

TRI-COUNTY BAR

Buffalo, Jackson, Pepin & Trempealeau

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TRICOUNTY BAR NEWS

In the presidential debates leading up to the election, Candidate Mark Skolos promised reasonable and accessible legal services for everyone, if only every TCB member referred all their clients to his firm. After his successful election, everyone did, at least they referred the demanding, nonpaying ones. Swept into office were:

President: Mark Skolos
Vice President: Roger Hillestad
Secretary: Paul Millis
Treasurer: Nick Heike

At the business meeting it was decided to restrict access to the online past issues of this newsletter to TCB members only. Google searches of TCB members names were returning results that were less funny when read out of context. You have to be logged into WisBar to waste your time reading them now.

I took good notes of the real educational portion of the Winter meeting, the social hour, but I lost my bar napkin. All that remained were the following quotes from police reports from various

officers in the TCB jurisdiction.

“Got taken down by hairy Nike wearing dude that look like a prehistoric man. Must have been Saskatwehen. It smelled bad. Never seen a female Saskatwehen. (sic)” (Not sure if the defendant is referring to an alleged ape-like creature, or a province of Canada, but clearly alcohol was involved.)

“He was a contradiction built on an inconsistency.”

“He was as silent as a m_____ f_____.” (Not sure if it was a direct quote from the defendant, or the officer’s own personal description.)

Summer meeting dates have been confirmed for Thursday August 26 through Saturday, August 28.

Cabin Cleanup day is Friday, May 14, starting about 1 pm TCB time. For those of you that thought it was a week earlier and filled your schedule so you had an excuse not to come, too bad.



No excuse now, mark it down. Or send beer money.

My part of this newsletter started from my attempt to make notes of things I might want to remember later. To help skim through past issues to try to find something you remember reading, I am going to try putting a title to each case note.

CIVIL

SETTLEMENT MEANS NO FEE AWARD When a will contest results in a settlement, no party is entitled to attorney's fees. *Wolf v. Wolf*, 2009 AP 781.

“AND” MEANS “OR” While acknowledging the modern trend in statutory construction to give the words “and” and “or” their strict meanings, the court found Sec. 944.44 ambiguous and, looking at the legislative history, concluded that the legislature intended that the conjunctive “and” meant the disjunctive “or”. *State v. Freer*, 2008 AP 2233.

KEY EMPLOYEE FIDUCIARY DUTY

A key employee who is not an officer or director may still all a duty of loyalty actionable in

court. Key employees whose job responsibilities are of such a nature that they may be used to harm the employer owe a fiduciary duty to the employer. *InfoCorp, LLC v. Hunt*, 2007 AP 2887.

CONSTRUCTIVE DISCHARGE

Telling an employee that he will be fired if he doesn't resign is not a constructive discharge, assuming that grounds exist for termination. *Mercer v. City of Fond du Lac*, 2009 AP 505

PHOTOCOPIES AS TAXABLE COST

A prevailing party can recover internal photocopying expenses as a cost under Sec. 814.04(2). There is no requirement that photocopy costs must be paid out to a third party before they can be claimed. *Mercer v. City of Fond du Lac*, 2009 AP 505

ACCORD AND SATISFACTION

Generally, if the amount due is in dispute and the debtor sends a check for less than the amount claimed and clearly expresses that it is intended as a settlement in full, the creditor's cashing of the check constitutes an acceptance of the offer, and thus, an accord and satisfaction. But when a creditor retains a check that states it is intended as payment in full and does not cash it, there may or may not be an accord and satisfaction, depending on the length of time the check is held and the other circumstances in the particular case. Factors discussed in *Wagner v. Foremost Buildings*, 2009 AP 650.

5TH AMENDMENT IN CIVIL CASE A party's continuous invocation of the Fifth Amendment privilege against self-incrimination in a civil action may be prohibited from later waiving the privilege and seeking to testify in the middle of trial when all discovery and preparation for trial is complete and the other party's theory of the case has been established. The trial court should balance the prejudice to both parties, including whether the timing of the request to waive the privilege undermines the purpose of discovery. *Johnson and Sons v. Morris*, 2008 AP 1647. Might the same argument be presented as to a witness in a criminal case? That answer might be driven by differences in civil and criminal discovery statutes.

ILLUSORY CONTRACT What is the difference between an indefinite contract term and an illusory contract term such as may make a contract unenforceable? In a real estate purchase agreement the clause "offer is subject to sellers obtaining a home of their choice on or before" a certain date was held to be not illusory by considering extrinsic information. *Vohs v. Donovan*, 2009 AP 507.

DOG BITE LIABILITY The owner of a house is strictly liable for injuries caused by the bite of her roommate's dog, as a "keeper" of the dog. *Pawlowski v. American Family Insurance*, 2007 AP 2651.

ACCOUNT NOT BUSINESS RECORD OF DEBT COLLECTOR

In an action to recover credit card debt, the testimony that the account statements were accurate made by a representative of the debt collector who purchased the account is inadmissible hearsay. The debt collector had no personal knowledge of the credit card company's business, therefore the records were not the debt collector's regularly kept business records. *Palisades Collection LLC v. Kalal*, 2009 AP 482.

