# TRI-COUNTY BAR

## BUFFALO, JACKSON, PEPIN & TREMPEALEAU

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## TRICOUNTY BAR NEWS

The Summer Meeting will begin Thursday, August 29 and run through Saturday. This is a week later than usual and is the Friday of Labor Day Weekend. That should get your spouses planning your funeral. No reason to leave the summer meeting early now.

Here are the minutes from the planning committee meeting:

"VP Tom Clark moved that he not be in charge of cleanup. Carried, I think."

Any additions or corrections?

William P. Nemer was honored with the ADA of the Year award by the Wisconsin District Attorneys' Association.at their Spring Conference. The Trempealeau County recognized that honor at their May County Board Meeting and Judge Damon held a reception in his honor. DA Taavi MacMahon, who has about .029% of Bill's experience, commented "If you have something appropriate to say, stand mute", potentially impressing some but confusing most. Bill's comment on this auspicious occasion was "As Woody Allen said, half of life is just showing up. Do it for 34 years and they feel obligated to give you something. It just shows you should never skip the WDAA lunch." Bill's humility is not only uncomfortably uncharacteristic, it is not accurate. This is well deserved. Well done, Bill.

Practitioners in Pepin County are nervous. Adam Sticht joined Seifert and Schultz, Durand, and as a recent graduate from Hamline he knows more law that the entire local bar put together. You already know Adam. He helped the TCB as a cabin boy years ago, and attended last summer as a law clerk. He coaches both boys and girls softball for Pepin. When asked about the difference between working with the two genders, he said "Not much". Understandably he is still single.

## CIVIL

*Tilidetzke v. Cianciolo*, 2012 AP 349 discusses what constitutes "reasonable diligence" in attempting personal service before using service by publication. The plaintiff must not stop short of pursuing any viable lead—or in other words, stop short "of the place where if [the diligence] were continued might reasonably be expected to uncover an address ... of the person on whom service is sought." Here, one trip to the house, and checking various data bases, was not reasonable diligence.

Failure to comply with the Wisconsin Consumer Act pleading requirements was more than a technical, procedural violation, entitling a successful debtor to receive actual attorney's fees. *Credit Acceptance Corp. v. Shepard*, 2011 AP 2249.

Excessive heat from an unknown source caused a homeowner's windows failure, which was not a "sudden and accidental" event providing

coverage under their homeowners insurance policy. *Gerbers v. AMCO Insurance Co.*, 2012 AP 455.

A lender can only repossess a motor vehicle if it has a judgment for replevin if the contract clearly so states, even if §425.206 would provide that right absent the contract provision. *Kirk v. Credit Acceptance Corp.*, 2010 AP 2573.

A person with memory loss from an accident is entitled to a limited presumption that they acted with due care, subject to being rebutted by competent evidence. This case also discusses when comparative negligence can be found by the court on summary judgment as a matter of law. *Ritter v. Penske Trucking*, 2012 AP 435.

Default judgment may be entered against a surety (a bonding company) without a finding of liability on the underlying subcontract. *Backus Electric Inc. v. Petro Chemical Systems Inc.*, 2011 AP 3004.

Arbitration clauses in consumer contract have received new life because of a recent decision. *Cirilli v. Country Insurance*, 2011 AP 2932, discussed the appellate standard of review of an arbitrator's decision, which is different than its review of a court decision. An arbitrator's award begins with a presumption that the award is valid. The appellate court will not overturn an award for errors of fact or law unless "perverse misconstruction or positive misconduct" is plainly established, if there is a "manifest disregard of the law," or if "the award itself is illegal or violates strong public policy. I guess an arbitrator can disregard the law, as long as it is just a little bit.

A pedestrian, while on foot and trying to direct a parked vehicle into traffic on a busy street, who was struck by that vehicle as it left the parked position, was "using" or "manipulating" the vehicle and therefore entitled to coverage under the vehicles underinsurance motorist coverage. *Jackson v. Wisconsin County Mutual Ins. Corp.*, 2012 AP 1644.

Where the insured property was vacant for more than 60 days, the insurer of a commercial property was not liable for damages because of the policy's "vacancy exclusion". The policy defined a building as "vacant" when less than 31% of the total space was rented and used. Could this apply to any of your clients' unrented commercial properties? *Waterstone Bank SSB v. American Family Mutual*, 2012 AP 912.

In *In re the Commitment of Boe H.*, N$^{o}$ 2012 AP 2612, the Court held the difference between outpatient and inpatient status under Ch 51 turns on whether the patient receives treatment in a hospital setting. A residential group home is a community-based residential facility, not a hospital or inpatient facility. Therefore a group home placement is an outpatient placement. Further the Court is without authority to order placement in a group home. That determination is reserved for the Department. The Court can only order inpatient or outpatient.

