

# TRI-COUNTY BAR

BUFFALO, JACKSON, PEPIN & TREMPLEAU

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## TRICOUNTY BAR NEWS

We don't care about your nine birthday parties, three family reunions, and five fishing trips. Write it down.

Summer meeting Sept 4-6!

For those of you who forgot how to read a calendar after getting your iPhone, that is the Thursday-Saturday on the weekend after Labor Day.

What issues mattered most to the voters in the election of officers at the Mid-Winter Meeting?

Satisfying subconscious desire for self harm- 19%  
Party affiliation. Party! Party!- 31%

Vigorous support for apathy- Not sure how many, don't care "Vote Tom, He's Not Here" campaign- 16%

At bar, did not know what we were voting for- 34%

Whatever the reason, here are the duly elected new officers:

President: Tom Clark  
VP: Terry Madden

Sec: Paul Millis  
Treasurer: John Sacia

President Clark has already reprimanded VP Madden for failure to look busy. Terry first came under scrutiny recently when he sat unproductively at his desk for more than three hours, surfing the Internet, playing Tetris and bending paper clips into animal shapes, all the while making no attempt to assume his duties as VP for the TCB.

Cabin Cleanup Day has been set for Friday, May 16, unless it is not, in which case it is the following Friday, in which case bring your family because that is Memorial Day weekend. Questions, call Jon the Dog.

## NEW FACES

In a miracle that defies statistical probability, Karina Kuhrt, UW, December 2013, found her perfect job right in her home town of Arcadia. "They say God puts one special job on this planet which is your one true love. It's incredible, but somehow I found mine right here in the town where I grew

up. If that's not fate, I don't know what is." The interview was difficult. Brovold asked "Are you a workaholic?" and Karina said, "Sure! And I like to hunt and fish and have access to Buffalo County hunting land." "She was so meant to be in this firm," Bruce said. She previously worked as a non-lawyer in an immigration firm and speaks Spanish and German. Pay attention, Nemer and Berns. Her father was born in Germany in 1944 and emigrated from a divided Berlin, believing it would never be reunited. Karina reports she enjoyed working on "anything they give me". That will change.

## CIVIL

### Failure to Disclose Principal

The defendant was held personally liable for a debt by failing to sufficiently disclose his principal, but that liability ended after proper disclosure. He again became personally liable when he changed the principal's corporate structure without notifying the creditor. *Bou-Matic LLC v. Legg*, 2012 AP 904.

**Recreational Use Immunity**

Recreational use immunity does not attach to a landowner whose acts are unrelated to the condition or maintenance of the land. But alleged negligence in setting up a skydivers' landing zone in proximity to the spectator area is related to condition and maintenance of the land and therefore the statute bars claims against the landowner. *Scheuren v. Green Bay Skydivers Inc.*, 2012 AP 2288.

**Governmental Immunity**

A road grader scraping ice backed into an intersection and was struck by an oncoming car. Neither the ministerial duty exception nor the known and compelling danger exception abrogated the County's governmental immunity. The motor vehicle code does not eliminate the driver's discretion in deciding how and when to back up a vehicle. A driver must use his judgment in deciding how to do so safely. *Holman et al v. Harvey et al.*, 2012 AP 2552.

**Septage is a "Pollutant"**

Septage, a combination of water, urine, feces and chemicals, is a pollutant. Coverage for damages from spraying septage over the Plaintiff's well and maintaining leaking storage tanks is excluded under the Pollution Exclusion of a commercial general liability policy.

*Preisler v. Kuettel's Septic Service*, 2012 AP 2521.

**Cow Manure not a**

**"Pollutant"** Manure is not a pollutant within the meaning of a farmowner policy's Pollution Exclusion. "The fact that milk *can* cause irritation or contamination in certain circumstances does not equate to a reasonable person defining milk as a "pollutant." A reasonable farmer likewise does not see manure as either "waste" or a "pollutant." *Wilson Mutual v. Falk*, 2013 AP 691.

