

TRI-COUNTY BAR

Buffalo, Jackson, Pepin & Trempealeau

Vol. 15, N^o2

Spring-Summer, 2010

TRICOUNTY BAR NEWS

What is TCB President Mark Skolos's birthday? Hmmm, maybe we can tell from this horoscope.

Aries

Your life will continue the way it is. Forever.

Taurus

You will learn the value of silence in those who disapprove of you.

Gemini

Your explanation to the cop will be a success. Temporarily.

Cancer

You will suddenly, mercifully, pass away during an all day divorce hearing.

Leo

Ignoring the advice of friends, you end up with many wooden nickels.

Virgo

Tragedy strikes when you tell your wife you prefer her sister.

Libra

You will meet a tall, dark Aquarius and fall in love. Gender unknown.

Scorpio

A combination of religion and everyday low prices will change your life.

Sagittarius

Your mother's mind reverts and she will come over, wanting to change and bathe you.

Capricorn

Your life is becoming boring, particularly for the people following you.

Aquarius

Everyone will talk about your decision to wear such a revealing swimsuit on the boat trip.

Pisces

You come to the TriCounty Bar Summer Meeting, August 26-28, and none of these things happen.

For the rest of us, we know the future. It starts at cocktail time, Thursday night, August 26, on Deer Island.

All are invited to get a running start with the boat trip upriver, leaving Alma Thursday at 1pm from the Alma Marina. We will have some lunch on the boat, but bring stuff as you wish. If you are running late, call 715-495-3915. For those wanting to have their cars in Pepin, meet at the Pickle Factory by 11:30 or so.



Canoeing on Friday, yes.

Organized yet, no

With the high water, we have several extra options. Perhaps Beef Slough, a side channel off the Chippewa, or the Rush River from STH 10 down to STH 35.

Friday golf will be played at the Lake Pepin Golf Course in Lake City this year. The format is the same as the last few years, a 4 person scramble. We will have prizes for various different sub events and for the winners. Teams will be determined by lot. The cost for golf is \$20 per person and includes a cart (1/2 cart per person). Tee times begin about 10:00.

Tee times are set aside from 12:30 to 1:00 pm @ Walnut Grove, Cochrane by Mike Chambers. No need to call, whoever shows, shows. (I actually copied this message from an email sent by Mike Chambers. Can you believe he knew where the @ symbol was on the keyboard? Or perhaps he is using Dean Martin's Slurring Voice Recognition software.)

NEW FACES

Kris Karmann is expecting her third child. Another Pronschinske

in the world. But she has to get to work to catch Associate Member Melissa Peterson, Hager City, who delivered her 5th child in July. The TCB Rules Committee needs to decide if these are valid entries into our historic summer meeting award contest.

Joe Boles, the new Pierce County Judge, will be coming to the summer meeting. I am putting this note in here and then sending him a copy of the newsletter so that he doesn't have a choice. Many of you will remember Joe from his River Falls practice with Rodli, Besker, Boles, & Krueger. But don't let that keep you away.

Haley Huiting, Cochrane, is starting up her solo practice. We have seen her in court in an increasing number of PD and Court appointments. She specializes in the "Not the sharpest knife in the drawer, but not a crook" clients. Haley says the word "Objection" in a particular way that is just a little bit nasty. She occasionally appears in Court as her dark alter ego, The Goddess of Destruction. "Bring it on", she told DA Tom Clark, "We don't need no frickin' Motions. I'm taking you down with my Turnbuckle Verdictbreaker move. The jury will know it is fake, but I make them want to believe it is real."

Just like this part of the newsletter.

Caution. You are about to leave the TCB Twilight Zone and

reenter real life. Brace for impact.

CIVIL

DEATH OF PARTY TO CONTRACT

A contract for the performance of personal service may not be enforced after the party's death, discharging the estate of its applicable duties under the frustration of purpose doctrine. *Ryan v. Estate of Sheppard*, 2009 AP 1307.

RESIDENCY REQUIREMENT The discharge of an employee for violating a municipality's residency requirement was upheld. *Vasquez v. Milwaukee City Board of Fire and Police Commrs*, 2009 AP 2102.

CH. 51 RECORD RELEASE When a police department released a copy of a Statement of Emergency Detention to an individual's employer, it violated §51.30(4) and is liable, even if the department felt it desirable to warn the employer of possible danger. *Milwaukee Deputy Sheriff's Association v. City of Wauwatosa*, 2009 AP 1924.

