

TRI-COUNTY BAR

Buffalo, Jackson, Pepin & Trempealeau

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TRICOUNTY BAR NEWS

Robert Longwell, Jr., 58, died Sunday, September 28, 2008. His friends and fellow lawyers met at Wasons after the service for his eulogy. Bob once remarked at the memorial service of a fellow attorney that he hoped that those who spoke at his memorial service wouldn't make him out to be a saint. Almost in unison all within earshot said; "Don't worry."

One of the younger attorneys remarked, "He was a good teacher." As Family Court Commissioner for Trempealeau County, Bob took the time to explain what was expected. Those who practice in the TriCounty Bar would not be surprised by that. It is tradition to mentor those young lawyers, and Bob could not have handled this young attorney any differently. It wasn't in his nature.

His small town practice was exciting, demanding, and challenging. He learned that his clients needed his advice, not a judgmental lecture. He will be remembered by his clients and friends as a man who enjoyed life.

His own life ended too soon.

Two dozen voices filled the church with song. In their midst sat a chair on which lay a choir robe and a rose, a lack in their completeness. Hon. Dane Morey was gone, from them and from us. Dane died Saturday, November 1, 2008. Bar members attending the service witnessed a celebration of one who believed that life was a constant state of renewal, that mistakes could be redeemed, that failure was not the final word. His son in law said that for his family Dane kept their moral compass pointed true north, living life full speed ahead. Journey well, Judge Morey.

The Winter TriCounty Bar meeting will be held on Friday, January 9 at the Sand Creek Brewing Company, 320 Pierce St., Black River Falls, starting at 1 pm. Randy Morey and a speaker from the Mondovi Historic Society will do an after dinner presentation on Grover Broadfoot, a Mondovi attorney who was born in Independence



who served on the Wisconsin Supreme Court from 1948-1962, eventually as Chief Justice. It was during this time that the summer meeting began attracting members of the Supreme Court, including a new young Justice, Thomas Fairchild.

It was an interesting summer meeting. Several injuries, one unfortunate incident but no fatalities. I waited too long to read my wobbly notes written on bar napkins during the summer meeting to remember exactly of what I was taking note. Any clues to the following?

Snag and Flank
The Elvira Dress-pettable
Alcohol is the oil of social
intercourse
Don't upset me, I get going
The Jedi of drunken poker
Booking Procedure- Do's and
Don'ts
An unravelled woman
Go run in your own state

I'm sure it made sense at the time.

Most of the members at least can remember to wear clothes at the summer meeting (even if it is the

same set for three days, Bruce Kostner). But Dan Diehn showed up dressed in spandex. Hmmm. He had to call the office to send clothes. Dan, if you are that forgetful you had better write down the recipe for ice. I hope he wasn't near a park staring at kids dressed like that. I can't think that would be appropriate. Except maybe in Jackson County.

CIVIL

A CGL policy generally does not cover faulty workmanship, but does cover damages faulty workmanship causes to other property. Damage from "mud rivers" caused by negligent erosion control practices on a construction site was a covered "occurrence". *Toldt Woods Condominium v. Madeline Square LLC*, 2007 AP 1763.

The titleholder is not necessarily the "owner" of the vehicle for the purpose of the "drove other car" exclusion. A woman purchased a motorcycle and titled it in her name even though she did not have a motorcycle license and had no intention of driving it. Instead her boyfriend drove the cycle and insured it. The woman was injured while riding as a passenger. The insurance company sought to avoid coverage because the cycle was titled to the woman but not included in the woman's insurance policy. The court found that ownership is not necessarily defined by the title. *Young v. West Bend Mutual*, 2007 AP 1441.

Post settlement offer interest is simple interest, calculated on a single amount over one period of time, without compounding. *Morrison v. Rankin*, 2007 AP 422.

Where the last building inspection found no deficiencies in the fire alarms, and the owner had no actual notice of defects, damages may not be awarded under the safe place statute for injuries caused by defects in the sprinklers. *Szalacinski v. Campbell*, 2007 AP 667.

CRIMINAL LAW

Excluding the use of the PBT test result by a defense expert in an OWI trial to do an absorption curve analysis does not deny the defendant a right to present a defense because of the PBT is not a "bona fide measurement". *State v. Fischer*, 2007 AP 1898.

A judge has a duty to insure that the impaneled jury is impartial and therefore has the authority to designate a juror as an alternate when concern was raised about her potential partiality. *State v. Gonzalez*, 2007 AP 2160.

A guest at a trailer did not have a reasonable expectation of privacy when the use was for a largely commercial purpose, the stay was only episodic over three or four days and that the defendant lacked a more firmly rooted

relationship to the premise characteristic of a overnight guest or frequent visitor. *State v. Fox*, 2007 AP 685.

No reasonable expectation of privacy in a bathroom?
"Although the intended use of public restrooms is without doubt an activity that has historically been considered very private, there is no historical basis for considering all activity that takes place within a public restroom to be private. See *State v. Boynton*, 688 A.2d 145, 148 (N.J. Super.Ct. App. Div. 1997) (general acceptance of the notion that individuals are due some degree of privacy in using a public restroom is based on the nature of the events that customarily take place there). ... Neitzel's claim of privacy while using the only restroom for males at a gas station for at least twenty-five minutes, without responding to the officer's knocking, is not consistent with historical notions of privacy." ... "The fact that he was sleeping while still on the toilet with his pants down, rather than lying on the floor passed out, does not change the fundamental nature of the use to which he was putting the restroom when the officers opened the door: he was sleeping." *State v. Neitzel*, 2007 AP 2346. You should read this case.

A defendant who jumps bail can be forced to pay back the money his mother posted for him and forfeited. The requirement can be



made either as restitution or as a condition of probation or extended supervision. *State v. Agosto*, 2006 AP 2646.

