TRI-COUNTY BAR

Buffalo, Jackson, Pepin & Trempealeau

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TRICOUNTY BAR NEWS

When Justice Thomas Fairchild passed away, news of his death was carried in the New York Times, the Chicago Tribune, and the Milwaukee Tribune. The obituaries noted his membership in the bar associations for the US Supreme Court, the 7th Circuit Court of Appeals, the Wisconsin State Bar, and the Milwaukee and Dane County Bar Associations. But at his memorial service in Madison, it was the members of the TriCounty Bar Assocation who were there, not members of those larger and more prestigious groups, filling two pews as is our tradition to attend one last meeting with Tom.

Speakers at the service included US Senator Russ Feingold, Justice Fairchild's associates at the 7th Circuit, several former law clerks and other notables. Most commented that out of respect, they also referred to Justice Fairchild as "Judge", and never could quite come to call him Tom. We knew him by no other name.

Gary Schosstein, Dale Sherman and Jaime Duvall are preparing a memorial for Tom, to be presented at the summer meeting. Please share thoughts and memories of Tom with them.

Kris Karmann: "I have found, in general, that when it comes to the Tri-County Bar, no matter how much I try to convince myself that my time could be better spent, I just keep coming back to the summer meeting -- there have been *many* years when *I just can't help myself*. I think Justice Fairchild understood that too."

Another member, kind of missing the thread of the exchange: "I just sent my (Fairchild memorial) check to Steve, same as when I contribute to spring cleaning expenses in years *I just can't help myself*.

Kris Karmann, in response: "As to Bob Hagness' comments, I share his problem, although it doesn't always result in my sending money to Steve."

Perhaps *I just can't help myself* should be the unofficial motto of the TCB. At one time or another over the years that has applied to every one of us at some point. It explains our bar association as well as anything I have ever heard.

It was suggested that TCB judges take judicial notice of the *I just can't help myself* affirmative defense, and not just during the summer bar meeting.

The Winter 2007 TriCounty Bar meeting was approved for 3.5 credits (none for ethics or GAL).

As winter has turned into spring, so has my procrastination turned this Winter newsletter into a Winter/Spring edition. Sorry.

Please rise! The TCB officers for this year are:
President: Hon. "Johnny Cash" Damon, the man in black
VP: Jon "Tank" Sherman,
Secretary: Paul Millis, missed the meeting, got reelected
Treasurer: Steve "Buddha" Schultz (think about it, picture Steve in your mind- no, wait, don't do that)

CIVIL PRACTICE

The WCA requires a creditor to give a debtor a Notice of Right to Cure after a default. §425.104 defines the term "default" as occurring when there was

"outstanding an amount exceeding one full payment which has remained unpaid for more than 10 days." The creditor argued that when one payment is unpaid for more than ten days, the default occurs as soon as a second payment is unpaid, but the Court concluded when the debtor missed her first payment, her unpaid balance was exactly one full payment and that her unpaid balance did not become greater than one full payment until she missed her second payment for more than 10 days. Therefore a Notice of Right to Cure given before 10 days after the second missed payment was defective. *Indianhead Motors v. Brooks*, 2006 WI App 266.

A snowmobile club maintaining a trail is an "occupier" of land entitled to protection under the recreational use immunity statute, but issue is fact driven. *Held v. Ackerville Snowmobile Club*, 2006 AP 914

There is no right to a jury trial in an Injunction action by a municipality to enforce a village ordinance even if affirmative defenses are raised and despite the fact that the requested injunctive relief has monetary consequences. An action seeking injunctive relief is an action in equity. *Village of Sherwood v. Hawkinson*, 2006 AP 931.

There is a duty to refrain from knowingly permitting underage persons from consuming alcohol on one's property and public policy does not preclude liability under a common law negligence claim. Neither immunity nor negligent per se is created by Ch 125, Wis. Stats. The dissent suggests this opinion effectively imposes strict liability on parents if underage alcohol consumption by teenagers occurs on their property and injury results, even if the parents knew nothing about the consumption. While this case involved high school students and their parents, a logical extension may suggest the same result for any underage consumption, such as a 20 year old adult child living with parents, or a 21 year old person sharing an apartment with a 20-year-old. *Nichols v. Progressive Northern Insurance*, No 2006 AP 364.

