

# TRI-COUNTY BAR

BUFFALO, JACKSON, PEPIN & TREMPLEAU

Vol. 19, N<sup>o</sup> 3

Fall, 2014

## TRICOUNTY BAR NEWS

Anna Becker was appointed Jackson County Circuit Judge August 28, 2014 by Governor Walker, succeeding Judge Tom Lister. Anna served four terms as District Attorney, and was then currently serving as Family Court Commissioner.

Welcome, Anna, to a long line of respected Jackson County Judges, including Louis Drektrah, Bob Radcliffe, Jerry Laabs, Eric Stutz and Tom Lister.

Summer Meeting Notes:  
From one associate member:  
Laughed all weekend remembering all the crazy things that went on at the summer meeting. Unlike years past, I don't think I left anything behind. Except, that is, my pride. If you find that in returnable fashion, I'll take it. I think the "Wild Hog" ate your pride, along with the good judgment, self-esteem and discretion of many others, including mine. No permanent damage and we all came home with a story. Signs of a good time.

Found on the boat top deck, one tassel. Please claim in person from the editor.



From another associate member: On my way home, I stopped at Slippery's to retrieve my misplaced Badger baseball cap. When I inquired, the bartender said "You also left an unpaid tab." Surprising considering one sparkling wine, two tequilas, and an indeterminate number of Manhattans. One of the three ladies I had been talking to the day before was still seated in the same place at the bar but with different friends. She said she phoned me about my left-behind cap (I- perhaps inadvisedly- had given her my business card for some reason) and continued the discussion where it had left off the day

before. I smiled stiffly and nodded and prepared to leave. As I left my new acquaintance exclaimed "You were a lot more fun when you were drinking Manhattans!"

The 2015 Winter Meeting will be held on January 9<sup>th</sup> at Club 10, on Highway 10 about 5 miles east of Durand, between Durand and Mondovi. Lunch off the menu 12-1, fascinating seminars 1-5, business meeting and dinner to follow.

After dinner memorials will be presented for Carlyle Skolos, Judge Richard Galstad and Gene Radcliffe. Let us all honor and remember those that went before.

The January 2014 Tri-County Bar winter meeting, which was held in Mondovi, has been approved for 4.5 CLE credits and 1.0 EPR credits.

You can stop reading now, the rest is just work stuff.

## CIVIL

### **Voir Dire Nondisclosure**

When a seated juror “was not forthcoming during voir dire”, a trial court is to consider three factors in the determination of objective bias: (1) did the question asked sufficiently inquire into the subject matter to be disclosed by the juror; (2) were the responses of other jurors to the same question sufficient to put a reasonable person on notice that an answer was required; (3) did the juror become aware of his or her false or misleading answers at any time during the trial and fail to notify the trial court.

**Sufficient Facts or Data** In *Nationwide Agribusiness v. August Winter & Sons, Inc.*, 2014 AP 488, the Court of Appeals upheld the trial court's exclusion of an expert witness because the opinion was not based on sufficient facts or data under §907.02. It discusses whether a court must examine all five *Daubert* factors if it finds inadequacy on one factor.

**UIM Damage Cap** An exclusion to UIM coverage is unenforceable where the underinsurance is a result of damage caps for torts by government employees. *State Farm Mutual v. Hunt*, 2013 AP 2518.

**Late Attorney Substitution** The criminal defendant hired a new attorney five days before trial. The Court of Appeals

upheld the trial court's denial of the request for continuance, noting the case had been pending for nine months, that the defendant's discussion of obtaining new counsel had been ongoing for six months, the difficulty of rescheduling expert witnesses and that the trial court was convinced the defendant would receive an adequate defense. *State v. Duncan*, 2013 AP 645.

**Dismissal as Discovery Sanction** In *Jay's Petro Mar LLC v. Khan*, 2013 AP 2278, the Court of Appeals upheld a trial court's striking of the Defendant's answer and entry of Default Judgment for the Defendant's failure to respond to discovery. It shows the trial court's good, but exhausting, efforts to encourage and warn the Defendant to comply, making a clear record upholding the sanction.

**Truck in Lake** Ice fishermen beware. *Anderson v. Viking Insurance Co.*, 2014 AP 222, held no liability coverage for the cost of raising a truck from the bottom of Clam Lake after it broke through the ice. The insured argued that had he not removed the truck he would have been liable for environmental damage to the lake. The Court held the policy coverage liability for which the insured is legally liable, not liability for which the insured may be held liable.

**Duty to Defend** An insurer continues to have a duty to defend, even after the insurer settled a claim for less than the policy limits. *Burgraff v. Menard Inc.*, 2013 AP 907.

