished).

The Statute of Limitations for an action to recover damages to crops begins to run when the crops are planted, not when they are harvested, for a claim of overfertilization from a defective corn planter even though the extent of damage was not known until harvest. *Bronsteatter v. American Growers Insurance*, 2005 AP 115 (filed 7-26-05, recommended for publication).

CRIMINAL LAW

A parent does not "accompany" a minor consuming alcohol merely by being on the same premises, unless there was "individualized supervision". *Mueller v. McMillan Warner In. Co,* 2005ap 121 (filed 8-2-05, recommended for publication)

When an arrest occurs within a home after an illegal entry, the evidentiary significance of the defendant's presence in the home must be subtracted from the accumulated evidence to determine whether the remaining evidence supports probable cause. Here, because the undercover officer involved in the controlled buy could have identified the defendant, probable cause was upheld even though the arresting officers couldn't identify the defendant and made the arrest only on incomplete information provided to them. *State v. Roberson*, (filed 8-25-05, recommended for publication)

Where a defendant had received notice that his outgoing calls over a jail's phone were subject to being recorded, his choice to use the phone constitutes implied consent within the meaning of the one party consent surveillance exception to the wiretap prohibition. *State v. Riley*, (filed 8-10-05, recommended for publication).

Information in the hands of the entire police department may be imputed to officers on the scene to help establish reasonable suspicion or probable cause. The collective knowledge doctrine may also be used to negate reasonable suspicion justifying a stop. *State v. Hall*, 2004 AP 1062 (filed 9-20-05, unpublished).

A defendant cannot reasonably have any legitimate privacy interest in property they have

abandoned. But a person does not abandon his property whenever he temporarily relinquishes direct control over his belongings. Whether property is abandoned or "temporarily relinquished" depends upon a number of factors including continued assertion of ownership of the property, the ability to retrieve the property at a later time, and whether other persons would have access to and be able to disturb or take the property. *State v. Bonds*, 2005 AP 948 (filed 9-27-05, unpublished).

§938.396(2m)(a) & (b), which deal with those juvenile records that are open records (i.e. the things the newspaper has access to) ends with the following phrase: "The requester may further disclose the information to anyone." But the sections concerning inspection by a parent, child, guardian or legal custodian (§48.396(2)(ag) & (am) and §938.396(20)(ag) & (am)) do not contain such a phrase. Can the parent etc., or someone receiving the information based on a release signed by such a person, rerelease the information he/she gets from the Court? Arguably the prohibition that makes juvenile records confidential is a prohibition on the court. There has never been any prohibition against a juvenile or parent from broadcasting to the world anything they want. In fact, a juvenile has a right to make juvenile proceedings open if the juvenile wishes. Therefore it could be argued that absent some type of statutory prohibition, if a juvenile/parent invokes §938.396(20)(ag) to inspect his/her records, and then wishes to publish or redisclose them, that is the juvenile's problem and not the Court's, even though the statute does not authorize redisclosure.

The Wisconsin Supreme Court held that evidence obtained from an out of court show up is inherently suggestive and will not be admissible unless, based on the totality of the circumstances, that is the procedure was necessary. It rejected a per se exclusionary rule, but suggested that a show up will not be found to be necessary unless a lineup or photo array was not possible due to exigent circumstances. *St v. DuBose*, 2005 WI 126.

Where physical evidence is obtained as the direct result of an intentional *Miranda* violation, the Wisconsin Constitution requires that the evidence must be suppressed. *St. v. Knapp*, 2005 WI 127.

To obtain a hearing on a postconviction motion, the motion must assert objective material factual assertions that would entitle the defendant to relief. The court suggested such a motion is sufficient to get a hearing if it alleges within the document's four corners answers to the questions of who, what, where, why and how. Admissibility of the asserted facts is not determined from the face of the motion. *St. v. Love*, 2005 WI 116.

A majority of the Supreme Court agreed that there is a constitutional right to a jury trial in a speeding case, but disagreed as to whether a jury of six or 12 was mandated. It also declined to find such a right in Municipal Court because of the ability to appeal to the Circuit Court. *Dane County v. McGrew*, 2005 WI 130.

The presumption that a warrantless entry into a home is presumed unreasonable was applied to the curtilage of the home, in this case the back yard. *State v. Dyer*, 2005 AP 381 (filed 8-2-05, unpublished).

Total jail as a condition of probation on multiple sentences cannot exceed one year if the defendant is sentenced on the charges "entered at the same time". A defendant entered a plea to one charge on 9-26-03, and to a second charge on 10-10-03. He was sentenced on both on the same day, 1-24-04. The Court of Appeals held these convictions were not "entered at the same time" and therefore a sentence on the first charge of 5 years probation and 9 months jail, and on the second charge of 12 years concurrent probation with 9 months jail consecutive to the jail

on the first charge, was proper. *State v. Johnson*, 2004 AP 2176 (filed 8-16-05, recommended for publication).