WHO IS A PREVAILING PARTY IN CONSUMER ACT CASE

When a Wisconsin Consumer Act case is dismissed without prejudice for a procedural defect (failure to attach copies of documents to the Complaint), is the consumer entitled to actual attorney fees as a prevailing party? Surprisingly, there is caselaw on both sides, one case holding the consumer has not prevailed because the WCA pleading requirements create no "claims or defenses" so the consumer has not prevailed. On the other side, there is a case holding dismissal is a "significant benefit in litigation" entitling the consumer to actual attorney fees. Read the one judge Court of Appeals decision in *Auto Cash Title Loans of Wisconsin v.*



Webster, N^o 2009 AP 676.

LONG ARM JURISDICTION

Minimal contacts for the purpose of personal jurisdiction are determined at the time the suit is filed, not whether there were substantial contacts with this state at an earlier point in time. *FL Hunts, LLC v. Field Logic Inc.*, 2008 AP 2506.

INDEMNIFICATION AGREEMENT-DUTY TO DEFEND A

subcontractor's duty to defend arising from an indemnification agreement with the general contractor does not include the duty to defend claims alleging negligence of the general contractor's employees, even if those claims arose during the subcontractor's work. *Mathy Construction v. West Bend Mutual Ins. et al*, 2008 AP 1326.

CRIMINAL LAW

EMERGENCY EXCEPTION A warrantless entry into a home is justified under the emergency exception if, based on objective facts, the officer believed there was an emergency present, even if it turns out later that there was no emergency. *Michigan v. Fisher*, 09-91, 558 US ____ (12-7-09)

BATTERY TO OFFICER AFTER ILLEGAL ENTRY A defendant can be convicted of battery to a law enforcement officer, even if the officer entered the home in violation of the Fourth Amendment. An officer need not be acting "lawfully" in

order for the officer's actions to be in the officer's "official capacity". Rather an officer only need be acting within his jurisdiction and not on some "personal frolic" unrelated to law enforcement responsibilities. *State v. Hayward*, 2009 AP 30.

SHACKLE USE DURING TRIAL The discretion of whether a defendant should wear a security device during trial must be made by the court, not law enforcement. The court cannot rely primarily upon law enforcement department procedures, but must consider the risk a particular defendant poses for violence or escape. *State v. Avidan*, 2009 AP 3060.

DV AND FIREARM POSSESSION

The US Seventh Circuit vacated a man's conviction for possession of a firearm after being convicted of a misdemeanor crime of domestic violence. It remanded the case for further findings as to whether the government has shown the law is reasonably tailored to serve an important government objective in order to survive intermediate scrutiny under the Second Amendment. *US v. Skoien*, No. 08-3770.

NONTESTIFYING DEFENDANT

COLLOQUY When a defendant does not testify, the court is supposed to conduct a colloquy to determine whether that choice is knowing and voluntary. If the

court does not do so during the trial, the state can still try to prove the decision as knowing and voluntary in a postconviction motion hearing. *State v. Garcia*, 2009 AP 516.

PRESCRIPTION BY FRAUD

Obtaining a prescription by fraud, which for certain unscheduled drugs is a misdemeanor, but the same facts may be charged as a felony forgery. *State v. Fortun*, 2009 AP 1172.

MI OWI COUNTS AS WI PRIOR A prior conviction in Michigan for "operating while visibly impaired" counts as a prior offense for Wisconsin OWI purposes. *State v. Puchacz*, 2009 AP 840.

MIRANDA AND SUCCESSIVE

INTERROGATION Being represented by an attorney is no longer construed as an automatic invocation of the right to an attorney. So says the WI Court of Appeals, overruling prior caselaw to the contrary by relying on a recent US Supreme Court case. The Court of Appeals declined to hold that the Wisconsin Constitution affords any greater protection than the federal constitution. Even if the defendant is represented, the police may validly give Miranda warnings to a defendant in custody and the defendant can waive Miranda rights and choose to speak to the police without the attorney being present or consulted. Even if that satisfies the 5th Amendment, what happened to the 6th Amendment?



State v. Forbush, 2008 AP 3007.

RECORDED TESTIMONY USE IN CLOSING It does not violate due process to play a witness's recorded testimony during closing argument, although its use is in the court's discretion. The comparison of the use of this type of evidence in closing to reading transcripts during closing is discussed. *State v. Martinez*, 2009 AP 83.

BOOKING EXCEPTION TO MIRANDA RULE Statements made during an ongoing routine booking procedure do not require Miranda warnings, including an admission by the defendant of his real name and a volunteered statement that he was wanted for armed robbery. *State v. Pugh*, 2009 AP 1313.

SENTENCE CREDIT A defendant was held in another state on a Wisconsin warrant, and also on a probation hold originating in the other state. Because the other state's probation revocation proceedings were not complete, the defendant should get sentence credit for the entire period of detention in the other state against the Wisconsin sentence. Until the other state actually acted on whether to grant credit there, the question of double credit is not ripe. The Wisconsin court is the only court the issue of credit is before. Should the other state not complete its revocation proceedings, or deny credit, the defendant would not receive

credit where credit is due. *State v. Brown*, 2009 AP 896.

