

RECEIVED

01-06-2016

WISCONSIN COURT OF APPEALS
DISTRICT II

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

COUNTY OF FOND DU LAC,

Plaintiff-Respondent,

v.

Appeal No. 2015AP002223

STUART D. MUCHE,

Defendant-Appellant.

Appeal from the Circuit Court for Fond du Lac County,
The Honorable Robert J. Wirtz, Presiding
Circuit Court Case No.: 2015FO359

**BRIEF OF DEFENDANT-APPELLANT,
STUART D. MUCHE**

Alexander L. Ullenberg, SBN 0102359
Kevin M. Lastres, SBN 1094463
Ullenberg Law Offices SC
101 Camelot Drive, Suite 2B
Fond du Lac, WI 5935
Telephone: (920) 924-9878

Attorneys for Defendant-Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	iii
STATEMENT OF THE ISSUES	v
STATEMENT ON ORAL ARGUMENT AND PUBLICATION	vi
STATEMENT OF THE CASE	1
STANDARD OF REVIEW.....	2
ARGUMENT	3
A. Counties Do Not Have The Authority To Adopt Ordinances Concerning Underage Drinking At Private Residences.	3
1. Counties Only Have The Legislative Powers Conferred Upon Them By Statute.	3
2. Counties Do Not Have Constitutional “Home Rule” To Act Without Specific Statutory Authorization.....	4
3. The Legislature Has Not Given Counties Permission To Regulate Underage Drinking At Private Residences.	4
a. Counties Can Only Regulate Certain Underage Drinking Activities; And Then Only By Strictly Conforming Their Ordinances To Wis. Stats. § 125.07.....	4
b. Contrary To What Fond Du Lac County Has Argued, By Enacting Ch. 125, The Legislature Intended To Uniformly Regulate All Distribution And Consumption Of Alcohol Beverages By All Citizens – Underage And Of Age – In A Consistent State-Wide Manner Among All Counties. Fond Du Lac County Cannot Enact Its Own Piecemeal Regulations.....	5

B.	Fond Du Lac County’s Social Host Ordinance Does Not Strictly Conform To Wis. Stats. § 125.07, And Therefore The Court Erred In Convicting Mr. Muche Thereof.	7
1.	The Social Host Ordinance Prohibits Different Conduct Than Wis. Stats. § 125.07.....	7
2.	The Social Host Ordinance Applies To Places The Statute Does Not.	9
3.	Even If The Ordinance Were Reformed To Be In Strict Compliance With Wis. Stats. § 125.07, Mr. Muche’s Actions Were Not A Violation.....	10
	CONCLUSION	11
	CERTIFICATION OF BRIEF LENGTH	12
	CERTIFICATE OF COMPLIANCE WITH	
	RULE 809.19(12) (ELECTRONIC FILING)	13
	CERTIFICATE OF MAILING	14

TABLE OF AUTHORITIES

CASES:

<i>City of Janesville v. Garthwaite</i> , 83 Wis.2d 866, 266 N.W.2d 418 (1978).....	6
<i>Dodge Cnty. v. Kaiser</i> , 243 Wis. 551, 11 N.W.2d 348 (1943).....	3
<i>Maier et al. v. Racine Cnty.</i> , 1 Wis.2d 384, 84 N.W.2d 76 (1957).....	3,4
<i>Nat'l Amusement Co. v. Dep't. of Rev.</i> , 41 Wis.2d 261, 163 N.W.2d 625 (1969).....	2
<i>Nichols v. Progressive Northern Ins. Co.</i> , 2008 WI 20, 308 Wis.2d 17, 746 N.W.2d 220 (2008)	7
<i>Phelps v. Physician Ins. Co. of Wis.</i> , 2009 WI 74, 319 Wis.2d 1, 768 N.W.2d 615	2
<i>Spaulding v. Wood Cnty.</i> , 218 Wis. 224, 260 N.W. 473 (1935).....	3
<i>State ex. rel Kalal v. Cir. Ct. Dane Cnty.</i> , 2004 WI 58, 271 Wis.2d 633, 681 N.W.2d 110 (2004)	5