**No Discovery Rule in**

**Contract Cases** There is no "discovery rule" available to bar claims in contract actions. The claim arises and the period of limitation commences when the breach occurs, not when the breach is discovered. *Tadisch v. Tadisch*, 2012 AP 2576.

**Criminal Acts Exclusion** The homeowners policy's Criminal Acts exclusion barred coverage for a negligent homicide conviction arising from kids playing with guns at an underage drinking party. The exclusion applied even though the criminal act was not intentional, but was criminally negligent. *Estate of Shawn Dobry v. Wilson Mutual Insurance Co.*, 2013 AP 580.

**Economic Loss Doctrine** The "fraudulent inducement" exception to the Economic Loss Doctrine (no tort claims in

contract cases) does not apply when the misrepresentations were "interwoven with the contract." To invoke the exception, "a plaintiff must demonstrate: there was an intentional misrepresentation; the misrepresentation occurred before the contract was formed; and the fraud was extraneous to, rather than interwoven with, the contract." Extraneous fraud concerns matters not related to the quality or the characteristics of the goods for which the parties contracted or otherwise involve performance of the contract. *Gould v. Mitchell*, 2013 AP 1264.

**Intentional Act Exclusion** The Intentional Acts exclusion in an automobile policy does not exclude coverage for acts which are reckless, but not intentional. Fleeing from the police at high speed was intentional, but losing control of the vehicle, while reckless and unlawful, was not intentional and the resulting injury to a third person similarly was not intended. *Fetherston v. Parks*, 2012 AP 1920.

**Asbestos Exclusion** An Asbestos Exclusion bars coverage for a claim that the owner negligently failed to disclose the presence of asbestos. The exclusion covers claims arising from asbestos, no matter the type of tort alleged. *Phillips v. Parmalee*, 2011 AP 2608.

**Basement Flooding with**

**Sewage** Because the Plaintiff did not produce evidence that the City's actions produced the basement flooding with raw sewage, a Directed Verdict in favor of the city was proper. The City successfully argued the flooding could have been caused by heavy rains, pipe blockage or other causes.

*David v. City of Milwaukee*, 2013 AP 741.

**Notice of Claim** §893.82(3) cannot reasonably be read to require a plaintiff to provide a municipality with notice of the exact time of the event giving rise to a claim when doing so is almost impossible. *Mayo v. Boyd*, 2013 AP 1578.

**CRIMINAL**

**Expungement** Under the plain language of §973.015(2), a defendant is not entitled to expungement of his record unless (1) he successfully completes his sentence; (2) the controlling authority issues a certificate of discharge; and (3) that certificate is forwarded to the Circuit Court. All three of these steps must be completed before the record will be expunged. The statute implicitly requires a defendant to provide the Court with the discharge certificate. Further, a defendant seeking expungement must petition the circuit court within a reasonable time following the issuance of a discharge certificate. Denial of

expungement was proper when the defendant waited one year after discharge before petitioning, had committed a new offense since discharge, and did not furnish his discharge certificate to the Court. *State v. Hemp*, 2013 AP 1163.

**Jury Unanimity as to**

**Location** Where location of the crime is not an element of the offense, it does not deprive the defendant of the right to a unanimous jury even if the jury does not agree on the location. *State v. Dabzinski*, 2011 AP 2905.

**IID for OWI 1<sup>st</sup> < .15** A Court must order installation of an ignition interlock device when a defendant is convicted of an OWI and also has any prior conviction for OWI. There is no 10 year look back limitation under the IID law. Therefore even if a charge is an OWI 1<sup>st</sup> because a prior was more than 10 years ago, an IID is required by reason of that prior conviction even if the test result is less than .15. *Village of Grafton v. Seatz*, 2013 AP 1414 (recommended for publication)

**Dog Sniff at House Door**

While a minimally intrusive dog sniff of the exterior of a car during a otherwise lawful traffic stop is not a search, *Florida v. Jardines*, 569 US \_\_\_\_ (2013), filed 3-26-13, held that the use of a drug sniffing dog at a defendant's front door without a

search warrant or probable cause is an improper search. In *State v. Scull*, 2011 AP 2956, the Court of Appeals held that the *Jardines* case applied prospectively only and searches prior to that decision are covered by the good-faith exception to the exclusionary rule.