The exclusionary rule does not apply at sentencing and statements taken in violation of the 6th Amendment right to counsel may be considered at sentencing. *US v. Krueger,* 04-2539 (filed 7-28-05)

ESTATE PLANNING

The State began using a complex "new" life estate formula last year for MA divestment calculations based on the IRS life estate tables. Generally, remainder interests became worth less, and life estate interests were worth more. A recent Fair Hearing Decision (MVD/14-68839) that has now reinstated the "old" table. The reason is that use of the new formula could be more restrictive and cause a longer period of ineligibility, so the IRS tables cannot be used.

The family of resident of an Illinois nursing home, wishing to move the resident to Wisconsin filed a protective placement in Wisconsin. The trial court dismissed the petition finding that a guardianship cannot be filed for a nonresident. The Supreme Court reversed and set forth standards for Wisconsin courts to follow when confronting cases of associated with interstate transfer of guardianships. *Grant County v. Unified Board of Grant County*, 2005 WI 2006.

FAMILY LAW

Having to deal with the division of the parties' phonograph record collection, a Dane County Judge ordered the parties to bring the records to Court, whereupon he put them in a single stack and then dealt them out, husband's stack, wife's stack, etc. He wound up with one extra record, which he slid over to the end of the bench, where he snapped it in half. It's a great story, whether it is true or not.

Should children be allowed to testify in disputed placement cases? According to a discussion on the famlaw listserv, the general trend towards not having children testify for or against a parent is based on weighing the relative merits of getting what the children might say before a judge against the relative drawbacks to the child. There is also the concern that a parent would use the children to win a power struggle or align the children with the parent in a blame-frame-game with the other parent. Does this empowers children in an inappropriate way? Does it undermine relationships with both parents? What does it teach them on how to resolve relationship problems for when they are older? If the children have a problem with their mother, they need to work it out in a healthier manner than going to a judge to have the judge do something. Dad may say he wants to use the child to prove Mom is alienating the child from him but is he really "using" the child as an attempt to alienate the child from Mom? Think of how nervous your adult clients usually are in court. Kids have even less understanding of what this is all about and will be very worried about it. In addition, teenage kids seem to me to be most vulnerable to the being swayed by one parent against the other. Should a GAL object?

Child support terminates when a child reaches age 18, or age 19 if still in high school. How do the Child Support Agencies know when to turn off wage assignments? Wage assignments are now all set to terminate support at age 18. A letter is sent to the person receiving support before the youngest child's 18th birthday stating the support obligation will terminate on the child's birthday unless the payee provides the agency with the verification that the child is still pursuing a course of education leading to a high school diploma or its equivalent. But perhaps one could instruct their clients to make sure to contact the CSA if a child will turn age 18 while still in high school. Otherwise it might require a motion to reinstate the order.

IRC §71 is the section that makes alimony taxable to the recipient; IRC §215 is the section that allows a deduction for alimony by the payer. A "Section 71 agreement" seeks to take advantage of the IRC taxability and deduction provisions of §71 and §215 but still avoid the Wisconsin maintenance definition that provides for modification upon change of circumstances. In 1990 the Family Law section issued an article discussing how to draft these agreements. An update is being prepared and will be released soon through the Family Law section.

§62.63(4), which prohibits assignment or garnishment of Milwaukee police pensions, does not exclude such pensions from valuation as a marital assets for property division even though the pension cannot be directly divided. *Waln v. Waln,* 2005 WI App 54.

In a felony nonsupport case, the trial judge noted his personal experience of difficulty in trying to hire a carpenter while finding the defendant's testimony that he could not find carpentry work not credible. The Court of Appeals reversed, saying a judge can take judicial notice of facts capable of determination from sources whose accuracy cannot be reasonably questioned. The Judge's personal experience was not such a source. *State v. Sarnowski*, 2005 WI App 48.

Contribution of a cohabitant to the household expenses of a separated spouse during the pendency of the divorce is relevant to temporary maintenance. *Woodward v. Woodward*, 2005 WI App 65.

Under claim preclusion, a judgment is conclusive in all subsequent actions between the same parties as to issues that either were or could have been litigated. Under issue preclusion, a judgment is conclusive only as to issues actually litigated and decided. Further issue preclusion requires the Court to conduct a "fundamental fairness" analysis. In *In re Termination of Parental Rights to Genesis M*, 2005 WI App 57, the Court noted the claim preclusion doctrine applies to custody determinations as long as the facts have not materially changed and therefore also applies in TPR cases.

