TRI-COUNTY BAR

BUFFALO, JACKSON, PEPIN & TREMPEALEAU

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TRICOUNTY BAR NEWS

After the election of officers at the January meeting, two new sinkholes opened in Florida, the Pope resigned, North Korea exploded a nuclear bomb, and the nation went off the fiscal cliff, but on the theory that disasters are good for the economy, the Dow Jones broke 14,000. You don't have to wait for the colored smoke, here they are:

President Tom Bilski
VP Tom Clark
Secretary Paul Millis
Treasurer Carly Sebion

You can explore the president's platforms at sexyshoes.com. Fishnet is optional.

The TCB Summer Meeting dates are August 29th – 31st, a week later than usual because of Y Camp unavailability. Mark it on your calendars NOW! (Wow, that was forceful. I surprised myself.) Yes, the Friday night is the start of Labor Day weekend.

Just to keep up, Jon the Dog set Cabin Cleanup a week later as well, Friday, May 24, the Friday before Memorial Day.

Bruce Brovold has been nominated to the Board of Governors to represent District 8. It is my understanding that nominations are closed and that no one else was nominated. Given the lack of competition, and assuming the full support of the Tri County Bar members, we expect he should have at least a 50-50 chance of election.

Chris Gierhart joined Kostner, Koslo and Brovold on January 15. Although he graduated from UW Madison for both law and undergrad, he is from Eau Claire, which is a lot closer to Highway 8. He recently moved to Arcadia. Both Esmond Kim and Chris live (separately) on Maplewood Court. In his youthful, idealistic days he worked for Environmental Protection in the Dept of Justice, but has now has crossed onto the dark side. He speaks Norwegian, why is unclear. Gierhart is an Anglicized version of the German name Gierhart which in Norwegian is Gierhart, which means "spear brave". He is single.

Peter Rindal joined Weld, Riley, Prenn & Ricci, S.C. in November and works out of WRPR's main office in Black River Falls. Previously Peter was an assistant district attorney in Monroe County for three years. However like Hansel leaving a cookie trail, his State Bar listing still shows his address as the WRPR Eau Claire satellite office. Wisbar also shows his DA email address. He doesn't seem too confident about working with Millis.

According to his office, Dale Sherman passed away earlier this month but continues to practice law in Jackson County.

A little note from Treasurer Carly Sebion:

Pay Your Dues!

Member dues are $120 and associate are $50. You know who you are.

CIVIL

PUBLIC POLICY BARS NEGLIGENCE CLAIM In a case applying public policy to bar an otherwise viable negligence claim, in *Nell v. Froedtert & Community Health et al*, 2012 AP 1556, the court of appeals barred on public policy grounds the recovery of the cost of raising a healthy child as damages for the negligent provision of vitamins when birth control pills were prescribed.

YOU INSURE MENARDS A Menards employee injured a customer while loading material into the customer's car. Menards claimed that because its employee was loading the car with the customer's permission, and loading a car constitutes"use" of a vehicle, it's employee is a permissive user and the customer's own auto insurance policy should defend a claim of Menards' employees negligence. While the court was troubled by the results, it held Section 632.32 required the customer's own auto policy to respond. *Blasing v. Zurich American Ins.* , 2012 AP 858.

HOME IMPROVEMENT CONTRACT A Court can order restitution in a conviction under ATCP 110.05 for a contractor failure to provide a written contract for home improvement services. *State v. Felski*, 2012 AP 1115.

ARBITRATION CLAUSE INVALID The incorporation by reference of the National Arbitration Forum's rules of procedure in an arbitration agreement makes the agreement unenforceable in light of the Minnesota consent judgment barring NAF from consumer arbitration. *Riley v. Extendicare Health Facilities*, 2012 AP 311.

ARBITRATION CLAUSE UPHELD The trial court found an arbitration provision in an employment agreement was unconscionable. This decision was reversed by the Court of Appeals. *Engedal v. Menard Inc.,* 2012 AP 305.