## CRIMINAL

The natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant. *Missouri v. McNeely*, 11-1425, SCOTUS, decided 4-17-13. Telephone warrants and other advances may allow officers to reasonably obtain a warrant before having a blood sample drawn without significantly undermining the efficacy of the search. Circumstances may make obtaining a warrant impractical such that the alcohol's dissipation will support an exigency, but that is to be decided based upon facts and circumstances.

A person seated in a car on the side of the road is "seized" within the meaning of the 4$^{th}$ Amendment when a squad pulls up behind and activates its red lights. The discussion contrasts the *Mendenhall/Young* standard

(reasonable person would not feel free to leave) with the *Hodari* standard (a person fleeing in the face of authority not seized until actually detained). *State v. Gottschalk*, 2012 AP 2351.

Bond posted on a dismissed bail jumping charge may be applied towards an OWI conviction which used the bail jumping as a read in. Inability to do so "would lead to an absurd result". *State v. Beckom*, 2012 AP 159.

Withdrawal of consent to search must be clear and unequivocal. A defendant failed to revoke his consent by asking, "Got a warrant for that?" *State v. Wantland*, 2011 AP 3007.

A defendant's consent to a DNA buchal swab was not involuntary, even though the police lied by saying it was requested to investigate a robbery, when they were really investigating a sexual assault. *State v. Cazares-Herrero*, 2011 AP 2955.

A collateral challenge to the use of a 1996 Wisconsin OWI as a countable prior offense was upheld in *Clark County v. Potts*, 2012 AP 2001. The defendant proved that prior to 1996 he had two Massachusetts OWIs unknown to the state, therefore the 1996 case should have been criminal and there was no valid waiver of attorney in 1996. The State argued it did not know about the Massachusetts convictions, did not know the defendant lived outside Wisconsin before 1996 and there was at that time no centralized database from which it could have discovered the priors. Too bad, Mr. DA.

Where the officer stopped the vehicle because of a good-faith mistake of fact, the evidence need not be suppressed. Here the officer misread the license plate and believed the defendant was operating a vehicle with an expired registration. *State v. Laufer*, 2012 AP 915.

The defendant was in custody for Miranda purposes when he was taken from his home handcuffed in a squad car, placed in a locked interview room, escorted to the bathroom, and with no clear indication of when the questioning would begin. *State v. Uhlenberg*, 2012 AP 827.

If a person is not in custody, neither the 5th Amendment, nor Miranda apply to require that the interrogation cease upon a request for an attorney. Therefore officers are not required to immediately cease questioning upon invocation of right to counsel. The Supreme Court also declined to extend those protections to defendants facing "imminent custody". *State v. Lonkoski*, 2010 AP 2809.

When officers investigated a domestic disturbance involving only two people, both of whom were present, the community caretaker function did not justify a warrantless search of the apartment absent some objective evidence that someone else was in the apartment. *State v. Maddix*, 2012 AP 1632.

Evidence excluded because of a discovery violation may be used in rebuttal if it is a fair response to evidence the defense introduced. *State v. Novy*, 2013 WI 23.

## EVIDENCE

Testimony from a school official that a student only stutters when he is lying was inadmissible lay opinion testimony. Under *Haseltine*, one witness cannot comment on the credibility of another, citing *United States v. Williams*, 133 F.3d 1048 (7th Cir. 1998) (police officer's "human lie detector" testimony that defendant avoided eye contact and lowered head while being questioned about a bank robbery constituted inadmissible lay opinion testimony). *State v. Echols*, 2012 AP 422

In *Westrich v. Memorial Health Center Inc*., 2011 AP 2357, the Court disallowed admission of national patient fall statistics, even if they served as a

foundation for expert testimony, unless such statistics were independently admissible, such as if presented through an expert with the requisite personal knowledge of the research, or if the statistics are offered for a purpose other than the truth of the matter asserted, or otherwise allowed under an exception to the hearsay rule.

## FAMILY

A Marital Property Agreement executed before a marriage between a doctor and a nurse did not have substantive fairness and was held unenforceable. *Zernia v. Zernia*, 2012 AP 838.

A parental decision by a father that his children should not have contact with certain persons during a court approved period of grandparent visitation was presumed to be in the child's best interest which the grandparents cannot disobey without overcoming the presumption. *In Re The Grandparental And Other Visitation Of S. J. et al*, 2011 AP 1315.

A parent's Stipulation waiving her appeal rights in a TPR proceeding is enforceable. *Ronald J.R. v. Alexis L.A.*, 2012 AP 1300

## REAL ESTATE

In an unpublished decision, the Court of Appeals held that the real estate broker cannot be held vicariously liable for a property sellers material misstatement in a real estate condition report. *Holz v. Lentz*, 2012 AP 65.

While generally it is the "physical character of the possession", not the subjective intent of the parties which is relevant in an adverse possession case, the Court held it appropriate to consider whether the possessor intended to occupy the disputed land exclusive of the rights of others in *Wilcox v. Estate of Ralph Hines*, 2012 AP 1869.

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