

# TRI-COUNTY BAR

Buffalo, Jackson, Pepin & Trempealeau

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## TRICOUNTY BAR NEWS

A 2006 study found that the average American walks about 900 miles a year. Another study found that Americans drink an average of 22 gallons of beer a year. That means, on average, Americans get about 41 miles per gallon.

That penetrating analysis reminds us that the TriCounty Bar Summer meeting will start on Thursday, August 16. Camp arrangements as usual. Women and John Damon in the nice cabin.

This year we have a 43 foot houseboat for the Thursday boat trip. The boat was once magnificent, now aging but still functioning though it sets no speed records. Just like us. So anyone who previously blanched at Jim Ritland at 4500 rpm and no life jacket might enjoy seeing the great Mississippi from a lawn chair with a drink at 8 mph. Meet at the Alma Marina by 1:00 pm (TCB time) Thursday. Usual arrangements for car shuttles. Call Jaime Duvall with questions.

Friday canoe trip proposal-Meridean to Durand?

Tom Lister gave Eric Stutz his choice for the course to be played this year and he has selected "The Legend" a Hale Irwin beauty near Lake City. Unfortunately a quick internet check shows that "The Legend" is actually located near Bellaire, Michigan, although there is another one in Minnesota, but unfortunately the directions start out "Take I-35 north from Minneapolis to Cloquet ..". However without admitting that "Mistakes were made", Tom intimated that the poor sick guy was to blame and redefined the golf course of choice to "The Jewel" near Lake City. Any persons interested in golf and not otherwise confused, notify Tom of your interest. He needs a head count. (Maybe more than that too.)

## CIVIL PRACTICE

Judicial estoppel may be invoked where a position in the current litigation is clearly inconsistent with an earlier position in prior litigation, the facts at issue are the same in both cases, and the

parties to be estopped convinced the first court to adopt its position. This doctrine applied in the context of litigation involving a breach of confidentiality and noncompete provisions. *NII-JII Entertainment v. Troha*, 2006AP2204

While a person may have a residence in more than one place for insurance purposes, such as when time is split between two residences, an individual only "resides with" individuals who occupy the same dwelling at any given point in time. Because the plaintiff was injured during a time of the year when she did not "reside with" her parents, there was no coverage for her under the parents UIM policy. *Carlson v. Southern Owners Insurance Co.*, 2006AP2660.

When a prime contractor also acts as one of its own subcontractors, it must pay all other subs first before paying itself profit from labor and materials supplied. In this case a general contractor was prosecuted for theft by contractor for keeping \$36,000 while \$47,000 owed to other subcontractors were left unpaid. *State v. Keyes*, 2004AP1104



The Wisconsin Consumer Act requires a credit card company to provide a copy of each individual transaction that made up the debtor's closing balance upon the debtor's request. Failure to do so prevents judgment, rejecting application of the "account stated" theory. *Newgard v. Bank of America*, 2007 AP 82.

A pre-existing relationship between a buyer and a seller does not preclude application of the false advertising statute, §100.18. The question of whether the defendant was a "member of the public" is a question to be decided by the jury. *K & S Tool and Die v. Perfection Machinery Sales Inc.*, 2005 AP 2148.

An employee lost one hand in a work accident, but did not sustain wage loss for Worker's Compensation purposes at that time because the employer continued to employ him on one-handed duty. The employee was later terminated for cause and had difficulty finding reemployment because of the loss of his hand. He was awarded Worker's Compensation despite termination for cause because his difficulty in becoming reemployed was not simply due to his firing but also to the fact he now had one hand. *Emmpak Foods v. LIRC*, 2006 AP 729.

