TRI-COUNTY BAR

Buffalo, Jackson, Pepin & Trempealeau

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TRICOUNTY BAR NEWS

For those of you who missed January's winter meeting, and for who attended but have already forgotten the events thereof, the following officers were elected:

President: Mark Franklin
Vice President: Mark Skolos
Secretary: Paul Millis
Treasurer: Nick Heike

The Summer Meeting is scheduled for the Pattison Radisson and Lake Pepin YMCA on August 20th -22nd. You are encouraged to mark your calendars now for this event.

A new sign in front of the Seifert and Schultz office in Mondovi reads: "Zoetic Massage, By Appointment". Bob Hagness called Nick Heike to congratulate him on a new way to meet women and to ask if his firm is bundling legal advice with massages, or the other way around. Nick maintained he isn't at the office when masseuse is providing her somewhat mysticism-related, "state of grace" services, but then having recently announced his engagement, Nick is unlikely to admit it either.

Public documents under seal appears as an exception to the hearsay rule because they carry an indicia of reliability. A sealed, official document from the Governments Accountability Board should make even your Evidence professor from law school feel warm and fuzzy, but not Tom Clark. He received a Certificate of Election certifying that James Duvall was elected DA in Buffalo County in November, 2008. At least they spelled my name right.

The TriCounty Bar received an award of Special Merit for the Teen Court project in Buffalo and Pepin Counties. The award was presented at the Local Bar Leaders Conference on April 24. Hearing of the projects receiving recognition was a good reminder of how we each can be leaders and can really make a difference. While we each contribute individually in our communities, doing so in a way related to the TCB strengthens our position in the community and uses our unique talents and position to serve as a moving force for good.

CIVIL

In a personal injury case involving whether a car accident aggravated a preexisting condition, the Court's exclusion of the plaintiff's expert on causation because he specialized in physical medicine and rehabilitation instead of orthopedics was an abuse of discretion. This unpublished case is a reasonable discussion of who may be an expert. *Recely v. Dillon,* 2008 AP 539.

There is no UM coverage for an insured resident of the household operating a parent's care without the parent's permission. *Zillmer v. American Family Mutual*, 2007 AP 1889.

An on-premises landlord is liable if his tenant's dog bites someone, even if the landlord has no ownership or control of the dog. Because the landlord provided the dog and the dogs owner with both shelter and protection on an ongoing basis, the landlord was a "keeper" of the dog under the strict liability statute, Sec. 174.02. *Pawlowski v. American Family*

Insurance, 2007 AP 2651.

Employers must communicate at least one reason to employees why a FMLA leave request was denied within five business days, effective January 16, 2009. 29 CFR 825.301. A sample form may be found at http://www.dol.gov/esa/whd/forms/wh-381.pdf

Insurance companies may hold up the liability payments until they are assured that Medicare's interest have been protected under the new PL 110-173, effective July, 2009. Insurance carriers last report certain information about liability claimants who are entitled to Medicare. This may result in more paperwork and possible delay in claim payments.

Independent contractors paid by the hour are employees under the unemployment insurance laws. True independent contractors are required to be paid by commission, competitive bid or per job. *Gilbert v. LIRC*, 2006 AP 2694.

Adding additional collection fees by debt collectors to debts they purchase violated both the FDCPA and the WCA. In order to collect a fee, a debt collector must show the fee is either authorized by contract or by applicable state law. Adding a 15 percent collection fee which is not shown to reflect actual costs is not authorized under law. The original contract did not authorize the collection fees. *Seeger v. AFNI Inc.*, 07-4083 (7th Cir.).

An uninsured motor vehicle being driven by a driver who is insured under his own policy is not an "uninsured vehicle" for UIM policy purposes. *Blum v. 1st Auto & Casualty*, 2008 AP 1324.

A party who paid another's property taxes may recover for unjust enrichment. *Buckett v. Jante*, 2008 AP 2166.

A commercial auto policy need not provide UM coverage to empoyees while driving their own autos. *Mittnacht v. St. Paul Fire*, 2008 AP 1036

Money a bankruptcy debtor received from a POD account within 180 days of filing is not part of the bankruptcy estate, because it was not received via "bequest, devise or inheritance". *In re: Holter,* No. 08-12209-7

Once a permanent partial disability award has been made under the Workers Compensation law, the award cannot be reopened even if the employee returns to work, except in limited circumstances as specifically provided by statute. *Schreiber Foods v. LIRC*, 2008 AP 1977.

Repeated exposure to asbestos is a single "occurrence" under the manufacturer's liability insurance policy. *CQ Plastics Engineering v. Liberty Mutual Ins. Co.*, 2008 AP 333.

Walking with a limp which requires the use of a cane is a "disfigurement" allowing a workers compensation recovery even though there is no visible scarring. *County of Dane v. LIRC*, 2006 AP 2695.

When an insurance policy covers "hit and run" as part of an uninsured motorist coverage and the policy does not define the term, "run" means leaving the scene without providing indentifying information even if the driver stopped to see if there was any injury. *Arder v. Humana Ins.*, 2008 AP 919.

CRIMINAL LAW

In *Arizona v. Gant*, — U.S. —, 2009 WL 1045962, the US supreme court issued a ruling on April 21, 2009 that modifies the search incident to arrest doctrine, rejecting a broad reading of *New York v. Belton,* 453 U.S. 454 (1981). The Court held that a search of the passenger compartment of a vehicle following an arrest is allowed "only if [1] the arrestee is within reaching distance of the passenger compartment at the time of the search or [2] it is reasonable to believe the vehicle contains evidence of the offense of arrest. When these justifications are absent, a search of an arrestee's vehicle will be unreasonable unless police obtain a warrant or show that another exception to

the warrant requirement applies." *Chimel v. California,* 395 U. S. 752 (1969), continues to be good law, insofar as the search incident to arrest can be justified by the suspect's ability to lunge to an area and destroy evidence or reach a weapon. However, once the suspect is handcuffed and moved away from the vehicle, the suspect's ability to reach evidence or a weapon is eliminated, or at least significantly reduced.