ATTORNEY GENERAL OPINIONS:

60 Wis. Op. Att'y Gen 348 (1971).....	3
---------------------------------------	---

CONSTITUTIONAL PROVISIONS:

Article XI, Section 3(1) of the Wisconsin Constitution	4
--	---

STATUTES:

Wis. Stats. § 66.01014

Wis. Stats. § 125.014, 6, 8

Wis. Stats. § 125.029, 10

Wis. Stats. § 125.074,5,6,7,8,10

Wis. Stats. § 125.0855

Wis. Stats. § 125.095

Wis. Stats. § 125.104,5,6

Wis. Stats. § 343.156

Wis. Stats. § 346.637

Wis. Stats. § 349.035

Wis. Stats. § 346.937

Wis. Stats. § 895.0357

ORDINANCES:

Fond du Lac County Ordinance 06-5 (2012)1, 7, 9

STATEMENT OF THE ISSUES

1. Does Fond du Lac County have statutory authority to enact a social host ordinance that penalizes hosting a gathering on private property where underage persons may be in possession of or consuming alcohol?

No, Wis. Stats. § 125.01 and § 125.10(2) give counties only limited authority to enact ordinances involving the distribution of alcohol at licensed premises, not at social gatherings on private property.

2. Did the Circuit Court err by holding that the County had such authority, and therefore denied Stuart Muche's motion to dismiss the citation issued here for violation of that ordinance?

Yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument may be helpful to the Court when addressing the public policy considerations raised in this appeal.

This appeal and the decision thereupon is appropriate for determination by a three-judge panel and publication because:

1. It will clarify or criticize existing social host ordinances recently enacted across Wisconsin. Wis. Stats. § 125.01 and § 125.10(2) restrict counties to enacting ordinances only that “strictly conform” to certain statutory sections. Six counties appear to have enacted social host ordinances in the last 3 years in violation of those provisions; and more appear to be planning to do so. (Mot. Three-Judge Panel, ¶5.)

2. The ruling will apply existing municipal law to a novel fact situation – i.e. whether counties can enact social host ordinances not specifically authorized in Wis. Stats. Chs. 66 or 125.

3. The ruling will decide an issue of continuing public interest: liability for social drinking on private property. The Supreme Court has declined to create common-law social host liability. *Nichols v. Progressive Northern Ins. Co.*, 2008 WI 20, 308 Wis.2d 17, 746 N.W.2d 220. These ordinances attempt to establish it on a piecemeal county basis.

STATEMENT OF THE CASE

Nature of the Case, Procedural Status and Disposition in Circuit Court

This is an appeal from an order and resulting judgment refusing to dismiss a citation for violating Fond du Lac Cnty. Ord. No. 06-5 (the “Social Host Ordinance” or “Ordinance”) (A-App. 10), which penalizes hosting of gatherings on private property where underage persons may be in possession of alcohol. Mr. Muche argued the Ordinance is invalid under Wisconsin’s Alcohol Beverage statutes, Ch. 125. (R.6, 11, 14.) The Circuit Court refused to dismiss the citation because there was no appellate authority to do so. (R.22; A-App. 1.) Thereafter the parties stipulated to certain facts, and the Court found Mr. Muche violated the Ordinance and imposed a \$1,000 forfeiture. (R. 13.) Mr. Muche appeals.

Relevant Statement of Facts

The parties stipulated that on June 20, 2015, Mr. Muche permitted a gathering of friends and family at his home in Fond du Lac County to celebrate his son’s high school graduation. (R. 12; A-App. 5.) Towards the end of that gathering, some uninvited persons under the age of 21 arrived, and Mr. Muche had reason to believe they were in possession of beer they intended to drink. Id. He took their car keys. Id. Sherriff’s deputies arrived shortly thereafter, and while Mr. Muche was cooperative, they cited him for violating the County’s Social Host Ordinance. Id. Mr. Muche did not provide beer to the underage persons and denied he was hosting an underage drinking party. Id.

