TRI-COUNTY BAR

Buffalo, Jackson, Pepin & Trempealeau

Vol. 16, Nº2 *Summer, 2011*

TRICOUNTY BAR NEWS

After serving in the Military Police and the Signal Company in New Guinea, Philippines and Australia during World War II, Roman Feltes attended Marquette Law and opened a solo law practice in Arcadia where he practiced for over fifty years. Roman was committed to the service of his hometown, the state and the nation, continuing his interest in history, politics, government and justice throughout his life. Roman left active practice in the 1980's and died April 18, 2011.

You thought it was hot in July. Just wait until the August 25-27, the howling dog days of summer on Lake Pepin. Roger "Honeyboy Hillestad" will be laying 'em down, jamming with "Papa John" Damon (used to be called "Half Pint John", but that was a long time ago), "Barbeque Bruce" Kostner (or is it "Barbequed Bruce"?), "Blind Boy" Tom Lister (named by the defense bar), "Springtime Autumn" Lindquist (don't know), "Furry Don" Hellrung (don't ask), Laura "Sin Sister" Seaton (don't tell) and the rest of the band.

Contact "Blind Boy" Mike Chambers for Thursday golf, "Sweet Papa Sugarcane" Scott Swanson for Friday golf.

From Summer, 1995
Those who can't attend should note that on Thursday we will be voting on who has the worst excuse. The winner (loser?) will receive a package of leftover smoked chubs mailed to his/her office on a hot day in August.

From Summer, 1997
Yeah, mon. Rum cruise on Friday afternoon? Braid your hair, those that have it.

From Summer, 1998
Naked flesh, steaming bodies. Yes, Yes, Yes! The sauna has arrived! However one must wonder whether seeing beads of gin bursting from every pore of an overheated Bruce Kostner as he lounges in scanty attire is a postive step in the brave history of the TriCounty Bar.

From Summer, 1999
Florin Hegge used to say his wife made time with him immediately before and immediately following the summer meeting so she could tell if he had behaved. Well, tell your spouses to get ready, the TCB summer meeting starts Thursday!

As usual, the boat leaves the Alma Marina (meet at the marina not the bar) about 1:00 pm Thursday. Options include meeting at the Pickle in Pepin at no later than noon, to carpool down to Alma. Questions, contact Jaime Duvall. Don't wait for an invite, just show up and bring your beverage of choice.

Judge Gary Schlosstein opened a museum of medieval armament in Alma this summer. He will give tours to interested members Friday afternoon. Seriously, this is seriously interesting. Check out www.castlerockmuseum.com

Been to the National Eagle Center in Wabasha? Another possible Friday desination.

All that was just to get you to read the following:

CIVIL

SETTLEMENT SANCTION The Court of Appeals upheld the dismissal of a case as a sanction when the plaintiff failed to go through with a valid settlement agreement. The Plaintiff claimed post agreement events affected the enforceability of the settlement, but the court disagreed. *Lewsi v. School District #70,* Nº 10-1453 (7th Cir, 6-1-11)

ARBITRATION CLAUSES Wisconsin caselaw had held that class action waiver provision in arbitration clauses in credit card agreements to be unconscionable. In *AT&T Mobility, LLC v. Concepcion*, Nº 09-893 (US, 4-27-11) the US Supreme Court held that the Federal Arbitration Act permits contracts to be voided by "generally applicable contract defenses", such as fraud, duress and unconscionability, but preempts defenses applicable only to arbitration, such as waiver of procedures available in a judicial forum, such as full discovery, jury trial, evidence rules or class actions.

BANK'S DUTY OF CARE A Bank has no duty of care to a noncustomer requiring it to investigate its accountholder for possible fraudulent conduct. There was no allegation the bank intended to assist the customer's tortuous conduct. *Grad, et al. v. Associated Bank NA.* 2010 AP 1461.

