TRI-COUNTY BAR

Buffalo, Jackson, Pepin & Trempealeau

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TRICOUNTY BAR NEWS

Following the lead of a lesser known president, in a decisive 1–0 decision, TriCounty Bar President Paul Bohac voted to grant the TCB president the constitutional power to grant himself additional powers, including the power to declare when and where the Winter meeting will be. "I promise the American people that I will not abuse this new power, unless it becomes necessary to grant myself the power to do so at a later time." *The Onion*, August 1, 2006.

So the Winter Meeting will be held on Friday, January 12, 2007, at the Skyline Golf Club, Black River Falls, the same place it has been held for the last three generations (except for last year) since Black River attorneys seized control of the presidency. (Sorry, Mike Chambers, I forgot about Waumandee, but by popular vote that location didn't really count).

Tell your spouses and staff to mark your calendars *now*, because we know all of us will forget the date and location between now and then.

Two new nicknames emerged from the summer meeting: "Generally Al Morgan", who proudly wore his Dukes of Hazard General Lee T-shirt all weekend, and Taavi "Admiral Ballast" McMahon, who successfully held down the center of a canoe loaded with the three beefiest guys on the canoe trip, giving the concept of freeboard a whole new meaning. At least we got the beer cooler away from them.

Overheard at the summer meeting:

"Oh yeah? My wife not only used an outhouse during vacation, she painted the outhouse. Never was prouder of a woman in my life."

"They weren't Amish, they were from Illinois."

Hearing one bar member describing the erotic experience of having his toenails painted pink, another responded "My wife lied to me when I did that once and there was no polish remover. Pretty tough on the construction site the next day."

Out of the blue, at breakfast: "So, what are your plans for menopause?"

Last year's TriCounty winter meeting, held in Jan. 2006, received approval for 4.5 CLE hours, including 1.0 hour ethics and professional responsibility, 0 GAL hours.

CIVIL PRACTICE

A five-year enlistment in the Navy is not a temporary absence and therefore the serviceperson does not "primarily reside with you" within the definition of a "relative" for a parent's UIM endorsement. *Bauer v. USAA Casualty Insurance Co.*, 2005 AP 2443.

A bystander cannot recover based on negligent infliction of emotional distress arising from a property damage. Therefore a child could not recover for witnessing a driver hit and kill his dog. But when the driver chased the boy with a "feces covered cattail", the Court held the boy could recover for emotional distress unless the court concludes the claim is barred by public policy. How do you distinguish as a matter of proof damage caused by the dog's death versus the dog's feces? What exactly is the public policy on chasing people with feces? *Camp v. Anderson*, 2005 AP 2407.

Failure to hold an annual *Watts* review within one year after the previous year's review does not entitle a protectively placed individual to termination of the order. However chapter 55 will be changing in December 2006 and the analysis of this decision may be affected by these changes. *In the Gaurdianship of Marilyn M.*, 2005 AP 3051.

UIM benefits are not reduced by payments to other injured parties. The plaintiff's UIM coverage with a $300,000 UIM limit was required to pay $50,000 despite the fact that the tortfeasor's liability limit was also $300,000 because the tortfeasor's limits were split between several injured parties, resulting in the plaintiff receiving only $250,000 from the tortfeasor's liability carrier. *Welin v. American Family*, 2004 AP 1513.

The collateral source rule bars admission of the amounts of the payments actually accepted by health-care providers as payment in full to show the reasonable value of services provided. The focus is on reasonable value, not the actual charge. *Lettinger v. Van Buren Management*, 2005 AP 2030.

A statement in a dunning letter "that you can either be honest or dishonest but you cannot be both" and "Your creditor believed to you be honest when your credit was extended" called into question the debtor's honesty and good intentions simply because the check was dishonored, making the statement false and misleading to an unsophisticated customer and therefore violated the FDCPA. *McMillan v. Collection Professionals, Inc.*, Case no, 052745 (CA7)

Where a victim was more than 50 feet away from his motorcycle when he was struck and killed and he was neither walking or turning towards the motorcycle when struck, the victim was not "occupying a vehicle with fewer than four wheels" at the time of an accident within the meaning of an exclusion to UIM coverage. *Estate of Steven Anderson v. Pellett*, 2004 AP 2364, recommended for publication.

When a tortfeasor causes injury to another person who then undergoes unnecessary medical treatment despite having exercised ordinary care in selecting his doctor, the tortfeasor is responsible for all of that person's damages arising from any mistaken or unnecessary surgery. *Hanson et al v. Am. Family Mut. Insu. Co.*, 2004 AP 2065.

