

TRI-COUNTY BAR

Buffalo, Jackson, Pepin & Trempealeau

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TRICOUNTY BAR NEWS

Mark your calendars! The TCB Winter meeting will be on Friday, January 11, 2013, at the Trempealeau Hotel, in Trempealeau, starting at 1:00 pm. President Hellrung has put together a scintillating educational program, some of which is bound to be approved for credit. A hot tub committee was also formed.

Here is an excerpt from the draft minutes from the October 22 planning session for the Winter meeting:

President Hellrung led a discussion about the Winter Meeting. He designated the Trempealeau Hotel as the location and will invite other's wives to join him.

President Hellrung set the meal as the 'best steak of your life' unless you rsvp in advance, requesting one of two other options that will only be disclosed upon arrival at the meeting.

President Hellrung appointed D.A. Taavi McMahon to chair a subcommittee to arrange a portable hot tub for the meeting.

Mike Chambers seconded the appointment, despite not being present.

A discussion was had about the summer meeting. Nothing was decided, but this may be an agenda item for the Winter Meeting, where nothing will be decided again.

Carly Sebion overruled everything J. Duvall said, therefore, we no longer listen to J. Duvall.

Last year's 2012 TriCounty Bar Winter meeting is approved for 4 credits, no ethics/GAL credits.

Campaign central for Taavi McMahon's DA contest was kind of like a wedding. Everyone was in a good mood until someone asked the political equivalent of "Does anyone know of a reason why this couple should not be joined in holy matrimony?" Several campaign slogans illustrate the concerns.

"Taavi- Who Else?"



"McMahon- He's Working On It"

"Never Elect a Man You Wouldn't Want to Vote out of Office."

"It Can't Be My Fault If You Voted for Me."

"Taavi, The Forbidden Fruit- You Can't Resist"

"Understanding Criminogenic Needs since 1990"

"It's OK. You'll Be Fine"

"The Protest Alternative to Frac Sand"

From a recent interview:
"If it's a legitimate crime, the criminal's body has ways to shut that whole thing down."

Celebrating his election, DA Taavi McMahon fell asleep in the bar at the Trempealeau Hotel with a sign on his chest promising to marry the person who awakened him with a single kiss. Fortunately the failure of the marriage amendment was in Minnesota, not Wisconsin.

President Don Hellrung said that the TCB budget could be reduced by millions if it just eliminated empathy. "The word "empathy" comes from a Greek word, "pathos", which means pathetic. We Americans need to get out of the habit of using Greek words. Look where it has gotten the Greeks- straight into bankruptcy." Ummm, Don, isn't "humanity" a Greek word, too?

CIVIL

SIDEWALK LIABILITY *Clark v. Rice Lake Housing Authority*, 2012 AP 583, reminds us that abutting landowners have no duty to passers-by to remove snow and ice or scatter abrasive material on adjacent sidewalks. Landowners are liable for only such defects or dangerous conditions in public streets or sidewalks as are created by the active negligence of such landowners or their agents.

MINIMUM CONTACTS When an out of state customer ordered product from a Wisconsin business and directed the product to be shipped out of state, Wisconsin has the "minimum contacts" sufficient to confer personal jurisdiction over the out of state defendant which does not offend traditional notions of fair play and substantial justice. *Johnson Litho Graphics of Eau Claire LTD v. Sarver*, 2010 AP 1441.

ECONOMIC LOSS DOCTRINE The defendant manufactured and supplied concrete pavers which

were allegedly defective, causing damage to the pavers themselves and adjacent driveway asphalt. The Court of Appeals held the general commercial liability insurers had a duty to defend. It held the economic loss doctrine does not determine whether something is "property damage" or "economic loss", and further that the claimed damage to the asphalt alleged damage to "other property" and that the concrete pavers and the asphalt were not indivisible parts of an integrated system. The court held the damage was an "occurrence". Damage to the concrete itself was caused by faulty workmanship and may not be covered, but the defective concrete damaged other property, the asphalt, which was an "accident", unintentional and unexpected. The court further considered and rejected exclusions for "performed operations" because the damage occurred to a part of the property on which the insured did not perform work (the asphalt). It similarly rejected the "your work" and "impaired property" and other exclusions. *Pamperin Rentals II v. R.G. Hendricks and Sons Construction*, 2011 AP 214.