**Policy Cancellation Estopped** An insurance company's regular pattern of accepting insufficient payments and threatening cancellation without ever cancelling the policy held sufficient to create reasonable reliance to equitably estop the company from a post loss cancellation. *Owners Insurance Co. v. Sikanovski*, 2013 AP 1387

**Page Limits on Briefs** The decision of a trial judge to disregard entirely Summary Judgment briefs which were filed in excess of the page limit set by local court rule was reversed as an abuse of discretion absence a showing of “bad faith” or “egregious” conduct and without any opportunity for the party to remedy the error. The law prefers matters be resolved on the merits. *Estate of George Gregovich et al v. Auer Steel & Heating Supply*, 2013 AP 1234.

**No Lien by Supp. Exam. Petition** A judgment creditor may levy against personal property by at least three different means: (1) a Writ of Execution against specific personal property; (2) serving a garnishee defendant in a garnishment action; or (3)

obtaining an order of the Court through a supplemental proceeding. However the mere service of an Order to Appear for a Supplemental Proceeding does not give rise to a blanket lien on personal property. *Associated Bank v. Collier*, 2011 AP 2597.

**Garnishment of Out of State Wages** A Wisconsin court can garnish wages earned in another state as long as Wisconsin has personal jurisdiction over the garnishee (the employer). Wisconsin need not have jurisdiction over the wages themselves. *Midland Funding LLC v. Mizinski*, 2013 AP 2422.

**Lien Follows Note Assignment** The WI Supreme Court has found that even if a MERS type mortgage assignment is not valid, the mortgage follows a proper assignment of the note. "... (T)he doctrine of equitable assignment is alive and well in Wisconsin ... (and) should not be distinguished or discredited due to its age or changes in banking practices. We further conclude that the language of Wis. Stat. § 409.203(7), which governs liens securing the right to payment, codifies equitable assignment. Finally, the application of equitable assignment in this case results in no unfairness to Dow. We further hold that the doctrine of equitable assignment does not conflict with the statute of frauds outlined in Wis. Stat. § 706.02. Equitable assignment

occurs by operation of law, which satisfies Wis. Stat. § 706.001(2)(a), a statutory exception to the statute of frauds." *Dow Family LLC v. PHH Mortgage Corp*, 2013 AP 221.

**Joint Account Created by POA Agent** In *Salem Evangelical Lutheran Church v. Kangas*, N<sup>o</sup> 2013 AP 2064, the Court found that when an agent under a power of attorney placed the principal's funds in a joint account (the agent being the other joint account owner), the principal did not intend to create a joint account or to gift the investment account to the agent. It created a constructive trust in favor of the persons who otherwise were the principal's beneficiaries.

**Missing Witness Instruction** The "missing witness" instruction allows a jury to draw a negative inference from the failure of a party to call a witness. Its use is controversial. It has been withdrawn from the Criminal JI book. In *Kochanski v. Speedway SuperAmerica*, 2011 AP 1956, the Supreme Court decided under the case's facts its use was reversible error.

**Failure to Timely File Settlement Documents** Shortly before a contested hearing in March, the parties informed the Court a settlement had been reached, requested the hearing be cancelled and that

settlement papers would be forthcoming. Having heard nothing further, in May the Court dismissed the action. In August the trial court denied the Plaintiff motion to set aside the dismissal. The appellate court upheld this (1) because the Plaintiff failed to show that the circuit court improperly exercised its discretion, and (2) the Plaintiff failed to provide the circuit court with an explanation for its persistent lack of diligence. *HSBC Mortgage Services v. Daya*, 2013 AP 2885.

**Marital Purpose Statement** A clearly commercial loan is not transformed into a consumer transactions when a guarantor signs a Marital Purpose Statement indicating that the obligations were incurred in the interest of the marriage or family. The Marital Purpose Statement is signed for purpose of determining the sources available to satisfy the debt, not classify the debt. *Town Bank v. DAC Management Co.*, 2013 AP 2777.

**Continuous Trigger Theory** When a home suffered water damage whenever it rained from the time it was built, a suit filed within one year of discovering the damage was timely. Under the "continuous trigger theory", continuous or repeated exposure to substantially the same condition is considered one occurrence for the purpose of the statute of limitations.

*Strauss v. Chubb Indemnity Ins. Co.*, 13-2580 (US District Court, ED WI)

## CRIMINAL

**No Expungement of Forfeitures** The language of the expungement statute, §973.015, unambiguously demonstrates it does not apply to civil forfeiture violations. Therefore forfeitures may not be expunged. *Kenosha County v. Frett*, 2014 AP 6 (recommended for publication)

**Collateral Attack** DOT Information Bulletin 1409 said the DOT will not reduce the revocation or IID requirement of the currently charged OWI even if the use of a prior OWI prior is successfully collaterally attacked.