FILING AFTER OFFICE HOURS The rule has been that the clerk of circuit court has some discretion in accepting papers received by the office after the official close of business as having been filed on that day. In contrast, the rule for the clerk of the supreme court and court of appeals has been the bright-line rule that any documents delivered or received at the appellate clerks office after the official close of business will be treated as having been filed as of the next business day. In *Northern Air Services, Inc. v. Link*, 2008 AP 2897, four justices through two concurring opinions concluded that the bright-line rule should apply to the clerk of circuit court for all cases going forward, overruling earlier precedent otherwise.

"LOST IN THE MAIL" cannot be rejected per se as excusable neglect. A court should consider various factors, but may be "skeptical of glib claims that attribute fault to the United States Postal Service". *Casper v. American International South Ins.* Co., 2006 AP 1229. Hmm, what about "the dog ate it"?

DOG BITE A landlord is not liable for a dog bite by the tenant's dog. The landlord is not the dog's "keeper" and has no dominion, custody or control over the dog. *Ladewig v. Tremmel,* 2010 AP 1925.

CRIMINAL LAW

NO REOPENING REFUSAL A refusal revocation order under §343.305(1) is not subject to a request to reopen Judgment under §806.07(1)(a). It is an administrative matter and there is no "judgment" to reopen. *In the Matter of the Refusal of Jesse Schaefer,* 2010 AP 2485.

FORFEITURE PLEA WAIVES APPEAL RIGHT §971.31(10) preserves the right to appeal an order denying a suppression motion even if the defendant pleads guilty. By caselaw, that rule was extended to noncriminal cases too (think OWI 1st). No more. *Columbia County v. Edrerer*, 2010 AP 2369 reversed prior law and held that a guilty plea in a forfeiture case waives any right to appeal a suppression motion.

COTENANT CONSENT TO SEARCH Consent to search received from one cotenant was sufficient to override nonconsent by another cotenant where there "is no societal or legal understanding of superior and inferior as between the co-tenants, e.g. parent and child." *State v. Lathan*, 2010 AP 1228.

RECKLESS DRIVING AS OWI PRIOR A Washington State reckless driving conviction, originally charged as an OWI and negotiated to reckless, properly counts as a prior conviction for a Wisconsin OWI because Washington's DUI penalty

structure counts reckless driving as a "prior offense" when the conviction was originally charged as DUI and the sentence had all the characteristics of an OWI-type conviction: alcohol assessment, attend a victim impact panel, and attend alcohol information school. *State v. Malsbury*, 2010 AP 3112.

EXIGENT CIRCUMSTANCES Police may make a warrantless home entry under exigent circumstances even if they create the exigency (sounds of evidence destruction in response to a knock on the door), consistent with Wisconsin caselaw *(State v. Robinson*, 2010 WI 80). *Kentucky v. King*, Nº 09-1272 (US, 5-16-11).

VICTIM MAY BE JUROR Even though our juror had been sexually assaulted and did not disclose it during voir dire, it was error for the trial court to find her biased and order a new trial. Case law forbids a per se bias rule based solely on having been the victim of a sexual assault. There was nothing in the juror's responses which demonstrated either objective or subjective bias. *State v. Funk*, 2008 AP 2765.

ANKLE BRACELET EXPERT Neither the electronic monitoring device (EMD) itself nor the report derived from it is so "unusually complex or esoteric" that expert testimony was required to lay a foundation for the admission of the report as evidence. Further a computer-generated report is not hearsay when it is the result of an automated process free from human input or intervention. Although the EMD report was not hearsay, it was subject to the authentication requirements of Wis. Stat. § 909.015(9). *State v. Kandutch*, 2009 AP 1351.

GANT NOT RETROACTIVE *Arizona v. Gant* overruled the old *Belton* automobile warrantless search exception and decided that once a defendant is secured, a warrant is needed to search an auto. *Davis v. US*, Nº 09-11328 (US 6-16-11) held that this change of law is not retroactive, even though it is constitutionally based, and fruits of a pre-*Gant* warrantless auto searches are not suppressed. "The issue is not retroactivity, but remedy" and the purpose of the exclusionary rule is to deter police misconduct.