"OCCURRENCE" UNDER CGL

The claim for faulty workmanship is not an "occurrence" under a commercial general liability (CGL) policy. *Mantz Automation Inc. v. Navigators Insurance Company*, 2009 AP 1681.



GOVERNMENTAL IMMUNITY Government contractors hired by a city to design and construct a street were "agents" of the city and entitled to government immunity against personal-injury claims. *Heuring v. A-1 Excavating Inc.*, 2009 AP 1354. A contractor is entitled to governmental immunity when (1) the governmental authority approved reasonably precise specifications; (2) the contractor's actions conformed to those specifications; and (3) the contractor warned the supervising governmental authority about the possible dangers associated with those specifications that were known to the contractor but not to the governmental officials.

BUGGING THE NEIGHBORS Audio recording a neighbor is not an invasion of privacy if the microphone is placed in one's own home. Recording sounds emanating from a neighboring property using a common recording device placed inside one's own window without trespass is not "bugging" the neighbors. Personally I think it would bug me. *Poston v. Burns*, 2009 AP 463

HIT AND RUN Even though a driver stopped at the scene and inquired about an injured person in the other vehicle, when the driver left without providing any information it met the definition of a hit and run for UM coverage. *Zarder v. Humana Ins.*, 2008 AP 919.

ARBITRATION CLAUSE Provision in a payday lender's documents requiring binding arbitration and waiving rights otherwise available under the WCA, such as the class action right, makes the contract substantively unconscionable. Similar arguments have been raised successfully in local actions involving credit card cases. *Cottonwood Financial v. Estes*, 2009 AP 760.

DUTY TO DEFEND Even though an insurance policy is an indemnity only excess umbrella policy that does not promise to provide a defense, the insurer has a duty to defend its insured. Even though the duty to indemnify does not attach until the underlying policies are exhausted, that does not mean the duty to defend requires exhaustion to attach. An insurer can have a duty to defend even under circumstances where there will ultimately be no indemnification under the policy. *Johnson Controls v. London Market*, 2007 AP 1868.

BUY SELL AGREEMENT Where a corporation's book value cannot be determined because the corporation's books do not accurately reflect the assets and liabilities, a buy sell agreement based on book value is unenforceable. *Ehlinger v. Hauser*, 2007 AP 477.

WCA VENUE In an action under the Wisconsin Consumer Act, an objection to venue is only lost by intentional waiver. It must be addressed whenever raised by the

defendant, not only when it is raised at the onset of the litigation. The time limits of §801.51 for raising venue objections generally applicable in civil actions do not apply in WCA cases. *Brunton v. Nuvel Credit Corp.*, 2007 AP 1253.

CRIMINAL LAW

VEHICLE SEARCH In a Wisconsin version of the federal *Gant* decision, the Court of Appeals held that an officer cannot search the interior of a vehicle incident to arrest after the driver has been secured and cannot access the vehicle, reversing the rule adopted in *Fry*. *State v. Bauer*, 2009 AP 1367.

GANT NOT RETROACTIVE *State v. Dearborn*, 2010 WI 84, held that the "good faith" exception precludes application of the exclusionary rule where police conduct a search in objectively reasonable reliance upon clear and settled Wisconsin precedent that is later deemed unconstitutional by the US Supreme Ct. This decision should resolve the concerns following the *Gant* decision. Remember *Gant* changed the interpretation of the old *Belton* rule that cars could be searched without reasonable suspicion, just because they were cars. *Gant* required the officer have reason to believe that evidence of the offense of arrest might be found in the vehicle.



GPS TRACKER IS SEARCH The Wisconsin Supreme Court assumed, without deciding, that placing a GPS tracking device on a car is a search within the meaning of the 4th Amendment, requiring a warrant. *State v. Sveum*, N^o 2008 AP 658.

CONSENT CURES ILLEGAL SEARCH Although the officer's entry was unlawful, the fruits of the subsequent search are admissible where the suspect voluntarily gave officers consent to search and not merely in acquiescence to police authority. *State v. Artic*, N^o 2008 AP 880.

VENUE JURY INSTRUCTION Although venue is not an element of the crime, it must be proved beyond a reasonable doubt. A defendant need not challenge venue before trial; instead he may put the state to its proof and request a venue jury instruction. *State v. Schultz*, N^o 2009 AP 1434.