**Unrecorded Statement of Juvenile** The urgency of apprehending armed robbers potentially still in the community made taking a statement of a juvenile in the back of an ambulance on the way to a hospital without recording reasonable. No recording equipment was available and circumstances made waiting hours for recording equipment not feasible. *State v. Joel I.N.*, 2014 AP 610

**UA “Accompanied” Minor** An underage person may consume alcohol when “accompanied” by a parent.

*City of Monroe v. Koch*, 2014 AP 540, held the term “accompanied” to mean “individualized supervision and control of the underage drinker while the person is drinking”. It is not enough to merely be on the same premises as the child in another room.

**Probable Cause Obtained Illegally** A search warrant based on observations made by police when they trespassed on the defendant's property and peered into their windows must be suppressed. *State v. Popp*, 2013 AP 1916.

**Weaving Within Lane** In *City of Tomah v. Seward*, 2014 AP 735, the Court held that a vehicle weaving within its own lane may give rise to reasonable suspicion to stop the vehicle. It rejected a bright-line rule that weaving within a single lane by itself gives rise to reasonable suspicion, but also rejected the bright-line rule that weaving within a single lane must be “erratic, unsafe, or illegal to give rise to reasonable suspicion.” Based on totality of the circumstances, “prolonged weaving or other suspicious aspects of driving” may support a finding of reasonable suspicion. “[I]t is clear that driving need not be illegal in order to give rise to reasonable suspicion.”

**Sentence Credit** Although *State v. Floyd*, 232 Wis. 2d 767 “requires sentence credit for

confinement on charges that are dismissed and read in at sentencing”, there is no sentence credit for confinement on a separate case which was dismissed and not read in, even though the Court may consider dismissed charges in imposing a sentence. *State v. Harrell*, 2014 AP 198.

**One Party Consent by Minor** Whether a minor can give consent to police interception of a telephone conversation is a question of voluntariness based on the totality of the circumstances, considering the minor’s age, intelligence, maturity and similar factors. *State v. Turner*, 2013 AP 2101.

**Alcohol Retrograde Extrapolation** A challenge to an expert’s opinion on an alcohol retrograde extrapolation was not a dispute with the science, but with the assumptions the expert made. The challenge goes to the weight of evidence, not its admissibility. *State v. Giese*, 2013 AP 2009.

**Community Caretaker** *City of LaCrosse v. Ducharme*, 2014 AP 374, upheld a seizure under the community caretaker exception when an officer approached a vehicle parked in a rural setting at 2 AM with running lights and a turn signal illuminated, finding there was an objectively reasonable belief that a citizen was in need of assistance.

**Community Caretaker** An officer stopped a vehicle based on a call from mom that dad just picked up the kids minutes earlier and was driving while intoxicated. There is a good discussion of the community caretaker warrant exception. *State v. Marker*, 2014 AP 1122

**Stop Lamp Probable Cause** As long as a tail lamp is visible from 500 feet to the rear of the car it is in “good working order” even if one of the bulbs was unlit, according to the WI Supreme Court. The statutory requirement for tail lamps does not require every single bulb to be lit. *State v. Brown*, 2011 AP 2907.

**3 Years for OWI 7<sup>th</sup>** A court must impose a prison sentence with at least three-year minimum initial confinement for OWI 7<sup>th</sup> and above. Probation is not an option. *State v. Williams*, 2011 AP 2686.

**Victim Refuses In Camera Inspection** The only available remedy when a sexual assault victim refuses to disclose mental health records for an in camera review after the proper preliminary showing has been made is exclusion of the witness’s testimony. *State v. Lynch*, 2011 AP 2680.

**Withdrawal of Consent to Search** If valid consent to search is given, any withdrawal

of that consent must be unambiguous. Police are not under a duty to ask follow-up questions to clarify an ambiguous statement, such as “Do you have a warrant for that?” *State v. Wantland*, 2011 AP 3007

**MJ Odor Supports Warrantless Home Entry** The smell of marijuana, plus the occupant’s knowledge that the police were outside, constituted exigent circumstances to support the warrantless entry of a home through an open window. *State v. Cornelius*, 2014 AP 43

**MJ Odor Wallet Search** An odor of raw marijuana may give probable cause to search a vehicle, but not the billfold of the occupant. There was no reasonable likelihood that raw marijuana of sufficient quantity to produce the odor was located in the wallet. *State v. Eirich*, 2014 AP 1901

**MJ Odor P/C to Arrest** In *State v. Turman*, 2013 AP 1838, a vehicle was stopped for a tail light violation. Upon approaching the vehicle, the officer noted a strong odor of marijuana coming from the vehicle, which contained the driver and several passengers. No specific link was made between any particular occupant and the odor. The driver was searched, drugs were found in a pants pocket. Citing *State v. Mitchell*, 167 Wis. 2d 672, 684

(1992) the Court found the fact that there were several occupants in the vehicle is not fatal to a finding of probable cause to arrest (as contrasted with p/c to search) the defendant. Because the arrest was proper, even the arguably improper search preceding the arrest was upheld because it could have occurred after arrest as search incident to arrest.

