TRI-COUNTY BAR

Buffalo, Jackson, Pepin & Trempealeau

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TRICOUNTY BAR NEWS

After 38 years of private practice in Black River Falls, Eric Stutz started down a new road when he decided to run for Jackson County Circuit Judge. He did so with excitement, anticipation and humor. On May 2, 2008, one month after being elected judge but before being sworn into office, Eric's death directed him down another new road with the same irrepressible spirit, not passing away but passing towards. Lady Justice set down her scales for a moment as courts in four counties stopped. She joined most of the TriCounty Bar members, the Chief Judge for the Judicial District, and other area judges and lawyers to celebrate Eric. Travel well, Eric, and enjoy. We know you will.

What are you doing Thursday, August 21 through Saturday, August 23? Don't ask your staff or your spouse. You know already. The TriCounty Bar summer meeting!

Jon Sherman, remember the steaks.

Ryan Radke is the new TCB Tequila and micro-brew chairperson and he has all the duties and responsibilities attendant thereto.

Thanks to President Sherman's Cabin Improvement Initiative of 2008, we now have a nice dock and a chest freezer to go with all the other new and improved stuff we got this year. Because the old Poker table was really crappy, and also because we threw it away, we do not have a good setup for Poker yet. However James Ritland agreed, after a reasonable amount of prodding from the Prez, to find us a Poker table top for use at the TCB meeting. Although it wasn't specifically discussed, Jon believes it was implicit in their conversation that Jim would pay for said poker table top out of his vast wealth earned on last year's table. This would be in addition to the Ritland Memorial garbage can he already donated to the Cabin. In order to further stiffen Jim's resolve, Jon asked me to include this private note to Jim in the newsletter. So don't read this or you will be sleeping with the fishes.

Any persons interested in the Thursday boat ride, please meet at the Red Ram Saloon in the heart of downtown Alma between 12:30 and 1:00 on Thursday to ride from Alma to Pepin on the Mississippi. It's a treat if you've never done it. All are invited, just show up- don't wait for a personal invite. Car shuttles work out so don't worry, be happy. Alternatively, be at the Pickle Factory in Pepin by 11:30 and leave your car there, and carpool down to Alma. The boat itself is leaving the Wabasha south harbor about 11:00 to head to Alma. Questions, call Jaime Duvall.

If they remember, Steve Schultz and Tom Lister are arranging Friday golf this year. Larry Broeren has snacks, provided he shows up and hasn't had "too much sunshine".

Once again it appears we will be the only tenants at the Y camp for the meeting. If that holds true, we will have the run of the place with no restrictions other than good sense (maybe this year).

The TriCounty Bar Midwinter Meeting has been approved for 5

CLE credits, including 1 ethics credit.

CIVIL

An "agreement to agree in the future" on a material part of a contract (such as the amount of rent in a contract extension) is not enforceable and the contract fails for indefiniteness. *Steffens v. Dumke*, № 2007 AP 1406.

However in *Devine v. Notter*, № 2007 AP 812, the Court held that an "attorney approval" clause did not render a contract illusory. The contract stated it became null and void unless within 5 days there was a letter from the party's attorney approving the contract. "The law of illusoriness includes a rule about contracts containing alternatives for a party: such a contract is not illusory so long as one of the alternatives would be consideration 'and there is ... a substantial possibility that before the promisor exercises his [or her] choice events may eliminate the alternatives which would not have been consideration.'"

The economic loss doctrine bars misrepresentation claims arising out of the sale of residential real estate. Home buyers can pursue contract and statutory remedies. This is the first time the economic loss doctrine has been applied in a residential real estate setting. *Velow v. Norton,* № 2005 AP 2855.

To prove a charge of habitual truancy from school, the State must prove that the school met with the student, offered counseling, evaluated the child and met the requirements of §118.16(5), but is not required to prove compliance with other subsections of §118.16, such as the notice requirements of §118.16(2)(cg). *In re Brandon L.Y.*, № 2007 AP 834.

In negligence cases, everyone owes a duty of care to everyone else. "Duty" equals foreseeability. If the harm is foreseeable, duty exists. It appears a different rule applies in strict liability type product liability cases, where a manufacturer is strictly liable if a product is unreasonably dangerous to a user or consumer. This "consumer contemplation" test is not extended to bystanders unless there is also unreasonable danger to users or consumers of the product. *Horst v. Deere & Co.*, № 2006 AP 2933.

In *Nichols v. Progressive Northern Ins.*, № 2006 AP 364, the Supreme Court decided on public policy grounds. that a property owner who knows minors are consuming alcohol on their property, but does not provide the alcohol, is not civilly liable on public policy grounds. It provides a good discussion of the concept of duty and its relationship to public policy factors.

Claims under the Home Improvement Practices Act for remodeling arise from contract for services. Therefore the Economic Loss Doctrine is inapplicable and tort based claims are not barred. *Stuart v. Showroom Gallery*, Inc., № 2005 AP 886.