A social worker cannot testify whether she believed a witness's testimony was coached. The worker can testify about typical signs indicating that a child has been coached to make a false allegation and also whether the child exhibited such signs, but cannot express an opinion as to whether the child has or has not been coached. *State v. Krueger*, 2007 AP 2064.

To prove repeater status, the State may submit repeater evidence any time following the jury verdict until the sentencing. *State v. Kashney*, 2007 AP 2687.

A probation search is not converted into a police search just because the information leading to the search was provided by law enforcement, that there was a concurrent law enforcement investigation, that the items seized during the search were transferred to law enforcement following the search and that probation and law enforcement cooperated in performing the search. The agent initiating to search was present at the scene in furtherance of her responsibilities as an agent. *State v. Jones*, 2007 AP 1989.

Venue for a prosecution for receiving stolen property is proper in the county where the property was stolen, even if the receiver has never been in that county. An

element of the offense requires that the property be stolen property and that occurred where the theft happened. *State v. Lippold*, 2007 AP 1773.

The recording of a conversation by a private individual on a hidden tape recorder might not constitute a violation of the wiretap law prohibiting admissibility. A child complained that he was being verbally abused by a school bus driver. The parents send the child on the bus with a tape recorder hidden in his backpack. The Wisconsin Supreme Court found that the bus driver did not have a reasonable expectation of privacy in statements he made to the child, applying a six factor test considering the volume of the statements, the proximity of others and other factors. The court held the wiretap statute only applies to statements made by a person exhibiting an expectation that the communication is not subject to interception. I guess you can use those answering machine tapes in divorce court after all. *State v. Duchow*, No 2005 AP 2175.

The criminal discovery statutes do not require a defendant to give pretrial notice of a claim of self-defense or of intended *McMorris* evidence. *State v. McClaren*, No 2007 AP 2382.

Bank records are non-testimonial



and therefore do not raise confrontation clause issues if they are otherwise admissible. *State v. Doss*, 2006 AP 2254.

The term "materially impaired" is to be given its ordinary meaning and it is not error to instruct the jury to give all words not otherwise defined in the jury instructions their ordinary meaning. *State v. Hubbard*, 2006 AP 2753.

Passage of time is only one factor in the totality of circumstances in establishing or even eliminating the reasonable suspicion for a frisk, or a protective search. Where the suspect made reaching gestures, had a cluttered vehicle, lacked identification, had a suspended driver's license, appeared nervous and perspiring and repeatedly reached into his pockets after being instructed not to, the officers had reasonable suspicion to do a protective search even though 15 minutes had elapsed since the time of the original stop. *State v. Sumner*, 2006 AP 102.

Section 343.05(4)(b)3 exempts Mexican nationals who hold a valid Mexican driver license from the requirement of holding a class D or M license to operate a car or motorcycle for a period of 1 year after arrival in the U.S. The statute does not require legal presence. However a Mexican national who establishes legal U.S. residence is not eligible for the exemption because he/she is no longer a "nonresident of the

United States." Persons operating commercial motor vehicles do not enjoy this exemption.

A 1st offense Illinois DUI, where the defendant was convicted and placed on court supervision, may not be used as a prior conviction to make a subsequent Wisconsin OWI charge a second offense if there was no valid waiver of counsel in Illinois, even though the defendant signed a plea questionnaire in Illinois and never actually spent time in jail. *State v. Shanks*, 2007 AP 2981.

Where an eyewitness to a robbery was in the military, leaving the state the next morning and the police could not organize a lineup before then, exigent circumstances existed permitting the use of an on the scene one person show up identification. *State v. Dodd*, 07 AP 2955.

The charge of Livestock on Highway, §172.015, requires the owner receive "notice by any peace officer". That notice need not be contemporaneous. Prior notice may be sufficient. *St. Croix County v. Rushfeldt*, 2008 AP 848.

FAMILY LAW

When a mother is a fit parent, the Court in a divorce case cannot order her to allow more visitation with the stepparent than she chooses to allow. The child's father cannot delegate his visitation rights to the stepparent while he is on active military duty.

The mother, as parent, has a fundamental right to make child rearing decisions and to direct the care, custody and control of her children, which the court must respect even if the court disagrees with the parent or believes a better decision could be made. *Lubinsky v. Lubinsky*, 2007 AP 1701.

Adoption by a new parent does not terminate the social security benefits payable as a result of the death of the deceased natural parent. Under the former law, adoption cut off social security death benefit, but that policy was perceived to have a chilling effect on adoptions.

REAL ESTATE

A local government has no obligation to improve access to public waters. Public water access may not be discontinued under section 80.32, but must be vacated by affirmative action of the governing body under section 236.43. The 1997 legislative changes found in §80.32(5) (now found at §82.19(2)(c)) shall be applied retroactively. *Vande Zande v. Town of Marquette*, 2007 AP 2354.

Another case has confirmed that riparian rights are not severable from riparian land and cannot be conveyed separately by easement other similar conveyance. *Berkos v. Shipwreck Bay Condominiums*,



No 2006 AP 2747.

An option to purchase is a separate contract from a contract for sale and requiring separate consideration. *McClellan v. Charly*, 2007 AP 1120.

Miscellaneous

If you had purchased \$1,000 of Delta Air Lines stock one year ago, you would have \$49 left. With Fannie Mae, you would have \$2.50 left of the original \$1,000. With AIG, you would have less than \$15 left. But, if you had purchased \$1,000 worth of beer one year ago, drunk all of the beer, then turned in the cans for the aluminum recycling REFUND, you would have \$214 cash. Based on the above, the best current investment advice is to drink heavily and recycle.

Thanks to Fred Berns for the note on Rob Longwell's passing.

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Jaime Duvall, Editor.