TRI-COUNTY BAR

Buffalo, Jackson, Pepin & Trempealeau

Vol. 14, No. 1 *Winter, 2008*

TRICOUNTY BAR NEWS

Despite the demotion of the TCB presidency to dwarf status, largely due to the eccentricity of the orbit of former office holders, after a bruising primary season and a series of debates with himself, Jon Sherman was elected as dwarf president of the TriCounty. "Better than being called a largish object", Sherman reports. The 2008 officers are:

President: Jon Sherman
Vice President: Mark Franklin
Secretary: Paul Millis
Treasurer Nick Heike

Little is known about President Sherman. Years ago TCB members studying the Sherman firm noticed something odd. It was almost as though the firm was being influenced by another mass of matter somewhere. After making detailed mathematical calculations, bar members deduced that the presence of another attorney could account for the irregularities, and they set about searching. In 1983 they finally located Jon, whose mass, position, and speed correctly explained what was happening in the firm.

Inspired by the new title John Damon earned by wearing the Burger King crown as he presided over the Winter Meeting, he has started a specialty court called Judge Whopper's Animal Court designed to handle cases involving disputes about animals. Finally a forum exists to break the tyranny of the cat at large ordinances. The following is a real case:

In *State v. Hathaway*, 2007 AP 2002, the issue was whether §944.17, Sexual Gratification with an Animal, required the animal to be alive. The defendant was convicted of having sex with a dead deer, after having served 18 months in jail for killing a horse with intention of having sex with it (and other charges). The consensus in the office- dead or alive, that is just wrong.

Mark your calendars. Cabin cleanup day is Friday afternoon, May 9. The TriCounty Bar summer meeting is August 21-23.

Nicholas Heike joined Seifert and Schultz in practice starting February 11, 2008. He will primarily be working civil practice out of the Mondovi and Alma offices. Pat Motley, an old attorney from Alma, once said "I've been in practice long enough to see my mistakes show up". Jon and Steve have been around for a while now. Nick should be busy.

Can you believe this is Volume 14? Have you really been putting up with this for 14 years?

CIVIL

Oral statements of the Court control only when carried forward into the written Judgment. If there is a conflict, the written Judgment controls. *Jantzen v. Jantzen*, 2007 WI App 171. We had better read proposed documents carefully to avoid winning the battle and losing the war.

A contractor received checks drawn on a corporate payroll account to pay for interior decorating services performed for the Corporation's principal. The court held that the payroll checks

when issued for this purpose bore apparent evidence of irregularity and therefore the contractor does not receive the protection as "holder in due course." *Willowglen Academy-WI, Inc. v. Connelly Interiors Inc*., 2007 AP 1178.

When the purpose of the court's order has been thwarted for a substantial period of time by noncompliance and the victims of the noncompliance have suffered unremedied injury as a direct result of the noncompliance, a remedial sanction remains available even if the contempt has ceased. *Christensen v. Sullivan*, 2006 AP 803.

Construction of a new home was completed by August 1997. Defects were discovered in October 2005. The action was commenced in April 2006 on the basis of breach of contract, negligence and misrepresentation. The court held that the contract claims were barred because the statute of limitations had expired and that the economic loss doctrine barred the tort claims because the contract was for a product (a house) and not a service. *Aslani v. Country Creek Homes*, 2007 AP 503.

An entity may be a nonprofit organization as that term is used in the recreational use immunity statute even though it is organized under chapter 180 as a for-profit corporation and has stockholders. The court stated the question under the recreational use immunity law as whether the organization is "organized or conducted for pecuniary profit". *De La Trinidad v. Capital Indemnity Corporation,* 2007 AP 45.

Minority shareholder rights in a closely held corporation is discussed in *Edler v. Edler*, 2006 AP 2937. The case discusses what constitutes oppressive conduct towards a minority shareholder, the frustration of the reasonable expectations of the shareholders, a corporate officer's fiduciary duty of fair dealing in the conduct of the corporation business, valuation issues and dissolution and partition as equitable remedies.

CRIMINAL LAW

WI Jury Instruction Criminal SM-34A states that whenever two charges are sentenced in the same hearing on the same day, sentence credit must be given on both charges for any time spent in custody on either charge, even if the two charges were not otherwise related. WRONG!, says the Court of Appeals in *State v. Johnson*, 207 AP 1114. The custody must be "in connection with" in order to receive sentence credit and imposition of concurrent sentences at the same hearing on otherwise unrelated charges is not sufficient.

Where defendant is arrested and held in custody in another state, but interrogated by a Wisconsin police officer, Wisconsin law determines the admissibility of his confession. It is unreasonable to require a Wisconsin officer to be aware of and implement the other state's evidence gathering rules. *State v. Townsend*, 2006 AP 1440.

A one-person showup identification is unnecessary and thus inadmissible when probable cause exists to justify an arrest for any offense, regardless whether it exists on the particular offense under investigation. The rule permitting admission of inherently suggestive showup identification evidence is limited to situations where the officer lacks a legal basis to detain a person and thus cannot acquire identification evidence by another, less suggestive procedure, such as a lineup or photo array. *State v. Nawrocki*, 2006 AP 2502.

One of the requirements to be proven in a mental commitment case is that the individual is "dangerous to self or others". In *In re Jennifer R.M*., 07AP2001, the individual appealed her commitment, saying that a special verdict using that language failed to require five jurors to be unanimous on whether she was dangerous to self or dangerous to others. The commitment was upheld, but this is a good example of the danger of submitting instructions or verdicts with language in the alternative. Other examples may include theft (take

and carry away or retain possession ...) and disorderly conduct (violent, abusive... or otherwise disorderly conduct).