Claim preclusion does not apply to bar a claim which could have been litigated in an earlier case as a permissive counterclaim. Claim preclusion does apply to compulsory counterclaims, that is claims which would nullify the earlier judgment or impair rights established in the earlier litigation. *Mertz v. Waldoch*, № 2007 AP 1525.

Where an insurer failed to provide an insured with notice of the availability of UIM coverage as part of their umbrella insurance, the insured is entitled to reformation with minimum coverage necessary to conform to §632.32(4m). *Stone v. Acuity*, № 2005 AP 1629.

When the client gave everything to the attorney sufficient to file a timely answer and the attorney filed it four days late, the negligence of the attorney should not be imputed to the client and default judgment was inappropriate. *Vetterkind v. Armbrust*, № 2007 AP 1219.

The plain language of the false advertising statute, Sec. 100.18(11), does not contain proof of reasonable reliance as an

element, but reasonable reliance is a proper consideration of causation, i.e. the false advertising caused the damage. *Novell v. Migliaccio*, Nº 2005 AP 2852.

A court has the right to sua sponte grant relief from a default judgment, even absent a motion by one of the parties. *Larry v. Harris*, Nº 2005 AP 2935.

When an insurer files an answer on behalf of its insured, but not itself, default judgment against the insurer was properly made, at least when the cause of action is pled directly against the insurer. *Estate of Otto v. PIC*, Nº 2006 AP 1566.

When money from a construction project runs short, a general contractor may pay subcontractors a proportional amount of the money that is left. The Supreme Court reversed a prior Court of Appeals decision which prohibited general contractors from taking any profit on projects before the subcontractors were paid in full. *State v. Keyes*, 2004 AP 1104 and 1105.

Providing alcohol to an underage person does not make a party jointly and severally liable for all subsequent actions by the underage drinker. The person who bought the alcohol with the minor's money is not liable when the minor, after consuming the alcohol, later has an accident at a time when the person providing the alcohol is not present. *Richards v. Badger Mutual Ins.*, Nº 2005 AP 2796.

Where an insurer has two UIM insurers, both may reduce coverage by payments from the other. *Progressive Northern Ins. v. Kirchoff,* Nº 2007 AP 1342.

CRIMINAL LAW

The roadways of a gated community are public roads under the OWI statute. *State v. Tecza*, Nº 2007 AP 1783.

A dog sniff of the exterior of a car located in a public place does not constitute an unreasonable search. In so holding the Wisconsin Supreme Court followed the federal court interpretation of the US Constitution, rejecting the argument that the Wisconsin Constitution should be interpreted more broadly than the federal Fifth Amendment. *State v. Arias*, Nº 2006 AP 974.

After a protective sweep has been performed, a second search of the same area incident to arrest violates the fourth amendment. *State v. Sanders*, Nº 2006 AP 2060.

It is plain error for a judge or prosecutor to participate in a trial where they are potential witnesses. In this case the defendant appeared in court intoxicated in violation of a “no drink” bond condition. The judge witnessed the defendant’s intoxication and then later presided over the subsequent bail jumping case. *State v. Jorgensen*, Nº 2006 AP 1847.

The judge, not the jury, decides whether a prosecution is barred by the statute of limitations. Issues of personal jurisdiction are typically a question of law for the trial court to decide. *State v. MacArthur,* Nº 2006 AP 1379.

It does not violate the defendant's right for the court to prohibit the defendant from looking at the witness during her statement at his sentencing. The court has considerable latitude in the reasonable control of the courtroom. *State v. Payette,* Nº 2007 AP 1192.

Where two charges are “transactionally related”, the State properly added the second charge after the defendant was bound over on the first charge. The authority to add to the information charges which are "not wholly unrelated" means that they are "transactionally related" in terms of witnesses, geographical and temporal proximity, physical evidence required for conviction and the defendant's motive and intent. *State v. White*, Nº 2007 AP 2061.

A court must state its reasons for imposing a DNA surcharge on any felony other than a sexual assault. Imposition of the DNA surcharge in a non sexual assault case requires exercise of discretion, such as whether a

DNA sample has been ordered to be given in that case, whether there was DNA evidence in the case, financial resources of the defendant and other factors. *State v. Cherry,* № 2007 AP 1808.

When police obtain bank records using a subpoena, but without complying with §968.135 by making an advance showing of probable cause to the court, the remedy is suppression of the bank records. *State v. Popenhagen*, № 2006 AP 1114.

There is no search incident to issuance of a municipal citation. "Search incident to arrest" requires that there must be an actual arrest, a taking into custody, before the search is done. *State v. Marten-Hoye,* 2008 WI App 19

A criminal defendant has no statutory or constitutional right to compel disclosure of police files before the Preliminary Hearing. *State v. Schaeffer*, № 2006 AP 1826.