A forum selection clause that does not specifically exclude other forums is merely permissive, rather than mandatory. Even though such clauses are presumptively valid, they cannot eliminate jurisdiction absent a clear indication of such purpose. A clause that says that the parties consent to and submit to the jurisdiction of the courts of the State of Ohio..." establishes jurisdiction in Ohio but does not exclusively exclude jurisdiction in other forums. *Converting/Biophile Laboratories v. Ludlow Composites Corporation*, 2005 AP 1628.

If an umbrella policy provides uninsured motorists coverage, section 632.32(4m) requires the insurer to give written notice of the availability of UIM coverage even when the umbrella policy is part of an integrated policy. The court rejected the argument that section 632.32(4m) only required notice for umbrella policies provided as a separate policy. *Stone v. Acuity*, 2005 AP 1629.

A standard CGL liability insurance policy, which defines an "occurrence" as "an accident …" does not provide coverage for common-law misrepresentation claims but does provide coverage for false advertising under ATCP 110.02(11) because that section contains no element of knowledge or intent with respect to the misleading nature of the communication. *Stuart v. Weisflog's Showroom Gallery*, 2005 AP 1287.

§100.01(2) provides that dealer in agricultural produce who rejects or fails to deliver produce in accordance with the contract without reasonable cause is subject to double damages. In *Wisconsin Central Farms v. Heartland Agricultural Marketing, Inc.*, 2006 AP 2971, this section was held to apply to 'large sophisticated

businesses" as well as individual farmers and that the protections of the statute cannot be waived by contract.

Where it is possible to separate the damages caused by two defendants alleged to have reached separate contracts with the same plaintiff, there is no right of contribution between the defendants. *Milwaukee Housing Authority v. Barrientos Designs*, 2005 AP 1394.

Suit for negligent design and construction filed by a homeowner against their general contractor dismissed because the economic loss doctrine bars tort claims, i.e. negligence, for purely economic loss arising from a contract. Construction of a new home held to be a contract for goods, not services. *Komorowski v. Jeff Janssen Builders*, 2006 AP 211 (filed 10-24-06, unpublished)

In order for concerted action liability to attach under §895.045(2), the persons held liable must have acted in accordance with a common scheme or plan to accomplish the result that injures the plaintiffs and there must have been an agreement, tacit or express, about that common scheme or plan. Even if an agreement exists, if that agreement does not directly relate to the tortious conduct that caused the injury, that agreement is insufficient to satisfy the agreement required for concerted action. *Richards v. Badger Mut. Ins. Co.*, 2005 AP 2796 (filed 11-14-06, recommended for publication)

Absent evidence that the driver was under the influence of a controlled substance at the time of the accident, the fact that the driver's urine tested positive for marijuana and PCP shortly after the accident is not admissible when the driver admitted that two days previous he had used marijuana laced with PCP. *Hacker v. Bush*, 2004 CV 139 (filed 11-16-06, unpublished)

CRIMINAL LAW

When the Court has notice of a hearing impairment, the Court must determine if the impairment will impede the individual from communicating with counsel or from understanding or being understood in English. The Court must make the factual determination whether an interpreter is necessary. The defendant need not request an interpreter. *State v. Christopher L.* 2005 AP 2857. The same logic might apply to persons with limited proficiency in English.

A defendant on probation was placed on a hold when arrested for OWI. The court denied sentence credit for the time spent on the hold because the hold was based on a violation of a "no drink" condition, not the fact he was OWI. *State v. Walz*, 2005 AP 491 (filed 6-22-06, unpublished).

CCAP records cannot be used to prove up repeater allegations in criminal cases because they do not rise to the level of reliability sufficient to establish a prima facie proof that the defendant has a prior qualifying conviction. *State v. Bonds*, 2005 AP 948.

The admission of an anonymous 911 call reporting a shooting as it was happening is not testimonial evidence subject to the confrontation clause. *US v. Thomas*, Case No 04-2063 (CA7, appealing a decision from the W. Dist, WI)

Even though medical records were generated with the knowledge that they may he be used in a criminal proceeding, *Crawford* and the Confrontation Clause do not bar their admission into evidence if otherwise admissible under a well-established exception to the hearsay rule because the statements by their nature are not testimonial and the employees were simply recording observations which were made in the ordinary course of business. *US v. Ellis*, Nº 05-3942 (USCA 7th Cir)

Three codefendants pled guilty in a "package plea agreement". Later one defendant sought to withdraw his plea, alleging that he entered into the agreement in order to give one of the codefendants an advantage. The Court of Appeals concluded that a plea is not constitutionally involuntary if it is motivated by a desire to obtain benefit for another. However the court acknowledged package plea

agreements carry the risk that one of the defendants will be improperly pressured into entering a plea. *State v. Goynette*, Nº 2004 AP 2211.