A defendant in a speeding case appealed his conviction, arguing that for a speed limit to be enforceable there must be a legible speed limit sign within immediate view at the location of the violation. The court disagreed, saying signs must be "in proper position and sufficiently legible", citing §346.57(6) and 346.02(7). A similar issue came up in Pepin County as to whether a speed zone increased where the new higher speed limit sign first became visible, or whether the new higher speed zone started at the base of the speed zone sign. Statutes and regulations did not seem to answer the question, but highway departments follow a manual put out by the Department of Transportation entitled *Wisconsin Manual on Uniform Traffic Control Devices* which indicates signs are placed at the beginning of a new speed zone. This manual may suggest what is "proper position" for the purpose of §346.02.

Driving over the fog line is not contrary to any statute. A one judge appeal held that crossing the fog line for 3-4 seconds twice, without sudden movement, was not reasonable suspicion to stop a vehicle, even though it was bar time and the officer was experienced. *State v. Gullickson*, 2007 AP 616, unpublished.

Movement within a house is not exigent circumstance that justifies a warrantless entry. "An emergency cannot be presumed in every case in which the police barge into a person's home unannounced. The government has presented no evidence that, like mink devouring their young when they hear a loud noise, criminals always (or at least in the vast majority of cases) set about to destroy evidence whenever the police knock on the door." *US v. Collins*, 05-4708 (US Ct. App, 7th Cir)

A nurse violated HIPAA rules by telling police officers that she smelled alcohol coming from the defendent upon admission and that the defendant told staff she had consumed alcohol prior to the accident. But that does not result in suppression of the evidence because such violations do not implicate the fourth amendment. *State v. Straehler*, 2007 AP 822.

A father's appearance in a Termination of Parental Rights case by web cam was held not to violate due process because of a number of factors. *Waukesha County Dept of Health and Human Services v. Teodoro K.*, 2007 AP 2283. The defendant and his attorney had a method of privately communicating through a separate phone. The court regularly checked to make sure the defendant was able to hear

and see everything. The court reporter kept a log of technical breakdowns and their remedies. The cameras allow the defendant to see both the witness and a wider view of the entire courtroom. This case may be an interesting review of what constitutes due process for videoconferencing.

The State's failure to provide a witness's criminal history to the defense for impeachment purposes was harmless error, where a witness had no motive to be untruthful. *State v. Rice*, 2007 AP 516.

FAMILY LAW

The Court in *Jantzen v. Jantzen*, 2007 WI App 171 also suggested that if the Judgment does not show it was anticipated that maintenance would increase when child support terminated, cessation of child support might not be a substantial change of circumstance to justify increased maintenance. So make a record.

Finally from *Jantzen v. Jantzen*, supra, a postjudgment modification of maintenance is judged by comparing the situation at the most recent maintenance to the present, and that a change must be substantial, stressing the importance of that term.

Prior to September 1, 2001, a court had no authority to change a child's surname as part of a paternity judgment. Effective on that date, §767.89 was amended

to grant a court the power to change a child's name in a paternity action under certain conditions. In *Rowell-Gofton v. Evans*, 2007 AP 752, the Court of Appeals held that statute was retroactive and a child's name could be changed in a pre-2001 paternity judgment by a motion filed after that date.

When awarding attorney's fees in a divorce action a court must find three things. First, need must be demonstrated by the recipient; second, an ability to pay be demonstrated by the payer; and finally, the Court must determine the reasonableness of the fee. A finding addressing the first two, but not the third factor of the reasonableness of the fee was held to be error. *In re Ladd v. Ladd*, 2004 AP 1092.

PROBATE

In calculating a taxpayer's estate tax, the DOR cannot include gifts made in contemplation of death. *DOR v. Schweitzer*, 2006 AP 984.

You have to like any case that involves the dead man's statute. That rule prohibits introduction of certain testimony by a witness with an interest in the outcome of a proceeding. However, in *Johnson v. Blodgett*, 2006 CV 214, it was held that the spouse of a person barred by the dead man's statute is not similarly barred. The recovery by the wife will be her individual property and therefore the husband does not stand to gain or lose directly in the case. An indirect or potential benefit is not sufficient interest to invoke the dead man's statute.

REAL ESTATE

Where tenants make improvements on leased land that are of no benefit to the landlord, the tenants may not recover from the landlord at lease termination for unjust enrichment. The landlord was not enriched. *Ludyjan v. Continental Casualty,* 2007 AP 38.

For evictions in Section 8 federally subsidized housing, strict compliance with federal regulations is required to terminate a tenancy and a state court is required to enforce those regulations. *Lakeside Gardens v. LaShay*, 2007 AP 1246.

A recorded affidavit was not sufficient to place a party on notice if it is "not in the chain of title". *Roberts v. Thall*, 2006 AP 2979. It seemed to me that the Court felt a document must be shown in the tract index based on the legal description in order to be in the chain of title. The court did not discuss Sec. 706.08(2) which says if a conveyance is not properly tracted in a tract index, it is still "recorded" if it is properly shown in the grantor-grantee index.

A father sold land on land contract to his son. Later the son wished to mortgage it. Instead of subordinating, the father satisfied the land contract by warranty deed, even though there was still money owing, but the remaining debt was not represented by a note or other documentation. When the son later defaulted, the subsequent lawsuit between father and son involved the statute of frauds, the parol evidence rule and a challenge to the equitable relief fashioned by the Court. This case is good reading to remember why family transactions should be documented the same as any other transactions. *Sarnstrom v. Sarnstrom*, No 07 AP 0264.

§704.27 gives a landlord the right to claim double rent if the tenant fails to vacate at the end of a lease or after notice. This is not anything new but it is interesting that landlords usually don't ask for this in eviction actions.

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Alma, WI.