STANDARD OF REVIEW

This Court reviews a question of statutory construction *de novo*. *Phelps v. Physician Ins. Co. of Wis.*, 2009 WI 74, ¶36, 319 Wis.2d 1, 768 N.W.2d 615; *Nat'l Amusement Co. v. Dep't of Rev.*, 41 Wis.2d 261, 266, 163 N.W.2d 625 (1969).

All relevant facts are stipulated.

ARGUMENT

A. Counties Do Not Have The Authority To Adopt Ordinances Concerning Underage Drinking At Private Residences.

1. Counties Only Have The Legislative Powers Conferred Upon Them By Statute.

“[C]ounty boards have only such legislative powers as are conferred upon them by statute, expressly or by clear implication.” *Maier et al v. Racine Cnty.*, 1 Wis. 2d 384, 386, 84 N.W.2d 76 (1957), citing *Spaulding v. Wood Cnty.*, 218 Wis. 224, 260 N.W. 473 (1935) and *Dodge Cnty. v. Kaiser*, 243 Wis. 551, 11 N.W.2d 348 (1943). They generally lack the authority to regulate alcoholic beverage possession and consumption on their own. Id.

The Wisconsin Attorney General agrees. He has opined that Chapter 125 grants counties very limited authority, and that counties do not have the authority to regulate alcoholic beverages without specific statutory authorization, which the Legislature has not given. *See* 60 Wis. Op. Att’y Gen. 358, 259-62 (1971).

Our Supreme Court agrees. In *Maier*, the Court struck down Racine County’s ordinance prohibiting the sale of beer to those under 21. 1 Wis.2d at 386. Despite the County’s pleas that the ordinance preserved public peace and good order, the Supreme Court confirmed that counties have limited authority and the Legislature’s statutory scheme did not provide for independent county regulation of underage drinking. Id. at 386, 389.

Since *Maier*, the Legislature has repeatedly reinforced its unilateral power to regulate alcohol distribution to underage persons and others. See Wis. Stats. § 125.01; 1981 A.B. 300 (s. 8); 2005 Act 103 (s. 1).

2. Counties Do Not Have Constitutional “Home Rule” To Act Without Specific Statutory Authorization.

Article XI, Section 3(1) of the Wisconsin Constitution provides that “cities and villages... may determine their local affairs and government, subject only to this constitution... the method of such determination shall be prescribed the by legislature.” (Emphasis added.)

The Legislature has confirmed that only city and villages, not counties, may exercise this “home rule”:

“Under article XI, section 3, of the constitution, the method of determination of the local affairs and government of cities and villages shall be as prescribed in this section.”

Wis. Stats. § 66.0101(1) (Emphasis added).

Fond du Lac County is not and cannot be a home rule municipality.

3. The Legislature Has Not Given Counties Permission To Regulate Underage Drinking At Private Residences.

a. Counties Can Only Regulate Certain Underage Drinking Activities; And Then Only By Strictly Conforming Their Ordinances To Wis. Stats. § 125.07.

Wis. Stats. § 125.10(2) specifically states:

A municipality or county may enact an ordinance regulating conduct regulated by s. 125.07(1) or (4)(a), (b) or (bm), 125.085(3)(b) or 125.09(2) only if it strictly conforms to the statutory subsection.

Wis. Stats. § 125.10 (2) (Emphasis added).

Wis. Stats. § 125.07 regulates providing and consuming of alcoholic beverages to and by underage persons. Wis. Stats. § 125.085 proscribes penalties for falsifying proof of age in procuring such alcohol. Wis. Stats. § 125.09 imposes licensing requirements on certain providers of alcohol. These are the only areas a county can regulate.

b. Contrary To What Fond Du Lac County Has Argued, By Enacting Ch. 125, The Legislature Intended To Uniformly Regulate All Distribution And Consumption Of Alcohol Beverages By All Citizens – Underage And Of Age – In A Consistent State-Wide Manner Among All Counties. Fond Du Lac County Cannot Enact Its Own Piecemeal Regulations.