The police can make a warrantless entry into a residence if there exists exigent circumstances, even for a misdemeanor *(Welsh* limited to forfeiture cases). However the United States Courts of Appeal are divided over whether a police officer impermissibly creates exigent circumstances by knocking upon a subject's door. Responding to a tip from a reliable informant, the police arrived outside the apartment door and smelled marijuana. They knocked on the door and heard suspicious sounds which suggested destruction of evidence and they made a warrantless entry based on exigent circumstances. Because the police could give no reason why they did not obtain a warrant, the Wisconsin Court of Appeals held that the police knocking created the exigent circumstances and suppressed the search, finding that knocking on the door is not a legitimate investigative technique. The Court found that the police impermissibly created the exigency and then used that exigency to justify their warrantless entry. *State v. Bender*, 2006 AP 411. Appeal anyone?

A court may order that a juvenile who violates his dispositional order may be placed in secure detention for more than 10 days because the court's power to order secure detention as a disposition is not limited by statute providing for sanctions for violations of the order. *In re Richard J.D.*, 2006 AP 555.

When a juvenile delinquency supervision ends, only unpaid restitution can be converted to a civil judgment, not the entire damages if that amount exceeded the juvenile's ability to pay during supervision. The court cannot find that a juvenile can only pay $900 during supervision but set to a higher amount of restitution, nor could it later use in some other figure to arrive at a civil judgment. *In re Anthony D.*, 2005 AP 2644.

A search incident to arrest must be contemporaneous to the arrest, but where an arrest follows quickly on the heels of the search it is not important that the search preceded the arrest rather than vice versa. However the fruits of a search prior to arrest cannot be used to support probable cause for the arrest. *State v. Starling*, 2005 AP 2989.

Is an alleged violation date for a child sexual assault as between January 1, 2002 and July 2004 too expansive a date range to allow a defendant to prepare an adequate defense? Seven factors discussed and, under the facts of this case, the date range did not violate the defendant's constitutional rights to notice. *State v. Radtke*, 2005 AP 2472, (filed 10-11-06, unpublished)

Subtle suggestions, strategically

made, may amount to deception or trickery where the intent is misrepresentation of authority. Officers pretending that a subpeona had the same weight as a search warrant made the suspect's consent involuntary. *State v. Giebe;*, 2006 AP 189, recommended for publication

A court lacks jurisdiction to try an OWI 2d as an OWI 1st. Therefore a 1997 OWI 1st conviction vacated when it was actually a 2nd offense. The challenge was not brought as a collateral attack, but in a motion to reopen and dismiss in the 1997 case. Because the judgment was void, the requirement to raise the issue within a reasonable time does not apply. *County of Pierce v. Shulka*, 2006 AP 1294 (filed 10-24-06, unpublished)

Where the TPR is based on the prior involuntary termination as to her other children, the failure of the CHIPS order to contain TPR warnings is not defective as to the current child because there is nothing in the mother could do to rehabilitate herself, similar to the homicide TPR grounds. *In re the TPR of Christopher G.*, 2006 AP 2151 (filed 11-16-06, unpublished)

FAMILY LAW

Whether or not a modification of placement requests falls outside the two-year period under §767.325 is determined by the intended effect of date of the modification order, not the date of filing of the request for modification. *Stempin v. Weiss*,

2005 AP 2271 (filed 6-21-2006, unpublished).

A payor is entitled to credit against child support payments based upon a former spouse's (or spouses' in in Utah) receipt of Social Security disability payments on behalf of the parties minor child. To rule otherwise would result in the payor paying his child support twice, first by his initial support payments directly to the spouse and second by the subsequent Social Security disability benefits paid to the spouse on the child's behalf funded by the payor's earnings when he was employed. *In re the Marriage of Paulhe v. Riley*, 2005 AP 2487.

The Court of Appeals discusses whether a verbal clash between a brother and a sister in front of her children constituted "harassment" sufficient to support a §813.125 Harrassment Injunction. *Reardon v. Braeger*, 2005 AP 2189.

