

TRI-COUNTY BAR

BUFFALO, JACKSON, PEPIN & TREMPLEALEAU

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TRICOUNTY BAR NEWS

Global warming generated by hot air is certain for Thursday, August 29, the start of the TriCounty Bar summer meeting, validating Governor Walker's 2012 decision to lay off 200 polar bears and 1,000 penguins normally employed by the State of Wisconsin in Lake Pepin. To avoid burning fossil fuels, President Bilski and VP Clark will paddle the houseboat upriver. Both deny use of performance enhancing drugs.

The few, the strong and the brave will be starting the meeting early by arriving Wednesday night. If interested, contact Jon the Dog Seifert or Jaime Duvall. Or just come.

Carnival Cruise lines will operate the boat trip this year, so no fluids after 9:00 Thursday morning. Buffet rules will be suspended and food will be served without a sneeze guard. Some may even use the same plate twice. For life on the edge, be at the Alma Marina Thursday at 1 pm or at the

Pickle Factory at noon to carpool down to Alma.

The "TCB Greatest Golfer" trophy is at stake on Friday at Lake Pepin Country Club, although the plastic image of Snoopy teeing off is not quite as impressive as it might be. Tee times are from 9:30 -10:00. The \$38 per person cost for 18 holes includes a golf cart and a pair of green double knit slacks. Contact awards committee chair Tom Clark for details.

NEW FACES

G'day Mate! Following his undergrad at UW, John Sacia worked in the financial services industry in Van Diemen's Land (some call it Australia) for two years. He returned to UW Law, graduating this spring. Wallaby John convinced the Board of Bar Examiners he was not really a prisoner down under, although he said some of the bankers he worked with were similar unsavory types. He described Sydney as a beautiful cosmopolitan city surrounded by a deadly region home to most of the things in the world that can kill you. He now office

shares with Don Hellrung in Trempealeau, a beautiful cosmopolitan city surrounded by Kostner, Koslo and Brovold. He will be on the boat.

The email address for Jon Sherman's new associate starts jebsherman@_____. Is he the rebel Sherman, from southern Jackson County, modeling his courtroom demeanor after a civil war general? Does he aspire to be the Florida governor? Well Jonathan E. Barnett (UW, 2012), initials JEB, would admit to none of this, though he does admit to being a retired Army Captain, living in a former convent and to having joined the Sherman firm on April Fools Day. Careful, Judge Damon, Jonathon is a real singer, not just an enthusiastic one, although I didn't specifically ask about Broadway Show tunes around a campfire.

CIVIL

Intentional Act Exclusion
When someone intentionally provides alcohol for an underage drinking party, the

intentional acts exclusion bars coverage for injuries that result. *Schinner v. Gundrum*, 2011 AP 564.

“Used in Connection With”

The storage of personal property in an isolated shed on an uninsured property does not make the shed a premises used in connection with the insured’s residence. *Schinner v. Gundrum*, 2011 AP 564.

Assignment Of Claim To Insurer

A claim for misrepresentation may not be assigned from a person to their insurer. The economic loss doctrine bars the insurance company from asserting such a claim. *United Concrete Construction v. Red-D-Mix*, 2011 AP 1566.

Public Officer Immunity A volunteer firefighter running a red light without an audible signal violates a clear ministerial duty to obey the traffic rules unless displaying both a visual and audible signal and therefore loses public officer immunity. *Brown v. Acuity*, 2011 AP 583.

Palisades Distinguished

Palisades Collection LLC v. Kalal, 2010 WI App 38, held that an employee of the assignee of the original creditor could not testify as to the business records of the original creditor because of lack of personal knowledge of the original creditor’s business. A

different result was reached *Central Prairie Financial LLS v. Yang*, N^o 2012 AP 2400, because of the assignee’s custodian’s knowledge of the regular processes by which Chase’s electronic account records were transmitted to its assignees. If you are interested, you need to read the case.

Mortgage Follows Note

Recently debtor’s attorneys have been challenging foreclosures by attacking MERS’s authority to assign the mortgage from the original creditor to the Plaintiff lender. Typically the mortgage note is endorsed in blank and the plaintiff lender claims to have physical possession of the endorsed note. *Dow Family LLC v. PHH Mortgage Corp.* 2013 AP 221 held under the doctrine of equitable assignment, mortgage automatically transfers upon the transfer of the associated note, without the need for a written mortgage assignment. It rejected a statute of frauds argument. This holding avoided the question of whether MERS had authority to sign mortgage assignment.

Proving Possession of Note

In a similar case the issue was whether the Plaintiff lender’s Summary Judgment Affidavit established that the bank actually physically possessed the note endorsed in blank. The Affidavit’s statement that the bank is “the holder of the note”

was held to be a legal conclusion unsupported by any facts to support that conclusion. Attaching an uncertified copy of the note was also insufficient to establish actual possession of the original note. Further the Affidavit must be based on admissible evidence. Under *Palisades*, the bank’s employee’s statements concerning knowledge of the bank’s procedures and records did not meet the business record hearsay exception as to the portion of the loan history and account information predating the assignment to the current Plaintiff lender. *Bank of America N.A. v. Minkov*, 2012 AP 2643.

SJ Affidavit Rejected

A Summary Judgment affidavit must be signed by a “person with personal knowledge”. “Personal knowledge” means the witness perceived the event through one of the five senses. An Affidavit by a bank attorney simply stating he “has reviewed Central Bank’s records in connection with the representation” does not provide sufficient basis demonstrating the affiant had personal knowledge. *Central Bank v. Duncan*, 2012 AP 2551.