A credit card agreement that bars class-action relief and contains a foreign choice of law clause is unenforceable as unconscionable, prohibiting the credit card company from enforcing a mandatory arbitration clause. Most credit card agreements have such clauses and many collection actions are currently attempted through arbitration. This case and the authorities cited therein may provide substantial authority in opposing credit card arbitration collection actions. *Coady v. Cross Country Bank*, No 2005 AP 2770.

Inquiry in an insurance application as to whether the applicant was "free of any sickness or physical impairment," is examined in the context which the term is used and

calls for a layman's answer, not a medical opinion. Whether the statement was false, and whether the person making the statement knew that the statement was false, are questions of fact for the jury and should not be decided at Summary Judgment. *Pum v. Wisconsin Physicians Service Ins.*, 2005 AP 3049 (filed 12-27-06, recommended for publication).

When a defendant seeks dismissal of tort claims arguing that the economic loss doctrine applies because the damaged property is "other property" with respect to the allegedly defective product, courts should normally first apply the "integrated system" test to determine whether the damaged property is "other property" and, if it passes that test, then the "disappointed expectations" test is applied. *Foremost Farms USA Coop v. Performance Process Inc.*, 2004 AP 1201 (filed 11-16-06, recommended for publication)

The Court cannot consider facts extrinsic to the "four corners" of the complaint in deciding whether a duty to defend exists until such time as coverage is determined even if the extrinsic facts make it fairly clear no coverage will exist (i.e. vehicle involved not a "covered auto"). *Horn v. American Country Insurance*, 2005 AP 2838 (filed 11-15-06, unpublished)

2005 Wis Act 255 effective 4-13-06, created an option for self help repossession of motor vehicles if certain advance notice provisions

are followed. The old rule was no self help unless a voluntary surrender. The new law requires a 15 day advance notice to the debtor and prohibits self help if debtor objects in the manner specified in the notice. The creditor must notify local law enforcement before taking the vehicle by self help after the 15 day notice. Affected statutes include §425.206 and a new §425.2065.

The statutory time limits under §802.08(2) for filing a response to a Summary Judgment trumps conflicting local court rules prescribing an earlier filing date requirement. *Christensen Trucking v. Mehdian*, 2005 AP 2546.

Where one defendant is granted Summary Judgment vis-a-vis the Plaintiff, the other defendant is barred from seeking contribution from that defendant under the doctrine of issue preclusion. *Rille v. Physicians Insurance Co.*, 2005 AP 1407

If both the owner and the driver of a motorcycle were negligent, the anti-stacking provisions of the policy do not limit coverage to the policy maximum. *Progressive Casualty Ins. v. Bauer*, 2006 AP 1568

CRIMINAL LAW

An individual may have an expectation of privacy in personal property inside a vehicle, even if the person has no expectation of privacy in the vehicle itself. However whether that expectation is a reasonable depends upon the facts and circumstances. *State v. Bruski*, 2006 WI App. 53.

The Supreme Court adopted a "forfeiture by wrongdoing" doctrine applicable to confrontation rights of the defendant in *State v. Jensen*, 2004 AP 2481. If the state can prove a witness's absence is caused by the defendant, the confrontation clause will not prohibit use of the out-of-court statement of the witness.

Time spent in jail in another state based in part on a Wisconsin warrant is time spent in custody for which a defendant is entitled to sentence credit. *State v. Wright*, 2006 AP 1216

A defendant is entitled to sentence credit for time in custody on an extended supervision hold where the hold was at least in part due to the course of conduct that resulted in his new conviction. *State v. Hintz*, 2006 AP 217

Sec 973.09(1)(d) says, contrary to the general rule of no good time for jail as a condition of probation, a person does get good time for conditional jail for offenses with minimum mandatory and presumptive sentences, with certain exceptions. Subparagraph 1 of Sec 973.09(1)(d) creates an exception for OWI offenses with a "mandatory minimum period of imprisonment under s. 346.65(2)(am)2. or 3. Those referenced sections are for 2nd and 3rd offense OWI. Therefore by implication, OWI 4th and above does get good time for jail imposed as a condition of probation.

A court can impose jury fees against the State pursuant to §814.51 when a jury is canceled less than 2 days before trial. *Flottmeyer v. Circuit Court of Monroe County*, 2006 AP 139.

A postsentence diagnosis of bipolar does not constitute a new factor warranting sentence modification when at the time of sentencing the judge knew the defendant has mental health issues, although without that diagnosis. *State v. Blau*, 2005 AP 1328.