PROBATE

A probate filing fee is based upon the total value of an estate, which includes the value of a contingent claim held by this estate at the time of inventory. Therefore a fee is due on personal injury proceeds paid to an estate after the filing of the inventory. *In re: the Guardianship of Bradley C.S.*, 2006 AP 27

REAL ESTATE

In *Dawson v. Goldammer*, 259 Wis.2d 664, the Court of Appeals held that when a landlord sought to enforce a lease containing an illegal attorneys fees clause, the clause was not severable and the entire year lease was void. However in *Dawson II*, 2004 AP 2507, decided 7-26-06, when the tenant sought to enforce the lease, the prohibited clause could be severed and remainder of the lease was enforceable.

Where plaintiffs, after invoking the inspection contingency in their offer to purchase a home, delivered two notices of defects and then a week later attempted to withdraw the notice and waive the inspection and financing contingencies, the notices could not be withdrawn without the seller's consent and, since the seller did not consent the contract became null and void and the sellers were free to sell to a different purchaser at a higher offer. *Briesemeister v. Lehner*, 2005 AP 1237

The owner of the burdened land allowed to install an underground power line beneath an access easement held by another. *Holmgreen v. Hilleman*, 2005 AP 1361.

Neither a construction lender nor the title company doing the construction loan disbursement is liable to a subcontractor that was not paid by the general contractor for failure to collect lien waivers before disbursing funds. *Hoida Inc. v. M&I Midstate Bank*, 2006 WI 69.

Act 206 allows the owner of real property to transfer that property without probate by designating a "transfer on death" (TOD) beneficiary. Russ Reppen of the Dept of Revenue has indicated the October 2006 *Transfer Tax News* will state that no transfer return is needed for the TOD deed if the appropriate language is included on the deed.

2006 Wis Act 204 revises the construction lien law for construction of improvements visibly commenced after April 11, 2006. The changes include as "prime contractors" a broader range of people, including construction managers. It expanded the definition of lienable activities and created a bright line exemption excluding applicability to commercial or mixed-use projects, and eliminating the old "10,000 total usable square feet of floor space" test.

An ancient fenceline within the presumptive right of way establishes the true boundary of the right of way. *Williams v. Township of Greenwood*, 2006 AP 451

If a homeowner fails to exercise his right to have a property inspected before purchasing it, he may lose the right to sue for misrepresentation, but such failure or may not bar a claim for false advertising under section 100.18 because reliance is not an element in this statute. *Malzewski v. Rapkin*, 2005 AP 1007

In a line fence dispute case, Mark Franklin and Rick Schaumberg suggested using the Farm Mediation and Arbitration Program for ADR. I was familiar with it for debt negotiation, but not other farm conflict dispute resolutions. I contacted the program and asked for more information. Run by the State DATCP, it is can be used for basically any dispute involving farm related issues, not just debt. It is free and can be used with or without attorneys. For more information, call 800-942-2474 or 608-224-5052. It might be a good referral for the farmer with the dispute with the local coop, feed and seed dealers about planting, fertilizing etc. It is also available for farm related landlord tenant, conflicts within families, nonfarm neighbors, government program disputes, etc. Just another option to know about. Thanks to Mark and Rick.

New notice provisions concerning contracts for residential construction or improvement created by 2005 Wis Act 201 impose new requirements on both contractors and homeowners. A "contractor", who is any person who enters into a written or oral contract with a consumer to construct or remodel a dwelling, must give a consumer a copy of a brochure specified in the newly created §101.48 before or at the time of an oral or written contract. If the consumer receives this notice, the consumer must give a written notice of claim at least ninety working days before commencing an action against a contractor or a window or door supplier or manufacturer. The "Right to Cure" law applies to any repair or improvement of a "dwelling" used as a home or residence. It includes exterior improvements, such as driveways, sidewalks, detached garages etc.. There are further requirements which the contractor must compy with before suing a supplier. This act to first applies to actions commenced after October 1, 2006. I am not sure of the penalty for failure to comply with the new rules.

§ 240.10, which requires RE listing contract to be in writing, does not allow recoveries of real estate brokers' commissions based on quantum meruit or implied contract. But where the counteroffer provides: "Commission to be 2.5% or $30,000, whichever is greater" and was signed by the seller, the Court concluded that this language in the counteroffer satisfies the requirement under §240.10(1) that the listing contract express "the commission to be paid." ***BRW Investment Realty Co. v. 3863 Humboldt, LLC***, 2006 AP 2700 (filed 10-12-06, unpublished).

MISCELLANEOUS

A member of the TCB studied very hard and learned all the capitals of all the states of the union. Proud of the new knowledge and wanting to impress, the member asked another TCB to test him. "Name any state in the US and I can name the capital." The other member said, "OK, Wyoming" to which the first replied, "That's easy, W".

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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Alma, WI.