VACATE DNA SURCHARGE A motion to vacate a DNA surcharge for failure of the Court to make the required case specific findings must be made within 90 days of sentencing or within the time limits for direct appeal. The 2008 *Cherry* decision is not a "new factor" for sentence modification purposes. *State v. Singleton*, 2009 AP 2089.

RIGHT TO SELF REPRESENTATION Where the defendant did not validly waive his right to an attorney, a court could not violate

a defendant's right to represent himself by not allowing him to proceed without an attorney. *State v. Imani*, 2008 AP 1521.

DV FIREARM PROHIBITION

UPHELD The Seventh Circuit has upheld the constitutionality of the firearm possession prohibition for persons convicted of misdemeanor crimes of domestic violence. *US v. Skoien*, N^o 08-3770

PROFILE EVIDENCE The charge of exposing a child to harmful materials does not require proof of sexual interest in children or likelihood to assault or molest children for pleasure. Therefore psychological profile evidence proffered by the defense that the defendant lacked such characteristics is not relevant and was properly excluded. *State v. Gonzales*, 2009 AP 1249.

RIGHT TO COUNSEL OF CHOICE

An indigent defendant does not have the right to counsel of choice. The Sixth Amendment guarantees effect of counsel, but not "a friendly and happy attorney-client relationship". *State v. Jones*, 2008 AP 2342.

SENTENCE CREDIT Where a defendant was in custody in another state in connection with the course of conduct for what he is sentenced in Wisconsin, he is entitled to sentence credit. *State v. Carter*, 2006 AP 1811.

EXPUNGEMENT In an interesting decision, *State v. Melody P.M.*,

2009 AP 2994, held that forfeiture convictions may be expunged, contrary to the current position of the CCAP hitlers. This case cannot be cited, even for persuasive effect, because it is unreported and a per curiam decision. I like the decision and I hope its logic is adopted, but I don't think it can be relied on yet. There may be several big issues. For example the expungement statute is found in Chapter 973, which applies only to criminal cases. See for example Sec 967.01. Generally forfeitures are governed by Ch. 778, or in municipal court by Ch 800. However the court system has grafted some due process rights from the criminal procedure into forfeiture actions. That was not the basis of the decision here however. Any other thoughts?

SENTENCE CREDIT A defendant is entitled to sentence credit for time spent in jail on a read in charge from another county. *State v. Hildebrand*, 2009 AP 880.

BLOOD DRAW IN OTHER COUNTY An officer may request blood as evidence for a violation occurring in the officer's jurisdiction, even if the request is made in a county outside the officer's jurisdiction. *State v. Nelson*, 2009 AP 818

MOTION SPECIFICITY To get an evidentiary hearing challenging

probable cause to arrest, a defendant must allege case specific facts which would entitle relief. A form motion will not suffice. *State v. Rice*, 2009 AP 1162. Yet the State has the burden of proof in 4th amendment cases and the State has the burden to prove probable cause to support a warrantless arrest. So, you figure it out.

DEPORTATION WARNING

Criminal defense attorneys must inform non-citizens about the risk of deportation when taking a plea deal. The US Supreme Court held such notification is a constitutional requirement for effective assistance of counsel. *Padilla v. Kentucky*, 559 US ___, N^o 08-651.

DEPORTATION WARNING The deportation warning must be given at the plea hearing, even if it was given earlier at the Arraignment. *State v. Vang*, 2009 AP 2162.

CELL PHONE SEARCH Failure of the state to preserve exculpatory voice mail messages on a cell phone in its possession justifies dismissal, even when the messages could have been accessed by the defense. It was reasonable for the defense to believe the State would preserve it. *State v. Huggett*, 2009 AP 1684

COMPUTER SEARCH A defendant's consent to search his apartment and to take away a computer was broad enough to



allow the detectives to search the hard drive of the computer for pornography. But this is a fact based consent exception to the general rule that a separate warrant is required to search a computer or cell phone's content. *State v. Ramage*, 2009 AP 784.

COUNTING PENDING OWIs When a defendant had two countable OWI priors, and one pending, on the date of arrest on the new OWI, the subsequent conviction on the pending charge cannot be a basis to amend the new charge to a 4th PAC with a .02-.079 range test. For 4th and subsequent PAC charges, the blood alcohol is an element because of the lower .02 limit. On the date of violation the defendant only had 2 priors, and so enjoyed the .08 limit, no matter what subsequently happened on the pending case. *State v. Sowatzke*, 2009 AP 1990.