Fond du Lac County has argued it has permission to regulate underage drinking at private residences because Wis. Stats. § 125.07 does not specifically prohibit or permit such acts. However, this argument ignores the county’s restricted legislative nature, the plain meaning of Wis. Stats. § 125.10, and the legislative intent of Wis. Stats. Ch. 125.

Wis. Stats. § 125.10(2) specifically gives authority to the county to regulate only certain matters; one of which is underage drinking – but only if it strictly conforms to the statutory scheme. If the Legislature intended to give the County permission¹ to regulate all matters, then it would not have mentioned or limited

¹ At the motion hearing in these proceedings, the County argued that *City of Janesville v. Garthwaite*, 83 Wis.2d 866, 266 N.W.2d 418 (1978) stands for the proposition that when a statute is silent on a matter the local municipality has authority to regulate. However, that case involved a city which has “home rule”, and a traffic ordinance. Wis. Stats. § 349.03(1) gives “local author[ies]”, like cities and counties, authority to enact any traffic regulation so long as it is not contrary or inconsistent with the state-wide scheme. Here, Wis. Stats. § 125.10(2) only gives counties, like Fond du Lac, authority to enact certain ordinances and then only if in strict conformity with the statutory language.

authority to only three² designated statutory sections.

Wis. Stats. § 125.07 is entitled “Underage ... persons...” The Legislature has addressed distribution and consumption by underage persons; even if not in the way Fond du Lac County’s supervisors desire.

Even if this court were to determine Wis. Stats. § 125.10 is ambiguous as to whether it prohibits counties from regulating other underage drinking activities, the scope, history, context and purpose of Ch. 125 show the Legislature did not intend to let counties enact piecemeal and inconsistent local ordinances that differ from or threaten the uniform statutory scheme. See *State ex. rel Kalal v. Cir. Ct. Dane Cnty.*, 2004 WI 58, ¶46, 271 Wis.2d 633, 681 N.W.2d 110 (2004).

The Legislature has stated:

“[Ch. 125] shall be construed as an enactment of the legislature’s support for the 3-tier system for alcoholic beverage production, distribution, and sale that, through uniform statewide regulation, provides this state regulatory authority over the production, storage, distribution, transportation, sale and consumption of alcoholic beverages by and to its citizens.”

Wis. Stats. § 125.01 (Emphasis added).

Wis. Stats. § 125.01 makes it clear the Legislature intended to have uniformity statewide and control the entire distribution system and the consumption by all its citizens – underage and over age. County-by-county regulation contradicts the Legislature’s clearly stated intent.

The Court can even view Ch. 125 as part of the broader underage alcohol abuse framework created by the legislature in Wis. Stats. § 343.15 (license

² Wis. Stats. § 125.10(2) allows the County to regulate only three sections in a Chapter with over 60 separate sections.

sponsorship), 346.63(2m) (sobriety), 346.93 (intoxicants in vehicle) and 895.035 (parental liability). Nowhere in this scheme has the Legislature left the decision of penalizing social hosts up to its counties.

Our Supreme Court also recently ruled that Wis. Stats. § 125.07(1)(a)3 represents a Legislative decision not to impose civil negligence liability for homeowners where an underage drinking party occurs. *Nichols v. Progressive Northern Ins. Co.*, 2008 WI 20, 308 Wis.2d 17, 746 N.W.2d 220 (2008). The Court also refused to imply liability under common law because it found that requiring social hosts to determine who is drinking and whether that person is underage would place an unreasonable burden on the social hosts. *Id.* at ¶25. Implying a right for counties to impose such an unreasonable burden would be equally contrary to the Legislative intent.

The Supreme Court and the Legislature agree that Wis. Stats. § 125.07(1)(a)3 provides immunity from civil liability for social hosts – like the Nichols and Mr. Muche – whether based on negligence or forfeiture. *Id.*

B. Fond Du Lac County’s Social Host Ordinance Does Not Strictly Conform To Wis. Stats. § 125.07, And Therefore The Court Erred In Convicting Mr. Muche Thereof.