UIM REDUCING CLAUSE UIM coverage is reduced from payments received from all sources, not just payments from the uninsured motorist. In *Kott v. American Family Mutual*, 2012 AP 1247, UIM coverage was reduced by a payment recovered from the injured person's employer.

MORTAGE LIEN SURVIVES CH 7 A mortgage secured several debts to the bank. The mortgagors filed Chapter 7 and reaffirmed one, but not all, of the debts secured by the mortgage. The court held the mortgagors had personal liability only on the one reaffirmed loan, but the bank retained a security interest in the property securing all of the loans.. *Molitor v. Advantage Community Bank*, 2012 AP 487.

NO TORT DAMAGES ON CONTRACT CLAIM Neither punitive damages nor pain and suffering damages are available as a remedy for breach of contract or implied warranty. When the jury failed to find tort liability, such damages are unavailable. *Hansen v. Texas Roadhouse, Inc.*, 2010 AP 3137.

SUPPLEMENTAL PROCEEDINGS CREATES LIEN A creditor has a lien superior to other creditors at the time the creditor serves the debtor with a summons to appear at the supplementary proceeding under Wis. Stat. § 816.03(1)(b)., including debtor's property acquired subsequent to a supplemental examination. *Attorney's Title Guaranty Fund v. Town Bank*, 2011 AP 2774.

OFFER OF JUDGMENT A statutory Offer of Judgment is invalid when it is made to several defendants with separate claims and the offer does not specify separate sums for each of the defendants' separate claims. *Wisconsin Physicians Service Ins. Co. v. AMCO Insurance Company*, 2011 AP 2860.

ECONOMIC LOSS DOCTRINE A water softener is not intended to interact with the drywall, flooring and woodwork. Focusing on the foreseeability

of a malfunction ignores the requirement of the disappointed expectations test that a water softener is designed to soften water. Stated another way, the damage to the home does not stem from a disappointment in how well the water softener functions in softening water. Therefore the economic loss doctrine does not bar tort recovery. *State Farm Fire v. Hague Quality Water*, 2012 AP 392.

ASBESTOS EXCLUSION An asbestos exclusion unambiguously bars coverage for any damages by asbestos. The exclusion would include property damage caused by the accidental dispersal or the mere presence of asbestos. If any part of the loss is caused in any way by asbestos, the policy provides no coverage. *Phillips v. Parmelee*, 2011 AP 2608.

CRIMINAL

OWI COLLATERAL CHALLENGE To show a defendant's lack of understanding of the "difficulties and disadvantages of self representation", it may not be enough for the defendant to claim he didn't understand a particular defense. Arguably if the defendant understands the role an attorney could play and that there were technical rules which have to be followed and the defendant made a strategic decision to proceed without an attorney, that might be enough even if the defendant didn't understand every possible defense, or arguably any particular defense. *State v. Gracia*, 2011 AP 813.

SEARCH INCIDENT TO ARREST Police may search a vehicle's trunk if they have probable cause to believe the trunk contains evidence of a crime, even a crime other than the one for which the vehicle was stopped. Here the defendant was stopped for a traffic violation and OWI, had probable cause for an unrelated burglary. *State v. Lefler*, 2012 AP 224.

OWI PRIORS NOT JURY QUESTION The existence of a prior conviction in a trial for OWI 2d or subsequent is a "status element" to be submitted to the sentencing judge after verdict. There is no right to proof of the existence of the prior offenses beyond a reasonable doubt and no right to have the issue decided by a jury. This was a consolidated appeal involving an OWI 2nd , an OWI 3rd and two OWI 5th cases. *State v. Verhagen,* 2011 AP 2033, 2192, 2478 and 2889.

SENTENCE MODIFICATION Assistance to law enforcement after sentencing might be a "new factor" supporting sentence modification. 5 part test discussed in *State v. John Doe*, 2012 AP 414.