When funds are deposited into a joint account, donative intent is presumed. But when a fiduciary, such as an agent under a FPOA, without written authority to

withdraws funds does so, fraud is presumed regardless of whether funds are deposited before or after the execution of the POA. *Russ v. Russ*, 2005AP2492

The election of remedies doctrine does not bar recovery of damages even if rescission of contract is obtained in an earlier lawsuit. Second action not barred by first action because the theory of recovery for damages for past injury is consistent with the factual findings in the first action for rescission which looked to future injury. *Wickenhauser v. Lehtinen*, 2004AP2681

Evidence of amount paid to a medical service provider is not admissible in a personal injury action as evidence of reasonable value under the collateral source rule. Even if relevant, its prejudice outweighs probative value. *Leittinger v. Van Buren Management*, 2005 AP 2030

The trial court held that a vehicle exclusion in a homeowner's insurance policy precluded coverage for an ATV owned by an insured but operated by a different insured off the insured premises. The Court of Appeals said "if we were writing on a clean slate, we might agree with the circuit court and conclude that the policy does not provide coverage." But the Court held that Northwestern National Ins. v. Nemetz 135 Wis.2d 245, compels

the conclusion that the policy language is ambiguous, which is resolved in favor of coverage.

A customer purchased a vehicle from a dealer, who completed the title application including the security interest information, and mailed it to the DOT. The DOT received it but did not process it, responding with a letter requesting an additional \$15 for a "special plate issuance fee". The fee was eventually sent in, but meanwhile the customer filed bankruptcy. The court held the creditor had a perfected security interest when the DOT received the title application with the original check containing funds designated for a \$4.00 loan file fee, even though the processing was held up waiting for funds for other purposes. *University of Wisconsin Credit Union v. Middleton Motors*, 2006 AP 1971.

## CRIMINAL LAW

A defendant's right to a public trial was violated when the courthouse was locked at the end of the business day, but before the trial concluded. One possible alternative to an unlocked courthouse after hours might be a sign by the locked door informing of access through the Sheriff's Department. *State v. Varness*, 2006 AP 2535

Weaving within your own lane may not itself be sufficient probable cause to stop a vehicle because no law is violated. An officer must have additional facts and circumstances. However when the



driving lane is 24 feet wide, approximately twice as wide as a standard single lane, driving in a distinctive S pattern within that lane at night held under the facts to be reasonable suspicion to justify an investigative stop. *State v. Post*, 2006 AP 2778.

Consecutive indeterminate and determinate sentences should be treated as one continuous sentence, with the confinement periods served first, followed by continuous non-confinement parole and extended supervision. *State ex rel Thomas v. Schwarz*, 2005AP1487.

A warrantless entry into a private home while in hot pursuit is now probably limited to felony cases. In *State v. Sanders*, 2006 AP 2060, a defendant refused to provide identification and, despite a police order not to go into a house, ran into a house, creating probable cause for the misdemeanor offense of obstructing an officer. The police ran after him into the house and the court held such entry illegal without a warrant despite hot pursuit.

Recorded phone calls made from jail by law enforcement are admissible under the facts of *State v. Christiansen*, 2006 AP 1565.

But a one party consent recording, obtained without police involvement, is inadmissible evidence. In *State v. Duchow*, 2005 AP 2175, parents placed a voice activated recorder in a child's backpack because they feared he was being abused by the driver of

the boy's school bus. The resulting recording, while "not unlawful", was not one they obtained "under color of law" and therefore law enforcement officers were not permitted by §968.29(3) to disclose the tape's contents, even to the court. See the Family Law section for some further thoughts on the use of answering machine tapes in divorce actions.

Failure to check tip-ups while ice fishing for more than an hour violates the regulation against fishing with an unattended line. *State v. Westphal*, 2006 AP 1963.

The fact that a suspect was under arrest does not render his consent to search involuntary. The totality of the circumstances test applies and custody is only one factor to be considered in determining voluntariness. *State v. Hartwig*, 2006 AP 2804.

§343.305(1) requires information on the Informing the Accused form be read to a defendant. The court denied a challenge when the form was incorrectly filled out, but correctly read, to an OWI defendant. *In re the Refusal of Charles Wethern*, 2006 AP 2739.