1. The Social Host Ordinance Prohibits Different Conduct Than Wis. Stats. § 125.07.

Fond du Lac County Ordinance No. 06-5 (A-App. 10) prohibits the mere failure to prevent possession of alcohol by underage persons:

“(d) *Prohibited acts.* It is unlawful for any person(s) to host or allow an event or gathering at any ... premises ... where alcohol

or alcoholic beverages are present when the person knows that an underage person will or does consume any alcohol or alcoholic beverage or will or does possess any alcohol or alcoholic beverage with the intent to consume it and the person fails to take reasonable steps to prevent possession or consumption by the underage person(s).

- (1) A person is responsible for violating this section if the person intentionally aides, advises, hires, counsels or conspires with or otherwise procures another to commit the prohibited act.
- (2) A person who hosts an event or gathering does not have to be present at the event or gathering to be responsible.

FDL Cnty. Ord. 06-5(d).

Wis. Stats. § 125.07(1)(a)1. and 3. only make it illegal to procure for, dispense to, or allow consumption by underage persons:

“No person may procure for, sell, dispense or give away any alcohol beverages to any underage person not accompanied by his or her parent, guardian or spouse...”

Wis. Stats. § 125.07(1)(a)1.

“No adult may knowingly permit or fail to take action to prevent the illegal consumption of alcohol beverages by an underage person on premises owned by the adult or under the adult’s control.”

Wis. Stats. § 125.07(1)(a)3.

The Ordinance prohibits the consumption of alcohol by an underage person even if accompanied by their parent or spouse unless the parent or spouse provides the alcohol and the underage person remains under their control.

“This section does not apply to conduct solely between an underage person and his or her parent or spouse ... while the parent or spouse is present and in control of the underage person.”

FDL Cnty. Ord 06-5(e)(1) (Emphasis added).

Wis. Stats. § 125.07(1)(a)1. allows anyone to disburse alcohol to an underage person so long as they are accompanied by a parent or spouse.

The Ordinance defines “alcohol beverage” by specific type:

“(b) *Definitions* ... “Alcoholic beverage” means alcohol, spirits, liquor, wine, beer and every liquid or solid containing alcohol, spirits, wine or beer, and which contains one-half of one percent or more of alcohol by volume and which is fit for beverage purposes either alone or when diluted, mixed or combined with other substances.

....
“alcohol” means ethyl alcohol, hydrated oxide or spirits of wine, whiskey, rum, brandy, gin or any other distilled spirits, including dilutions and mixtures thereof from whatever source or by whatever process produced.”

FDL Cnty. Ord. 06-5(b).

Wis. Stats. § 125.02(1),(6), (8) confines it to fermented malt beverages and intoxicating liquors:

“Alcohol beverages” means fermented malt beverages and intoxicating liquor.”

...
(6) “Fermented malt beverages” means any beverage made by the alcohol fermentation of an infusion in potable water or barley malt and hops, with or without unmalted grains or decorticated and degerminated grains or sugar containing 0.5% or more of alcohol by volume.

...
(8) “Intoxicating liquor“ means all ardent, spirituous, distilled or vinous liquors, liquids or compounds, whether medicated, proprietary, patented or not, and by whatever name called, containing 0.5% or more of alcohol by volume, which are beverages, but does not include ‘fermented malt beverages.’”

Wis. Stats. § 125.02.

2. The Social Host Ordinance Applies To Places The Statute Does Not.

The Ordinance prohibits possession and consumption on all private property:

“(b) ... ‘... premises’ means any home, yard, farm, field, land, apartment, condominium, hotel or motel room or other dwelling unit, or a hall or meeting room, park or any other place of assembly, whether occupied on a temporary or permanent basis, whether occupied as a dwelling or specifically for a party or other social function, and whether owned, leased, rented or used with or without permission or compensation.”