WCA APPLIED TO FOREIGN JUDGMENT The Wisconsin Consumer Act applies to attempts to collect a judgment in Wisconsin even if the consumer transaction did not occur in

Wisconsin. For example, the creditor must comply with the pleading requirements under Chapter 425 if it wishes to bring suit in Wisconsin. *Credit Acceptance Corp. v. Kong*, 2011 AP 476.

GENERAL CONTRACTOR LIABILITY A home builder who subcontracted with another contractor to install the roof on the house and garage is not liable for a defective roof unless (1) the general contractor has a contractual duty of care to the homeowner, or; (2) when a non-delegable duty is statutorily imposed or; (3) when the subcontracted work is inherently dangerous. *Adams et al v. Westmark Development LLC*, 2011 AP 1293

MISREPRESENTATION AND ECONOMIC LOSS DOCTRINE A farmer filed an action against both the installer and the manufacturer, DeLaval, alleging defective equipment installed in a new milking parlor. In dismissing most claims against DeLaval, the court found (1) alleged misrepresentations were "mere puffery", and (2) breach of contract claims were dismissed because DeLaval was not a party to the contract. The Court found that claims for damage to cows due to negligent installation were not excluded under the installer's CGL policy. Further even if misrepresentation claims were not covered under the CGL policy, if there was another act which damaged the cows (incorrect



installation of rails), there was coverage as long as “damages are caused both by the alleged liability-creating act and by a distinct event that is an “occurrence.” Finally the Court concluded the contract, while mixed, was primarily a contract for goods for economic loss doctrine purposes and misrepresentation claims were barred, but that the “Other Property Exception — Disappointed Expectation” analysis did not bar the negligence claims. Does any of that make sense? *Schullo v. DeLaval*, N^o 2011 AP 1876

PUBLIC POLICY BARS

NEGLIGENCE CLAIM An employee, finding the bank closed, took the day’s cash receipts home with him instead of returning them to the employer’s premises. The home was burglarized and the cash stolen. The Court rejected the argument that an employment at will doctrine precluded an employer from recovering damages for losses stemming from an employee’s negligent performance of an employment contract. The Court found the employee negligent, but found public policy considerations prevented assertion of the negligence claim against the employee by the employer. *EBA Design Inc. v. Meeker*, 2011 AP 1670.

CRIMINAL

METABOLISM AND DAUBERT
County of Marathon v. DeBuhr,

2011 AP 2959, discusses a *Daubert* type challenge to expert testimony on retrograde metabolism in an OWI case as “not proper science”. Evidence admitted, authorities discussed.

VINDICTIVE DA CLAIM Filing additional charges during the give-and-take of pretrial plea negotiations does not warrant a presumption of DA vindictiveness. A prosecutor’s conduct did not violate defendant’s due process rights where the prosecutor carried out an explicit threat to file more serious charges if the defendant refused to plead guilty to a less serious offense. Thus a defendant must show actual vindictiveness motivated by some constitutionally impermissible consideration. “There must be objective evidence that a prosecutor acted in order to punish the defendant for standing on his legal rights.” *State v. Cameron*, 2012 AP 1368.

EVIDENCE

DEAD MAN’S ACT Testimony of a party that she gave another party’s predecessor in interest, now deceased, permission to use an easement, is barred by the Dead Man’s Statute. The Court discusses Supreme Court cases applying that statute. *Rutter v. Copper*, 2012 AP 25

BUSINESS RECORDS

AUTHENTICATION Arch Bay, the assignee from the original mortgage lender GMAC, filed a Summary Judgment motion in the foreclosure action. In support of its motion, Arch Bay filed an affidavit setting forth the loan payment history signed by an employee of Matrix Servicing, a “loan servicer”. The Court of Appeals rejected the Affidavit because an affidavit must be made by a person with personal knowledge of how the business records were kept. There was no showing the payment history were business records of the loan servicer. A statement from the current custodian is not sufficient to authenticate the record of the business of a former custodian, citing *Palisades Collection LLC v. Kalal*, 324 Wis. 2d 180. Therefore a prima facie case was not made as to the amount owed. *Arch Bay Holdings v. Gartland*, 2012 AP 756.