Police may search personal belongings of a passenger located outside a car in a search incident to the arrest of the driver. Prior cases had ruled that passenger belongings located in the may be searched, but that the person of passengers may not be searched without individualized cause to justify the search, such as a reasonable suspicion that a suspect may be armed. *State v. Denk*, 2006 AP 1744.

An officer may answer a defendant's ringing cell phone when the officer had probable cause to believe that the defendant was involved in drug use and, based upon the officers training and experience, cell phones are frequently used in drug transactions and there was no time to get a search warrant for the phone prior to answering the phone. *State v. Carroll*, 2007 AP 1378.

Theft of telephone services is a theft of "property" as defined in Sec. 943.20. *State v. Howard*, 2007 AP 1877.

In *State v. Pablo Ruiz-Velez*, No 2008 AP 175, the Court of Appeals concluded that court reporters are required to take down and transcribe audiovisual recordings received into evidence under Wis. Stat. (Rule) § 908.08. See e.g. Wis. Stat. (Rule) § 885.42(4) ("At trial, videotape depositions and other testimony presented by videotape shall be reported"). The Court concluded that this rule required the court reporter to take down and transcribe the child victim's statement, even though the recording was itself admitted as evidence and was unsworn. The court also concluded that SCR 71.01 required the court reporter to take down and transcribe the audiovisual statement.

Where an intoxicated person was asleep in the drivers seat, with the key in the ignition in the auxiliary position, evidence was sufficient to prove he was operating the vehicle even though the engine was not running. *State v. Mertes*, 2007 AP 2757.

Even if the officer's entry into a home was unlawful, the fruits of the subsequent consensual search need not be suppressed when there is no evidence that the police entered with an ulterior motive or with bad faith and the officer explained the reason why he wanted to search and asked for and received consent to search. *US v. Artic*, 2008 AP 880.

A defendant can be charged with two counts of bail jumping for a single failure to appear even though he only signed one bond for both of the two underlying cases. *State v. Eaglefeathers*, 2007 AP 845.

A valid guilty plea must be supported by factual allegations contained in the record, or by factual allegations personally or through counsel adits are true or agrees may be used for that purpose. When a plea negotiation resulted in an amended charge not supported by the complaint, and the defendant pled guilty by did not admit facts to support the amended charge, the plea is defective. *State v. Weatherall*, 2007 AP 918.

A defendant who made a bomb scare at a school may be ordered to pay restitution for the salaries and benefits paid to staff during the evacation. *State v. Vanbeek*, 2008 AP 1275

The denial of a defendant's request to substitute attorney one week before trial held proper when the defendant could not give any reason for the substitution other than the desire to change attorneys. *State v. Prineas*, 2007 AP 1982.

Where a car is stopped by the side of the road with its emergency flashers on, a police officer acted within his community caretaker

function by stopping. State v. Kramer, 2007 AP 1834.

State v. Xiong, 2008 AP 1137, contains a good discussion of when a waiver of Miranda rights is knowing in the context of a defendant for whom English is a second language.

FAMILY LAW

A contract entered into to hide a substantial asset from a spouse and the family court during a divorce is unenforceable. *Jezeski v. Jezeski*, 2007 AP 2823.

When a party requests a de novo hearing appealing the ruling of a FCC, the Court must hold an evidentiary hearing. *Stuligross v. Stuligross*, 2008 AP 311.

Generally child support may not be modified retroactively. But if the payer fails to disclose an asset or income that otherwise may have produced higher support, a retroactive adjustment is appropriate. *Stevenson v. Stevenson*, 2007 AP 2143.

Income from a nongrantor trust is income available for child support whether it has been distributed or not, because it is considered income for income tax purposes. *In re the Marriage of Stevenson*, 2007 AP 2143.

Grandparents' petition for adoption were properly dismissed when they failed to comply with the preadoption placement requirements of Sec. 48.90. "Even a loving grandmother is required to follow the statutes." *In re the Adoption of Elizabeth A.K.*, 2008 AP 2151.

REAL ESTATE

The failure of a contingency in a real estate offer to purchase may not be waived unilaterally if the contingency can be interpreted to benefit both parties. *Baldwin v. FCC Land LLC,* 2008 AP 1374.

Sec. 799.40(4) provides for a stay of eviction if the tenant has applied for rental assistance under Sec. 49, but the stay is only effective for a reasonable time. *McQuestion v. Crawford*, 2008 AP 1096.

Miscellaneous

Effective 1-1-09, SCR Chapter 20 has changed the procedure for pro hac vice admission of an out of state attorney on a temporary basis for practice in this state. Non-resident attorneys seeking to be admitted pro hac vice must submit an application and a $50 application fee to the Office of Lawyer Regulation (OLR). The application must be made prior to the motion for admission by the sponsoring Wisconsin attorney; a copy of the application and evidence that the fee has been paid should be attached to the motion. Further information, along with a new CCAP form, may be found on the Court website at www.wicourts.gov.

A recent citation to the *Mikrut* decision reminded me of the story told by Paul Millis about Mike Chambers. Being a student of advocacy, Mike remembered the importance of primacy and recency. Make your most important points the first thing and last thing you say. Mike Chambers closed his oral argument to the Wisconsin Supreme Court in *Village of Trempealeau v. Mikrut* saying, "What kind of pickle would we in then?" Opposing counsel Daniel Hildebrandt was speechless. Mike won the case.

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.