Community property rules require each spouse to report half of each spouse's income on their single tax return in the year of divorce unless an exception applies. One way to avoid this is to have the parties sign a Limited Marital Property Agreement making income individual property for tax reporting purposes, but those agreements cannot be retroactive. This causes a problem if the divorce if filed in March, with a Final Hearing in November. Sec. 71.10(6m)(b) may provide another way. A Judgment specifically allocating tax liability based on who earned the income will also allow to each report their own income/expenses. Consider putting this in all Stipulations and ask for it in any Judgment in a contested matter. This statute technically only applies to Wisconsin tax returns, but arguably the community property characteristic of income is determined by WI law in the first place and so this change for WI purposes should also apply to federal reporting.

Where an alcoholic spouse was seeking treatment, it was an abuse of discretion to reduce her maintenance because of her alcohol abuse and a finding that she could regain her old earning capacity by controlling her drinking was speculation. *Hacker v. Hacker*, 2005 AP 223 (filed 8-2-05, recommended for publication).

According to the famlaw listserv, the new bankruptcy law reforms change how child support payment and collection procedures are treated. The automatic stay has been clarified that continuing to collect child support from the property of the bankruptcy estate is no longer a violation of the stay. 11 USC Sec. 362(a)(2)(A) (ii) & (2) (B). Debtors

also have to be current on domestic support obligations prior to the completion of their Ch 12 or Ch 13 plans or they cannot get a discharge. Sec 1328(a). They also have to be current on post-petition support or the plans won't be confirmed in Ch. 11, 12, & 13. Sec. 1325(a), 1129(a)(14), 1225(a)(7). Domestic support obligations will be treated as priority claims in Ch11 before administration claims. Sec 507 (a)(1).

What happens to custody and placement when a parent dies? According to the discussion on the famlaw listserv, if custody is joint the surviving parent automatically receives custody. If sole custody and the custodial parent dies, the surviving noncustodial parent would have to amend the order to get custody. But can something be filed in a divorce/paternity action once one party dies?

MUNICIPAL

Municipalities do not have the authority to permit a bidder to amend its bid after bid opening. The only relief available to a bidder that acknowledges a mistake is to request that its bid be withdrawn from consideration. The court also discussed the procedure for forfeiture of bid bonds. *James Cape & Sons v. Mulch*, 2005 WI 128.

A town has the initial authority to name town roads under section 81.01(11), but the county has discretionary authority under section 59.54 to establish a road naming and numbering system for the specific purpose of aiding in fire protection and ultimately has therefore authority to implement name changes even if the town does not consent. *Liberty Grove v. Door County* , 2005 WI App 166.

REAL ESTATE

Mowing grass alone not sufficient to demonstrate claim of ownership and establish adverse possession because mowing is an action susceptible to several other more reasonable interpretations, including that the mowing party is being neighborly because it is more convenient for that party to mow the strip of grass than the true owner. Also the "wild lands" rule discussed. *Kleutgen v. McFadyen*, 2004 AP 2469 (10-27-05, unpublished).

A mortgagor has the right to redeem any time prior to the confirmation of sale, even after the sheriff's sale. *Security State Bank v. Sechen*, 2005 AP 482 (10-18-05, recommended for publication).

A sample hunting lease may be found at www.michiganfarmbureau.com/specials/hunting_lease_agreement pdf

MISCELLANEOUS

A message on the answering machine at a psychiatrist's office:

If you are obsessive-compulsive, please press 1 repeatedly.
If you are co-dependent, please ask someone to press 2.
If you have multiple personalities, please press 3, 4, 5 and 6.
If you are paranoid-delusional, we know who you are and what you want. Just stay on the line so we can trace the call.
If you are schizophrenic, listen carefully and a little voice will tell you which number to press.
If you have a nervous disorder, please fidget with the # key until a representative comes on the line.
If you have amnesia, press 8 and state your name, address, phone, date of birth, social security number and your mother's maiden name.
If you have post-traumatic stress disorder, slowly and carefully press 000.
If you have short-term memory loss, press 9. If you have short-term memory loss, press 9. If you have short-term memory loss, press 9. If you have short-term memory loss, press 9.
If you have a masochistic complex, please press "0" for the operator. There are 200 calls ahead of you
If you are depressed, it doesn't matter which number you press. No one will answer.

This newsletter reviews mostly unpublished cases, believing published cases are covered elsewhere. Ideas for this newsletter are sincerely appreciated. If you run across an interesting idea, have a question you would like others to consider, please send them. We all benefit by working together.

It is not the intent of this newsletter to establish an attorney's standard of due care. Articles may make suggestions about conduct which may be well above the standard of due care. This publication is intended for general information purposes only. For legal questions, the reader should consult experienced legal counsel to determine how applicable laws relate to specific facts or situations. No warranty is offered as to accuracy.

Thanks to those that contributed to this newsletter.

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