Police may act as community caretakers even when there is only a possibility they will discover some criminal activity. The officer need not subjectively rule out all possibility of criminal activity before acting in a community caretaker capacity. The motivation is determined from the objective circumstances. Subjective motives are irrelevant. *State v. Kramer*, № 2007 AP 1834.

State v. Benoit, 229 Wis 2d 630, held the trial court erred in instructing the jury that an element had been conclusively proved when the parties stipulated to that element. In *In re the Termination of Lyle,* D.E., № 2007 AP 8, the trial court did not err by allowing the parties to stipulate to an element and so informed the jury, but left the question on the verdict to be answered by the jury.

If the defendant completes a Guilty Plea Questionaire, states he fully understands it and gives the Court no reason to believe that is not the case, the Court is not required to "revisit the particulars of each item with the defendant" to take a valid guilty plea. *State v. Hoppe*, № 2007 AP 905.

FAMILY LAW

If a security fund is set up under §767.30(2) to guarantee payment of current support, failure of the obligor to directly pay such support is not contempt as long as the fund has sufficient assets to make the payment. *Roush v. Roush*, № 2005 AP 3038

http://dhfs.wisconsin.gov/em/ops-memos/2008/pdf/08-29.pdf links to the State DVD's Operations Memo saying that effective July 1, 2008, use $6,259 as the divisor (a/k/a avg. cost of nursing home care) in calculating penalty periods. Until July 1st, the 'old' figure ($5,584) applies in such calculations.

PROBATE

A widow, left out of her spouse's IRA, who missed the one year deadline to assert a claim under Ch 766 to challenge an improper gift, may not breathe life into her claim by asserting it as part of the probate proceedings. *In re the Estate of Joyce*, № 2007 AP 1751.

An individual must be physically present at a Protective Placement hearing unless personal attendance is waived in writing by the GAL for reasons given. §55.10(2) states as follows: "The petitioner shall ensure that the individual sought to be protected attends the hearing on the petition unless, after a personal interview, the guardian ad litem waives the attendance and so certifies in writing to the court the specific reasons why the individual is unable to attend." In *Dane Co. DHS v. Michael L.,* № 2007 AP 1641, the court lost jurisdiction when the individual was not present and the GAL only orally waived attendance and cited no reasons. This case held the same for guardianships under the old Ch 880, which also required written waiver. But note the new §54.44(4) does not on its face require written waiver in

guardianships (as contrasted with protective placements under Ch 55).

Chapter 51 precludes disclosure of copies of Statements of Emergency Detention in the possession of law enforcement agencies, absent written informed consent or court order. *Watton v. Hegerty*, Nº 2006 AP 3092.

REAL ESTATE

A junior lienholder has no right of redemption in a foreclosure filed by a senior lienholder. If there is a 3rd party bidder at the sale, the junior lienholder's only right may be to purchase the owner's redemption rights. Neither a separate foreclosure action on the second mortgage, nor paying the balance on the 1st mortgage and accepting assignment of their interest, will prevent confirmation to the 3rd party. *JP Morgan v. Green*, Nº 2007 AP 1753.

The serviant estate cannot unilaterally relocate or terminate an express easement. Rejecting the Restatement of Property position, the Court also applied this prohibition to prescriptive easements, which also are not subject to relocation absent consent of both parties. The court also rejected the argument that the court had power to relocate the prescriptive easement. *Desbrow v. Porter*, Nº 2007 AP 2565.

An "as-is" clause in an offer to purchase is not effective to bar an action for breach of warranty of condition when the offer also contains the standard language that the premises are as stated in the Real Estate Condition Report. *Berard v. Schertz*, Nº 2007 AP 2131.

Miscellaneous

What does your client need to do to get this/her drivers license back? Does the other spouse in a divorce have a valid DL when he/she drives the children around? Look at https://trust.dot.state.wi.us/drvrsmelig/drvrsmelig This site allows you to figure out if the person's driver's license is suspended, why it is suspended, and what must be done to reinstate the license.

A judge has a duty to ensure that the correct law is being applied and therefore has the right and duty to do independent research. By doing independent research and applying the law to the facts, the court does not show preference for one party over the other. If a party feels a judge has incorrectly rested his decision on a case that the parties did not cite, an attorney could file a motion for reconsideration, addressing the case or cases on which the court relied. *Camacho v. Trimble*, Nº 2007 AP 1472.

Ole applies for a job at the Sheriff's Department. In the interview the Sheriff says "I have three questions. First, what is one plus one?" Ole hold up the index finger of each hand and looks at them. "Oh, that's easy. Eleven." The Sheriff shakes his head and says "OK, second question. What two days of the week start with the letter 'T'?" Ole thinks and replies, "I know, today and tomorrow." The Sheriff then asks "Who killed Abraham Lincoln?" Ole thinks again but can't come up with the answer. The Sheriff tells Ole to come back tomorrow.

When Ole arrives home, Lena asked him, "How did the interview go?" "Pretty good," Ole answered. "I think I got the job. They already have me on a murder investigation!"

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Alma, WI.