FDL Cnty. Ord. 6-05(b).

Wis. Stats. § 125.02(14m) prohibits consumption only at licensed establishments:

“Premises’ means the area described in a license or permit.

Wis. Stats. § 125.02(14m).

Our Supreme Court has held “premises” concerns only places subject to a liquor license or permit; not a private residence. See *Nichols*, supra.

The Ordinance improperly attempts to transform Wisconsin’s alcohol regulation system (for Fond du Lac County) from licensed premises to include private homes or gatherings anywhere in the county.

3. Even If The Ordinance Were Reformed To Be In Strict Compliance With Wis. Stats. § 125.07, Mr. Mucche’s Actions Were Not A Violation.

As discussed above, Wis. Stats. § 125.07 does not prohibit hosting of an underage drinking party.

Here, Mr. Mucche did not invite or provide the beer to the underage persons. (R. 12.) He did not dispense the beer to them. Even if the Ordinance strictly complied with Wis. Stats. § 125.07, he did not violate Wis. Stats. § 125.07(1)(a)1. The graduation party took place at Mr. Mucche’s private residence, not a licensed premises. He did not violate Wis. Stats. § 125.07(1)(a)3.

CONCLUSION

Fond du Lac Ordinance 06-5 does not strictly conform to Wis. Stats. § 125.07, and therefore is invalid.

Mr. Muche respectfully asks this Court to reverse the Circuit Court's ruling to the contrary, vacate the judgment of conviction therefore and remand the action with instructions to dismiss the citation with prejudice.

Dated this 5th day of January, 2016.

ULLENBERG LAW OFFICES SC

/s/ Alexander L. Ullenberg
Alexander L. Ullenberg, SBN 1023529
Kevin M. Lastres, SBN 1094463

Attorneys for the Defendant-Appellant,
Stuart D. Muche

MAILING ADDRESS:
101 Camelot Dr., Ste. 2B
Fond du Lac, WI 54935
Phone: (920) 924-9878

CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the rules contained in Wis. Stats. § 809.19(8)(b) and (c), for a brief produced using proportional serif font. The length of this brief (comprising the statement of case, argument and conclusion) is 2,425 words.

Dated this 5th day of January, 2016.

ULLENBERG LAW OFFICES SC

/s/ Alexander L. Ullenberg
Alexander L. Ullenberg, SBN 1023529
Kevin M. Lastres, SBN 1094463

Attorneys for the Defendant-Appellant,
Stuart D. Muche

MAILING ADDRESS:
101 Camelot Dr., Ste. 2B
Fond du Lac, WI 54935
Phone: (920) 924-9878

**CERTIFICATE OF COMPLIANCE WITH
RULE 809.19(12) (ELECTRONIC FILING)**

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stats. § 809.19(12).

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 5th day of January, 2016.

ULLENBERG LAW OFFICES SC

/s/ Alexander L. Ullenberg
Alexander L. Ullenberg, SBN 1023529
Kevin M. Lastres, SBN 1094463

Attorneys for the Defendant-Appellant,
Stuart D. Muche

MAILING ADDRESS:
101 Camelot Dr., Ste. 2B
Fond du Lac, WI 54935
Phone: (920) 924-9878

CERTIFICATE OF MAILING

I hereby certify that on January 5, 2016, I personally caused copies of the Defendant-Appellant’s Brief and Appendix to be mailed by first-class postage prepaid mail to:

Atty. Eric Toney
District Attorney
c/o Atty. Curtis A. Borsheim
City-County Government Center
160 S. Macy St.
Fond du Lac, WI 54935

Dated this 5th day of January, 2016.

ULLENBERG LAW OFFICES SC

/s/ Alexander L. Ullenberg
Alexander L. Ullenberg, SBN 1023529
Kevin M. Lastres, SBN 1094463

Attorneys for the Defendant-Appellant,
Stuart D. Muche

MAILING ADDRESS:
101 Camelot Dr., Ste. 2B
Fond du Lac, WI 54935
Phone: (920) 924-9878