SJ Affidavit Sufficient An Affidavit dealing with the bank’s procedures by someone with personal knowledge of the procedures is sufficient to obtain Summary Judgment in a foreclosure action. “Personal

knowledge” requires that the witness has personal knowledge of how these type of documents are created, not that the witness knows how this particular document was created. *Bank of America NA v. Neis*, 2012 AP 1994.

Pre-Replevin Notice

Nondelivery Where a debtor did not give its creditor notice of a change of address, the creditors repossession of her car did not violate the consumer act if the registered mail containing the required notice was sent to the address in the creditors file. *Molinski v. Chase Auto Finance Corp.*, 2012 AP 2184.

HIPA Violation and Costs

Under the home improvement practices act, damages must be caused by a violation of the act, rather than breach of contract, in order to be doubled and to receive an award of attorney's fees. In *Grand View Windows, Inc. v. Brandt*, 2012 AP 8, because there was no evidence to support a pecuniary loss due to the HIPA violation, the award of double damages and actual attorney fees was reversed.

CRIMINAL

Right to Be Present A court's decision to exclude a criminal defendant from an in-chambers meeting with jurors attended by all attorneys did not violate the defendant's right to be present at his trial, applying various

factors as discussed in the case. *State v. Alexander*, 2011 AP 394.

Reinterrogation after Miranda Invocation Once a defendant has invoked his 5th Amendment right to counsel, all subsequent waivers are presumed invalid until the defendant has been out of custody for 14 days. Further held, the statement “Can my attorney be present for this?” is an unequivocal invocation of right to counsel. *State v. Edler*, 2011 AP 2916.

Specificity of Violation Date

A violation date of “2004-2006” for a charge of repeated child sexual assault passed the 7 factor “*Fawcett*” test for specificity and also a duplicity challenge, based on case specific facts in *State v. Dettloff*, 2012 AP 2202. It distinguished *State v. RAR*, which rejected “summer four or five years ago” as specific enough for a charge of several individual acts of sexual assault.

Consent to Search by Guest

A girlfriend of three months, he invited to stay the weekend at a defendant's home, has authority to consent to the search of the defendant's computer. A “close personal relationship” bolsters a showing of authority to consent. *State v. Sobczak*, 2010 AP 3034.

Witness Mental Health

Records If the defense makes the prerequisite showing under

Green, a Court can order a witness to produce privately held mental health records, but if the witness refuses, is the witness barred from testifying? A majority said the witness is not barred from testifying, but for various rationales. *State v. Johnson*, 2011 AP 2864

Vehicle Search If police have probable cause to search the passenger compartment of a vehicle, they may search “every part of the vehicle that may conceal the object of the search”, in this case the trunk as well. *State v. Jackson*, 2013 AP 66.

Hearsay at Preliminary Bind over for trial after a preliminary hearing consisting solely of hearsay testimony does not violate the defendants right of confrontation, compelled testimony or effective assistance of counsel. *State v. O'Brien*, 2012 AP 1769.

Sexting The practice of “sexting” does not constitute the crime of exposing one's genitals to a minor, but does constitute a violation of §948.11, exposing harmful materials to a child. *State v. Stuckey*, 2012 AP 1776.

Confrontation Clause and Lab Results DNA profiles are not testimonial statements subject to the confrontation clause. A DNA expert could rely on the defendants DNA profile in the databank in comparing it to a victim sample

even without repeating the analysis independently. *State v. Deadwiller*, 2010 AP 2363.

FAMILY LAW

Personal Injury Division At divorce, there is a presumption against dividing proceeds of a personal injury claim which may be rebutted based on “special circumstances”. *In re the Marriage of Singerhouse*, 2013 AP 83.

MUNICIPAL

Elected Officials Although the compensation of elected officials may not be reduced during their term of office, this protects salaries and fees only. Fringe benefits (insurance premiums, pension contributions etc.) may be reduced. *Cramer v. Eau Claire County*, 2013 Wis. App 67.

Nuisances not Legislative Acts

The creation and maintenance of private nuisances are not recognized as legislative acts subject to protection under §893.80(4). *Bostco, LLC v. MMSD*, 2007 AP 221.

Squeal, Squawk and Squeak

If you are interested in a case which discusses whether an ordinance prohibiting tire squealing is unconstitutionally vague, including a spirited discussion comparing the definitions of “squeal”, “squawk”, and “squeak”, read

State v. Mauermann, 2012 AP 2568.

Conditional Use Permit The standards for reviewing a Board of Adjustment’s denial of a conditional use permit application is discussed in *CFS, LLC v. Bayfield County Board of Adjustment*, 2012 AP 1830.

PROBATE

Ch 51 Transfers Mental Health Ch 51 transfers to a more restrictive setting “for reasonable medical and clinical judgment” under §51.35(1)(e)(1) does not require a hearing within 10 days, as contrasted with a transfer to a more restrictive setting for more than five days resulting from a violation of a treatment condition, which does require a hearing. *Manitowoc County v. Samuel J.H.*, 2012 AP 665.

Competent to Refuse

Medication To support a finding of incompetency to refuse medication under Ch. 51, the evidence must track the language of the statute, showing that a medical professional provided a reasonable explanation of the medication. Mere testimony that the individual is not competent to refuse medication is insufficient. *In re: Donna H.*, 2013 AP 80.

REAL ESTATE

Unilateral Severance of JT A joint tenant can sever the survivorship feature of a joint tenancy by transferring his undivided one half interest in the property to his wife and himself as survivorship marital property without the knowledge or permission of the other original joint tenant. *Marchel v. Estate of Robert Marchel*, 2012 AP 2131

MISCELLANEOUS

Effective Date of New Statutes/Regs New acts are now effective the day after enactment, not on the day after publication under Act 5. Act 20 eliminated the printed version of the Administrative Code, which will now only be published by the state in electronic form.

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