**Interviews Not Recorded at Suspect's Request**

Although custodial statements of a juvenile must be recorded, when a juvenile suspect insists that his statements not be recorded and the officer responds by turning the recording off, the statements are admissible. *State v. Moore*, 2013 AP 127.

**Concurrent or**

**Consecutive?** Where an offender is serving a sentence for one offense and is then ordered to serve another sentence for a different offense, the second sentence is deemed to run concurrently with the first sentence in the absence of a statutory or judicial declaration to the contrary. *State v. Rohl*, 160 Wis .2d 325, (1991). (This came up in a local case recently).

**Partial Verdicts** A defendant is charged with two criminal counts. The jury reported they reached a unanimous decision on the first count but were deadlocked on the second

count. The judge brought the jury in, and received the verdict on the first count and then sent the jury back to deliberate on the second count. Since the law on partial verdicts is unsettled in Wisconsin and across the state, the defense counsel agreeing to this procedure was not ineffective assistance. However the first verdict was not guilty to a sexual assault and the victims on the first count demonstrated angrily after the first verdict in front of the jury before the jury was sent out to deliberate on the second count. That sounds like a problem. *State v. Grant*, 2013 AP 515.

### **Refusal Hearing Time Limit**

The 10 day time limit for requesting a refusal hearing cannot be extended for good cause. Prior caselaw held the use of the term “shall” was mandatory, not discretionary, and was the consequence for failure to request the hearing. *State v. Bentdahl*, 2012 AP 1426.

### **Discovery in Forfeiture**

**Actions** Civil discovery rules under Ch 804 apply in a non-traffic code forfeiture citation action commenced under §778.25. *State v. Bausch*, 2013 AP 752.

### **Running DL checks w/o P/C**

An officer can run a query on DL and vehicle registration “for no apparent reason”. Reasonable suspicion not required because there is not

expectation of privacy in that information. *State v. Folkman*, 2013 AP 1363.

## **R** REAL ESTATE

**Right of First Refusal** A Right Of First Refusal which states it continues in effect until there is a sale of property or the holder relinquishes its rights is reasonable as to time, and not terminable at will. The agreement in this case was also reasonable as to price. *MS Real Estate Holding LLC v. Donald P. Fox Family Trust*, 2013 AP 679.

**Foreclosure and Palisades** In an unpublished case dismissing a foreclosure, the Court rejected under *Palisades* testimony from a Bank of America employee about business records of a prior lender, and rejected a copy of the note as proving possession of the original of the note. *BAC Home Loans Servicing v. Thompson*, 2013 AP 210. In the last several years there have been about 25 mortgage foreclosure appeals and over half of them have been thrown out. So if you work in this area, understand the developing law.

**2<sup>nd</sup> Foreclosure Barred** Hear the sound of the other shoe dropping. A creditor’s foreclosure action was dismissed in 2011 for failure to prove that they held a valid assignment of the note and mortgage from the original

lender. In *Colonial Savings v. Fields*, 2012 AP 2000, a second attempt to foreclose was held barred by the doctrine of claim preclusion.

### **HAMP is Mandatory**

**Counterclaim** A complaint against a lender for failure to comply with the federal HAMP program was barred under the compulsory counterclaim and claim preclusion rules because the HAMP defense was not raised in an earlier foreclosure action. *Ripp v. McMillan Mortgage Group LLC*, 2013 AP 1124.

**Leasing MFL Land** The prohibition against leasing out MFL land applies to both open property and closed property. *State v. Lautenbach*, 2013 AP 1603.

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