If a suspect is not at home when officers execute a search warrant, failure to knock and announce does not require suppression, at least where there was no damage to property. *State v. Brady*, 2006 AP 1339.

When a defendant has served conditional jail time and his probation is later revoked, the defendant is entitled to sentence credit for days spent in custody on conditional jail time status against the sentence after revocation, even if the condition jail time was served concurrent with an unrelated prison sentence. *State v. Yanick*, 2006 AP 849.

Where conduct might be prosecuted under several different sections of the criminal code, the prosecutor has freedom to choose

which statute to charge as long as the choice is not based on an unjustifiable standard such as race, religion etc. The prosecutor is not required to choose the more specific section over a more general section covering the conduct. *State v. Ploeckelman*, No 2006 AP 1180.

A driver is suspended 15 days when convicted for exceeding the speed limit by more than 25 mph. The DOT has taken the position that the suspension starts when they mail out the notice of the driver, even when the judge says it starts on the day of conviction or any other date. DOT says generally they will follow a suspension start date, but in this case because of §343.30(1n), they ignore the judge, a sentiment most of you share. I guess judges are useless after all.

A court cannot confine a defendant for failure to pay the fees of his court appointed attorney without a hearing and a finding that the defendant is able to pay, either at sentencing or at the time the commitment order is issued. *State v. Helsper*, 2006 AP 835.

Temporary license plates issued by the DOT are not grounds for a stop, distinguishing cases holding that temporary plates issued by a dealer is sufficient reason to stop a vehicle in order to verify registration. *State v. Lord*, 2005 AP 1485.

Even though officers shone their flashlights in the car, stood on either side of the vehicle and asked a driver questions, the court concluded a reasonable person would feel free to leave and therefore it was not a "seizure" within the meaning of the 4th Amendment. *US v. Douglass*, No. 05-2608 (filed 10-30-06, CA7)

Defendant took the breath test, which was the agency's primary test. Then he requested the agency's secondary test, blood, which was given. Finally he demanded that he be allowed to take the alternate test at his expense, which was denied. Held that prior law requires two tests be provided, but no suppression for denying three tests. *County of Burnett v. Ayd*, 2006 AP 2229 (filed 12-27-06, unpublished)

Is a Miranda warning inconsistent with the Implied Consent law? If the Miranda warning is read first, does that explicitly assure a defendant he has the right to remain silent and obtain counsel prior to responding to the request for an evidentiary chemical test? Detemined case by case. *State v. Kliss*, 2006 AP 113 (recommended for publication)

Compliance with proper plea soliloquy does not bar a postconviction challenge when a defendant asserts a non-Bangert reason why the plea was not knowing or voluntary. Here the defendant claimed the responses given during the plea were false and plausibly explained that he gave the false answers because his counsel threatened to withdraw if he did not do so and therefore he is entitled to have an evidentiary hearing. *State v. Basley*, 2005 AP 2449.

Furtive or suspicious movements do not automatically give rise to a reasonable suspicion that the occupant of the vehicle is armed and dangerous. *State v. Johnson*, 2005 AP 573

A court, rather than the jury, may determine the applicability of a prior conviction for sentence enhancement where the applicability of the prior conviction is readily determined on the existing judicial record. *State v. LaCount*, 2006 AP 672

FAMILY LAW

According to the famlaw listserv, maintenance paid under a temporary order is not deductible at all, unless 1) a marital property opt out agreement exists or 2) total payments are more than 50% of marital income. At least be aware of the issue and encourage divorce clients to get tax advice.

Parties may stipulate to forgive child support arrearage, despite the prohibition against retroactive modification. *Motte v. Motte*, 2005 AP 2776

Generally property transfers between spouses are nontaxable events if incident to divorce under IRC §2512. What about postjudgment modifications to a

MSA incorporated into the judgment? Letter Ruling LTR 200709014 decided that any order from the divorce court that modifies an original divorce judgment must be considered related to the cessation of the marriage, even if the order occurs years after the divorce.