## FAMILY LAW

Cessation of child support does not constitute a substantial change of circumstances justifying maintenance modification. It was anticipated at the time of divorce,

and child support is for support of the children, not the spouse. *Jantzen v. Jantzen*, 2006AP1690. But what if maintenance was calculated based on ability to pay after subtracting child support from net income and equalizing income? Address this in the Judgment at the time of divorce?

Is there an argument that an answering machine recording tape, or a voice mail message cannot be disclosed to third persons, including the court or law enforcement as part of an investigation? (Think divorce or harrassment here.) §968.31 generally allows one party consent recordings for a person not acting under color of law. But §968.29 (3)(a) says information "intercepted in accordance with ss. 968.28 to 968.37" may disclose the contents of that communication or that derivative evidence only while giving testimony under oath. If so, would this rule also apply in civil cases? See §885.365: "Evidence obtained as the result of the use of voice recording equipment ... shall be totally inadmissible ... except as provided in ss. 968.28 to 968.37".

Before 2006, both Buffalo and Pepin Counties used Sandcastles as the approved provider for parenting education in divorce cases. In spring, 2006, the Better Beginnings program operated by the Buffalo County Extension office was approved for Buffalo County. That program has now been extended to Pepin County. Therefore Sandcastles



(Menomonie) and Better Beginnings (UWEX in either county) are approved options available for parenting education classes in Buffalo and Pepin County divorces. There are some differences. Better Beginnings is free (except for a small material cost), two sessions are required, and it is held at local courthouse. Sandcastles is fee based, held in Menomonie and one session only.

A court does not lose competence in a TPR case by failing to enter a written dispositional order within 10 days of the dispositional hearing. *Dane County Dept of Human Service v. Dyanne M.*, 2006 AP 2919.

## MUNICIPAL

§19.84(2), the open Meetings law, requires an agenda item contain sufficient detail to "reasonably apprise the members of the public". A statement of the general topic of a meeting may not be sufficient. A notice stating that the board would consider "employment/negotiations with District personnel" was held insufficient under the facts of that case for a board to approve a union contract. *State ex rel Buswell v. Tomah Area School District*, 2005AP2998.

Since a riparian owner holds qualified title to the center of a navigable stream, a land owner who owns both shores of a navigable stream owns the entire stream bed. Therefore a stream running through a property does not divide the property into two separate lots for

purposes of applying the zoning ordinance. *FAS, LLC v. Town of Bass Lake*, 2005AP1689.

A person under a chapter 51 was placed into a facility in another county. That commitment expired, but the individual remained in the second county and continued to receive services on a voluntary basis. It was held that the individual never established residence in the second County because his living in the second County after the commitment ended was not a voluntary choice but still related to that being the location of needed services. *Portage County v. Juneau County*, 2006 AP 2347.

## REAL ESTATE

A party seeking to amend a deed description must follow the procedures in §847.07 or seek reformation. A property description error may not be cured by filing an affidavit and rerecording the deed with the affidavit. *Smiljanic v. Niedermeyer*, 2006AP3083

Equity does not bar the filing of a strict land contract foreclosure during the pendency of a foreclosure action brought by a junior judgment lienholder. *Republic Bank of Chicago v. Lichosyt*, 2006AP1578

## MISCELLANEOUS

Dan Diehn reports that the Black River Falls police spotted a man in an alley at 3:00 am carrying two mannequin heads, with a third head cleverly concealed under his shirt. Not yet having developed reasonable suspicion, the police continued their observation and finally moved in when the man unzipped his pants and urinated from a second floor balcony to the alley below. No report of whether the mannequins averted their eyes. During the transport to jail the squad passed a life size nativity scene which had been vandalized. The defendant explained "They were talking shit to me". The officer explained that mannequins don't talk, to which the defendant replied "Well at least not any more". The defendant has since been released but the mannequins have been detained at Guantanamo Bay without charges.

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.

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