REAL ESTATE

APPURTENANT EASEMENT A parcel of land benefitted by an access easement was conveyed by deed and purchase money mortgage using the legal description but without referencing the easement. The deed also contained the standard language of “all appurtenant rights, title and interests”. After briefly contrasting an “easement in gross” with an “appurtenant easement”, the Court of Appeals found the easement passed with the land even though not



specifically mentioned. On its face the easement expired after 5 years, a fact noted in the title policy. When the easement did lapse and the owner was denied access, there was no liability on the title insurance because the policy excluded adverse matters arising subsequent to the policy date. *Community Credit Union v. AmeriTitle & Abstract*, 2011 AP 2294.

SUFFICIENCY OF LEGAL DESCRIPTION “Remaining acreage” in a right of first refusal is not specific enough to satisfy the Statute of Frauds. Parol evidence cannot operate to supply the fatal omissions because it would be offered for what the parties intended, rather than for what the written conveyance described. Because the document is on its face insufficient to identify the specific property, parol evidence would not be admissible for the improper supplying of a description or adding to a description that is on its face insufficient. *LCC v. Born*, 2011 AP 2368.

30 YEAR LIMITATION PERIOD FOR DEED REFORMATION An action for deed reformation based on mutual mistake is not barred by the contract 6-year statute of limitations. When there is a mutual mistake, there is no “contract”. Not all actions necessarily have *any* applicable statute of limitations. The deed in question was created less than 30, but more than 6, years prior to

filing the case. *Tyler v. Schoenherr*, 2011 AP 2075.

SHORTENED FORECLOSURE PUBLICATION PERIODS Act 136 amended §815.31 to reduce the publication period for mortgage foreclosure sales from six successive weeks to three weeks. Additionally, §846.102 was amended to reduce the publication period for abandoned property from 2 months to 5 weeks and to add factors for the Court to consider when deciding whether a property is abandoned. Effective April 5, 2012.

MISCELLANEOUS

Courtesy of the State Bar:

The State Bar of Wisconsin Ethics program, supported with your dues dollars, provides valuable services to members. First, through the Ethics hotline, members can informally and confidentially discuss ethics questions with the State Bar's ethics counsel, Timothy Pierce and Susan Walker. They can be reached at (608) 229-2017 or (800) 254-9154, Monday through Friday, 9 a.m. to 5 p.m. The ethics hotline is an advisory service that puts you in touch with an experienced ethics lawyer who can discuss relevant rules and case law and provide non-binding guidance to help Wisconsin lawyers conform their

own conduct to the Rules of Professional Conduct for Attorneys. Written guidance is also available through Wisconsin Ethics Opinions, located on WisBar, the State Bar's website. To ask questions or request an opinion, please contact either Tim or Susan.

The ethics program can help in other ways, such as reviewing your fee agreement or providing a speaker for CLE credit. Have a question – just ask; Ethics counsel Tim Pierce and Assistant Ethics counsel Susan Walker are dedicated to responsive, practical advice and detailed guidance in navigating Wisconsin's Rules for Professional Conduct for Attorneys.

Thanks to those who contributed including Paul Millis and Bob Hagness.

It is not the intent of this Newsletter to establish an attorney's standard of due care. Articles may make suggestions about conduct which may be well above the standard of due care. This publication is intended for general information purposes only. For legal questions, the reader should consult experienced legal counsel to determine how applicable laws relate to specific facts or situations. No warranty is offered as to accuracy.

Jaime Duvall, Editor.