A fit parent has the right to substantial control over the extent of grandparent visitation and an order that set a more generous and predictable grandparent visitation schedule over the mother's objection is unwarranted. It is not enough that such grandparent visitation may be in the child's best interest. *Rogers v. Rogers*, 2006 AP 1766 (2-21-07, recommended for publication)

Parties may not agree that child support can only be modified due to "catastrophic circumstances" rather than a "substantial change in circumstance", again raising the question of the enforceability of clauses that attempt to make child support nonmodifiable. *In re: Wood v. Propeck*, 2005 AP 2674.

Shortly after their marriage, the parties executed a Limited Marital Property Agreement which provided that all assets owned by each party were to remain individual and either parties' earnings were classified as individual property. The Agreement specifically stated that it applied in case of divorce. During the marriage the wife's substantial income was used to purchase assets, some of which were titled jointly. During the divorce, the Court held that the Agreement classified, but did not divide, the property because it did not state that tracing should be used to determine the property division. If an asset was to retain its classification irregardless of title, the agreement should have been drafted with greater precision. Further, the law requiring tracing of individual property to determine classification applies only to gifted or inherited property. Finally the cases discussing donative intent to rebut the transmutation of gifted or inherited property into joint property are not directly applicable out of that context, but may provide some guidance. This case may be important reading for practitioners drafting Martial Property Agreements intended to be applicable in case of divorce, and to review such agreements drafted in the past. *Steinmann v. Steinmann*, 2005 AP 1588 (filed 12-20-06, unpublished)

There is no constitutional right to counsel for an indigent person in placement disputes in a family law matter. Poverty, standing alone, is not a suspect classification and neither the state or federal Constitution guarantee representation to indigent persons in civil cases. *Parish v. Ropnmmfeldt-Mendoza*, Nº 2006 AP 246 (filed 12-14-06, unpublished).

A guardian ad litem is required

whenever custody or placement is disputed. It cannot be waived, nor lost pursuant to the "invited error" doctrine. A judgment entered without a GAL's recommendation in a disputed case converts to a temporary order pending final disposition after the recommendation is received. But does the absence of the recommendation make the nonconforming judgment void? Or voidable? In other words if there was no direct appeal, is the absence of a GAL grounds to reopen under §806.07? *In re the Support of CLF: State v. Freymiller*, 2005 AP 2460.

PROBATE

The court's authority in a Chapter 51 mental health commitment is limited to determining "the least restrictive placement; whether inpatient or outpatient treatment". Once that decision is made, the conditions of treatment, including the place of treatment within the level of restrictions set by the Court, are for the county's experts to make. *In re: Robert C.B.*, Nº 2006 AP 1891 (filed 12-13-06, unpublished)

A Chapter 880 (now Ch 54) guardianship of a minor child's grandparents should not be granted unless there is a finding that a parent is unfit or unable to care for the child or that other compelling reasons require guardianship. The "best interests of the child" standard should not be used. *In the Matter of the Guardianship of*

Hailie E.T, Nº 2006 AP 567 (filed 12-12-06, unpublished).

REAL ESTATE

§74.485 requires a seller of land that has been assessed as agricultural to notify the buyer of the land of three things: (1) that the land is assessed as agricultural, (2) whether the seller has been assessed a penalty, and (3) whether the penalty has been deferred. For example, when a farmer sells off a five acre parcel he knows will be used as residential, he must give the required notice. Is a general statement appearing in a title commitment sufficient? Apparently not under the facts of *Thomas v. Pringle*, 2006 AP 697.

When a property owner built his house several feet too close to a shoreline in violation of a restrictive covenant contained in a deed, the resulting action lies in equity and the court may order damages to other property owners rather than order that the structure be razed. *Hall v. Gregory A. Liebovich Living Trust*, 2006 AP 40

TAXATION

A Wisconsin taxpayer may not set off his gambling winnings with his gambling losses for Wisconsin income tax purposes. *Dettwiler v. Department of Revenue*, 2006 AP 1660

MISCELLANEOUS

Ever have a public domain citation, like 2005 WI App 100, but felt frustrated when you reached on your bookshelf to open Wis. Reports because you did not have the parallel West cite, 282 Wis. 2d 746? You can use the public access website for the Supreme Court (not the usual CCAP site, which is for the Circuit Courts) to search for the West citation by the Public Domain Citation. Look for the blue navigation bar and click on "Public Domain Citation Search". The reporter citations will appear at the bottom of the case's summary page.
http://wscca.wicourts.gov/index.xsl

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Thanks to those that contributed to this newsletter.

Jaime Duvall, Editor,
Alma, WI.