FIELD TESTS NOT SCIENCE OWI field tests are observational tools, not scientific evidence. Therefore there is no *Daubert* type challenge to the officer as an expert witness before admitting testimony about field tests, including HGN. (citing *City of West Bend v. Wilkens*, 2005 WI App 36, ¶21, 278 Wis. 2d 643, 693 N.W.2d 324, an officer testifying that field sobriety tests and other observations led him to form the subjective opinion that a driver's alcohol level was impermissibly high is not scientific or expert testimony.) *State v. Warren*, 2012 AP 1727

ONE TAIL LAMP NOT P/C A tail lamp with one of three bulbs unlit does not violate §347.13 and does not constitute probable cause to stop. *State v. Brown*, 2011 AP 2907.

BLANKET BAIL POLICY A "blanket bail policy" is improper. Courts must make a proper individualized determination as to conditions of release. *State v. Wilcenski*, 2012AP142, reviewing Waukesha County's policy that every person charged with OWI 2d or subsequent offense was required to go to AODA treatment as a condition of bail.

WALKING AWAY NOT P/C Police do not have grounds to seize a person whose only offense was parking illegally once the police abandon the parking issue and whether to issue a citation. Further,

persons have the right to walk away from police contact. Thus, without more, backing away from an officer is not sufficient objective evidence to support a reasonable suspicion that criminal activity is afoot or that he was a threat. *State v. Pugh,* 2012 AP 481.

SEARCH INCIDENT TO ARREST A search incident to arrest may be of the defendant's person and the area within his immediate control to look for weapons and to prevent destruction of evidence. When the defendant ran into a house and was apprehended near the doorway of a bedroom containing a bed with rumpled bedclothes, it was reasonable to believe an object may have been recently hidden in the bed. *State v. Sanders*, 2011 AP 2384

DA MAKES DEF DO FIELD TESTS AT TRIAL At trial an OWI defendant wanted to testify that his HGN failure was due to diabetes. The state asked the Defendant to retake the HGN test during the trial when, it was assumed he was sober and still had diabetes. The Court ruled that field tests are not testimonial, so that there was no 5th Amendment issues, and further it did not violate the Defendant's right to a fair trial. *State v. Schmidt*, 2012 AP 64.

REAL ESTATE

FORECLOSURE OMITTED PARTY Where a senior mortgage has been foreclosed without making a junior lienholder a party, the proceedings are not null and void but leave the holder of the subordinate lien with the same rights that he would have had, had he been made a party to the foreclosure proceedings. The rights of the junior lienholder are not improved, and the lien does not advance. A subsequent purchaser may bring an action to compel the improperly omitted junior claimant to exercise his right of redemption or have his redemption barred. *Associated Bank v. Bradley*, 2012 AP 81.

SUBLESSEE BOUND BY LEASE TERMS A sublessee cannot avoid burdens imposed by the lease, including lease extension terms, in a provision contained in the sublease. The sublessee is bound by all of the provisions of the original lease even if they do not know about those provisions. The original Lessor is not a party to the sublease and did not consent to it. *Anthony Gagliano Co. v. Openfirst LLC*, 2012 AP 122

PERMISSION PREVENTS PUBLIC HIGHWAY A public highway is created when a municipality has worked the road as a public highway for more than 10 years. However such claim can be defeated if the landowner can show that such work was done initially by permission of the owner and that the municipality did not subsequently take unequivocal hostile action regarding user ownership of the property, meaning actions inconsistent with the property owner's rights. *School District of Hillsboro v. City of Hillsboro*, 2012 AP 888.

VACATING JUDGMENT VOIDS HOUSE TRANSFER A successful challenge to a divorce judgment because of lack of personal jurisdiction voids the Judgment awarding the spouse the house, even though she had already sold it and the buyers relied on the apparently valid and final Divorce Judgment. Will title companies now reject Abridgment of Judgments as effective transfers of title, so that family law practitioners should always get a QCD? *Montalvo v. US Title*, 2012 AP 102.

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 warranty is offered as to accuracy.

Jaime Duvall, Editor