FAMILY

GOODWILL AS PROPERTY OR INCOME All salable goodwill, both corporate and professional, is included as a divisible asset, but not excluded from income when considering maintenance, even if future earnings are intertwined with part of the divisible goodwill. Double counting discussed. *McReath v. McReath*, 2009 AP 639.

CHILD SUPPORT A Court cannot reduce child support for the amount paid for the payee's child from a previous marriage,

although it could be considered for maintenance and property division purposes. *Ladwig v. Ladwig*, 2009 AP 1202.

ATTY FEES IN CONTEMPT In a family law contempt action, a losing party is not entitled to a reduction in attorney fees assessed against them for time spent by the winning party in unsuccessful claims if the winning party achieved "substantial success" and the unsuccessful claims were brought and pursued in good faith. *Rand v. Rand*, 2009 AP 2241.

SAME SEX "PARENT" A former same-sex partner of a child's parent is not a "parent" for the purpose of guardianship. *Wendy M. v. Helen E.K.*, 2009 AP 720.

CHIPS DISPOSITIONAL ORDER A CHIPS dispositional order need not separately list each individual service the department is to provide as long as the department is ordered to provide "supervision, "services" and "case management", reversing a prior Court of Appeal's decision which held otherwise and attracted much attention. *Sheboygan County DHHS v. Tanya M.B.*, 2008 AP 3065.

REAL ESTATE

ADVERSE POSSESSION The doctrine of acquiescence is a supplement to adverse

possession. Where neighbors are innocently mistaken about the boundaries, the adverse intent element of adverse possession is not required to show title through the equitable doctrine of acquiescence. In *Northrup v. Opperman*, 2009 AP 1559, the court held this doctrine applies even when the deed description is unambiguous. Extrinsic evidence is admissible when a party claims title through acquiescence despite an unambiguous description.

ADVERSE POSSESSION

Trespassers who hunted on another's land for more than 20 years did not acquire the land by adverse possession. A landowner with title is not required to prove efforts to keep the trespassers out, to post the land or to patrol it. The sound of gunshots, the presence of year-round portable deer stands and cutting down trees established the existence of trespassers, but not adverse possessors. *Steuck v. Easley*, 2009 AP 757.

Despite the fact that it was released just two days after the *Northrup* decision, *Steuck* discussed prior caselaw and raised the question of whether the doctrine of acquiescence has been subsumed into the law of adverse possession and no longer stands as a separate doctrine. *Steuck* suggested that mistake can satisfy the "hostile" intent of adverse possession, eliminating the need for the separate doctrine of acquiescence. However because the Court decided the necessary



showing was not made under either doctrine, these comments appear to be dicta rather than holding.

PAINTING THE BASEMENT AS MISREPRESENTATION A homeowner can sue the seller for misrepresentation because the seller painted the basement if the buyer can show it was done to hide evidence that the basement leaked. *Novell v. Migliaccio*, 2009 AP 1576.

RACE NOTICE When closing documents clearly said that a mortgage was a second mortgage, it did not have priority over a first mortgage even if recorded first in time. *First Bank of Highland Park v. Summer Haven LLC*, 2009 AP 669 and 1878.

TENANT NOT LIABLE FOR DAMAGE A tenant is not liable for fire damage caused in part by the tenants in the absence of tenant negligence or misuse, at least without an unambiguous lease clause so stating. *Maryland Arms Limited Partnership v. Connell*, 2008 AP 1700.

DEFICIENCY

WAIVER/GUARANTOR A lender foreclosing under a short redemption period obtained by waiving the right to obtain a deficiency against the homeowner does not forfeit the right to obtain a judgment against a guarantor of payment. *Bank Mutual v. S.J. Boyer*, 2008 AP 912.

ENLARGING EASEMENTS A right of way appurtenant to a particular lot cannot be used as a mode of access to another lot to which it is not appurtenant even though there is no resulting additional burden. Such use would “enlarge and extend” the easement. *Grygiel v. Monches Fish & Game Club*, N^o 2008 AP 2028.

EASEMENTS ARE TRANSFERRABLE Unless a conveyance states otherwise, an easement is transferable, citing §706.10(3). *Borek Cranberry Marsh v. Jackson County*, N^o 2008 AP 1144.

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Jaime Duvall, Editor.