LAB SUPERVISOR TESTIMONY The author of a forensic evidence report (e.g. drug test, blood alcohol test, etc) must testify at trial so the defendant can question him. Testimony by the analyst's supervisor, when the supervisor did not actually perform or witness the forensic tests, violates the confrontation clause. *Bullcoming v. New Mexico*, Nº 09-10876 (U.S., 6-23-11) A forensic report is testimonial evidence that cannot be introduced without the live testimony of a witness who can attest to the accuracy of its contents.

FAMILY LAW

TPR FACTS EXTEND UP TO HEARING DATE In considering whether the TPR standard of failure to establish a "substantial parental relationship", the factfinder can consider all facts up until the time of the factfinding hearing to decide if the parent has engaged in the requisite behavior. Evidence is not limited to a specific point in time. *Tammy W-G v. Jacob T,* 2009 AP 2973.

GOODWILL AS ASSET Saleable goodwill of a professional business is a divisible asset. The Wisconsin Supreme Court rejected the argument that professional goodwill is not salable and only represents increased future salary to the partners. It distinguished a line of cases holding professional goodwill nondivisible, limiting those cases to professions where goodwill cannot legally be sold, such as in a law office. It chose not to require the trial court to distinguish between personal goodwill and enterprise goodwill when doing the valuation. As such it was not double counting to include all of the husband's projected future income from the professional practice for maintenance purposes, noting the double counting rule does not prohibit the inclusion of investment income from assets awarded to a spouse as part of property division when calculating maintenance. *McReath v. McReath*, 2009 AP 639

GOODWILL AS INCOME The second question presented in *McReath* was whether the circuit court double counted the value of Tim's professional goodwill by basing Tracy's maintenance award on Tim's expected future earnings when the future earnings would arise from Orthodontic Specialists. Here, the Supreme Court concluded that the salable professional goodwill in Orthodontic Specialists was similar to an asset that produces income. Tim has the option of continuing to generate substantial income from Orthodontic Specialists without diminishing its value. As with income from an income earning asset, this income was separate from the value of Orthodontic Specialists as it existed at the time of the property division.

REAL ESTATE

FORECLOSURE COMBINED PROCEDURE Can a mortgage lender bring a combined proceeding- Count 1 for money judgment on the note docketed at the time of Judgment, and Count 2 for foreclosure and deficiency? Why? Perhaps the borrower has other assets or income that the lender wants to go after while the redemption period is running. A creditor may commence an action on the mortgage note "without waiting to procure a deficiency judgment in the foreclosure suit." *Marshall & Isley Bank v. Stepke*, 228 Wis 39 at 43-44. Direct action on the note can be combined with action for foreclosure and sale of property. *White Eagle Bldg & Loan Ass'n v Freyer*, 231 W 563, 567–68 (1939). If there is a waiver of deficiency in the foreclosure count 2 in order to get the shorter redemption period, it probably suggests a personal judgment cannot be entered on the note. But there seems to be serious practical problems dealing with finality of a judgment on the note. Is interest on the note then limited to the judgment rate, which is not only probably different from the note rate, but also simple, not compound? Can we later add additional amounts due, such as costs to protect their collateral and costs of collection- taxes, insurance, attorney fees, etc.? Because there is only one contract between the parties, the note, there would appear to be a problem having a final judgment as to the amount due on the note but then later having a different amount due on the same obligation in the foreclosure cause of action at the time of confirmation.

MISCELLANEOUS

Kentucky Judge Martin Sheehan issued an Order canceling a trial saying the settlement "made this Court happier than a tick on a fat dog because it is otherwise busier than a one-legged cat in a sand box and, quite frankly, would rather have jumped naked off of a twelve foot step ladder into a five gallon bucket of porcupines than have presided over a two week trial of the herein dispute, a trial which, no doubt, would have made the jury more confused than a hungry baby in a topless bar and made the parties and their attorneys madder than mosquitoes in a mannequin factory." Why don't we write this stuff?

Jaime Duvall, Editor.