**Invocation of Right to Silence** A defendant’s statement “Well then take me to my cell. Why waste your time?” is not an unequivocal invocation of the right to remain silent sufficient to require new *Miranda* warnings. *State v. Cummings*, 2011 AP 1653.

**Right to Public Trial** A defendant’s failure to object to a judge’s decision to close the courtroom forfeits the right to public trial if the defendant is aware that the judge is excluding the public. The right to public trial is not a structural error and does not mandate a waiver analysis. *State v. Pinno*, 2011 AP 2424.

**Officer Window Knock** An officer’s knock on a car window does not constitute a sufficient show of authority to give rise to a belief in a reasonable person that the person is not free to leave. Therefore the officer did not need reasonable suspicion to knock on the car window. *County of Grant v. Vogt*, 2012 AP 1812.

**Auto Consent Search** If a driver gives police consent to search an auto without limiting the scope, they may search everything in the auto, including a passenger's briefcase. Any withdrawal of that consent by the passenger must be clear and unequivocal. "Got a warrant for that?" was not unambiguous.

## FAMILY

**Required Return to School District** "Based on the unique facts of this case" a court could order a parent to reside in a particular school district as a condition of retaining primary placement. *Groh*, 110 Wis.2d at 125, held a court cannot order a custodial parent to live in a designated part of the state. *Derleth*, 352 Wis.2d 51 said a court may not prospectively order a parent not move more than 45 miles from marital home. However this case was a review of a prior approval of an out of state move based on certain facts which never came to fruition. Further, the out of state school district had a waiting list for autistic children. *Shulka v. Sikraji*, 2013 AP 2080.

**Domestic Abuse** In *State v. Bandy*, 2014 AP 1055, the Court rejected the defendant's argument that violation of a domestic abuse restraining order is not an "act of domestic

abuse" allowing longer probation under §973.09(2).

**Institutions as Harassment Petitioners** A Harassment Injunction may be issued to protect an institution as well as a natural person. *Board of Regents v. Decker*, 2011 AP 2902.

**No Second TRO Extension** A Harassment Temporary Restraining Order may be extended once for 14 days, but not twice. A court loses jurisdiction after the first extension expires, even if the final hearing is ultimately held within the 14 day period permitted by statute. *Hill v. D.C.*, 2013 AP 1844.

## MUNICIPAL

**72 hours for Ch 51 P/C Hearing Jurisdictional** A court loses competency to proceed when a mental health probable cause hearing is not held within 72 hours of initial detention under §51.15. *In re Steven R.C.*, 2014 AP 1032.

## REAL ESTATE

**Right of First Refusal** A Right of First Refusal is not indefinite in term. When the ROFR holder allowed a third party to buy the property, its ROFR was extinguished. *MS Real Estate Holdings v. Fox*, 2013 AP 679.

**Subjective Intent and Adverse Possession** Some adverse

possession cases "broadly pronounce that the subjective intent of parties is irrelevant. At the same time, and seemingly inconsistently, the adverse possession statute, WIS. STAT. § 893.25(2)(a), requires occupation under claim of title, and several cases, at least superficially, indicate that subjective intent does matter." *Wilcox v. Estate of Ralph Hines*, 2012 AP 1869, discusses this apparent inconsistency and holds that a possessor's subjective intent to claim title (e.g. requests for permission to use the property) may be relevant to rebut the presumption of hostility that arises when all other elements of adverse possession are satisfied.

### Legal Description

**Interpretation** The Statute of Frauds does not require a legal description, only a writing describing the property to a reasonable certainty- facts and circumstances from which the court can with reasonable certainty determine the land which is to be conveyed. The controlling principle is the intention of the parties. If the language is unambiguous, the inquiry ends. If the language is ambiguous, then the parties may introduce other evidence to demonstrate the intent behind the language. *Prezioso v. Aerts*, 2013 AP 2762.

**Time Lapse Bars Recorded Easement** Actions to enforce

easements set forth in any recorded instrument are barred unless the underlying instrument was recorded within the applicable statute of limitations period. § 893.33(6). When that sixty-year period from the last recording of the easement expired, the easement became unenforceable under Wisconsin law against any subsequent purchaser, regardless of whether the purchaser had actual notice of the easement. This case is remanded to consider whether a prescriptive easement has arisen. *TJ Auto LLC v. Mr. Twist Holdings LLC*, 2013 AP 2119.

**Commission Earned Upon Signed Offer** A sale is not a prerequisite to a broker earning a commission. If the seller entered into an enforceable contract with the buyer, a commission is owed even if the sale does not close. *Ash Park LLC v. Alexander & Bishop Ltd.*, 2013 AP 1532.

warranty is offered as to accuracy.

Jaime Duvall, Editor

---

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