WARRANTLESS SEARCH- ANSWER CELL PHONE Under the exigent circumstances doctrine, when the officer had an independent reason to believe that a call may relate to illegal drug dealing, the officer could answer a suspect's cell phone without a warrant. However a warrant was required to search the image gallery contained on the cell phone. *State v. Jermichael Carroll*, 2007 AP 1378.

PBT EXCLUSION PROPER A defendant is not deprived his right to present a defense by the court's exclusion of PBT evidence in an OWI trial. *State v. Richard Fischer*, 2007 AP 1898.

DYING DECLARATION IS CONFRONTATION EXCEPTION The dying declaration exception to the hearsay rule does not violate the confrontation clause. There is no *Crawford* violation. *State v. Beauchamp*, 2009 AP 806.

FAMILY LAW

GRANDPARENT VISITATION Where one parent is deceased, the family is not intact and a court can order grandparent visitation. The death of a parent is the triggering event that creates a compelling state interest to

protect a child's best interest. The inquiry focuses on the best interest of the child, with a rebuttable presumption in favor of the parent's decision regarding visitation. This is different from the *Barstad* standard which applies when both parents are alive and does not focus on the best interests of the child. *Rick v. Opichka*, 2009 AP 40.

GAL CAN'T MEET WARD A guardian ad litem cannot meet with a represented ward unless the ward's attorney is also present or consents. *In re the Guardianship of Jennifer M.*, 2008 AP 1985.

REAL ESTATE

FORECLOSURE- JUNIOR LIENHOLDER What is the remedy for a second mortgage holder who is omitted as a party defendant in a foreclosure of the first mortgage of a property sold at sheriff's sale to an innocent third party? When undisputed evidence showed that the value of the property was less than the first mortgage amount, the second mortgage holder has suffered no damage because it was not named. However the Court gave the second mortgage holder the right to acquire the property at the then current market value if it remains interested in owning it. *Federal National Mortgage Association v. Lewis*, 2008 AP 2.

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.

MISCELLANEOUS

From the Buffalo County Historic Society. Sorry for the poor quality. The original was pretty yellowed.

Roger Hartman, Jaime Duvall's predecessor in practice, took over Jim Gleason's Alma office when Jim died in 1959, for the price of probating Jim's estate. Of course the physical assets consisted of a couple desks and a manual typewriter.

This is a story I have always heard told about how Jim lost his pants during a closing argument to a jury. Yes, sometimes belt and suspenders is a good idea.

I have a picture of a pear shaped figure, pants slipping lower with each cough only to drop around his ankles to reveal his long johns, penguin marching into the vacant jury room to put things right. He returned to complete his closing. Did he win the case?

Northwest News

Buffalo County Trial Lawyer Loses Pants

Leader & Telegram News

ALMA — Legal circles in Buffalo County are chuckling over the catastrophe which befell defense attorney James J. Gleason, Alma, Thursday when his pants fell beneath his knees while he pleaded with a jury.

Gleason, former city attorney here and a veteran of 40 years before the bar, wryly notes it was the first time anything like that had ever happened to him. "AND I HOPE ITS the last," he said Friday. "I've heard of lots of lawyers losing their pants in a lawsuit but its the first time it ever happened to me. It was very embarrassing."

Gleason was summing up the defense for Herman Oseau, Rt. 3, Mondovi, before the jury consisting of six men and six women when he was taken with a coughing spell. Then the pants fell.

He reached down, clutched them tightly to his waist and ducked into the jury room a few steps away to tighten up the belt.

In the courtroom there was dead silence as the principals in the case, attorneys, court officials, Judge G. L. Pattison, and some 20 spectators waited for the case to resume.

"If anyone at all had laughed it would have brought the roof down right then and there," one witness said later.

Gleason resumed his pleading a moment later after apologizing to the jury.

The assault and battery case against Gleason's client was brought by William Slifer, Rt. 3, Mondovi. The men live on adjoining farms in the Town of Gilmanston.

The jury awarded Slifer \$1,000 damages broken down as follows: medical expense, \$21; loss of time and wages, \$59; pain and suffering, \$420; and punitive damages of \$500.

AMONG THE witnesses called to the stand were Slifer, Dr. Eugene Meyers, Mondovi, Wilma Slifer, Ronald Rindahl, Rt. 3, Mondovi, a hired man on the Slifer farm; Frank Krampeter, Mondovi, Sheriff Glen Davis, Herman Oseau, and Emmory Davis, both of Mondovi.

Harold Zittle, Mondovi, was foreman of the jury, other members of which were: John Zehr, Elmer Schroeder, Mrs. James Kirchner, all of Fountain City; Raymond Fedie, Mrs. Jarvin Lee, both of Durand; Russell Reinhardt, Frank Weisenbeck, both of Nelson; Mrs. Joe Johnson, Mondovi; Mrs. John Hillig, Cochrane; Mrs. Joe Boland, Arcadia, and Mrs. Norman Comero, Independence.

