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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

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

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ARGUMENT

- A. Wis. Stats. §59.03 does not give the County unfettered power to enact any ordinance it desires. A county ordinance cannot conflict with statewide concerns, and if the ordinance also addresses a local county concern the ordinance must compliment the associated statewide concern.**

WIS. STATS. §59.03 does not give Fond du Lac County the power to pass a social host ordinance. It is merely a general grant of county authority.

In the words of our Supreme Court:

“Thus contrary to the direct and expansive delegation of power to municipalities under Wis. Const. art. XI, sec. the authority of county boards is limited.”

St. ex rel. Teunas v. Kenosha Cnty., 142 Wis. 2d 498, 504, 418 N.W. 2d 833, 835 (1988).

The County does not dispute that its right to enact ordinances is limited.

Wis. Stats. §59.03 specifically limits the county’s right to enact ordinances that involve “any legislation that is of statewide concern¹ and uniformly affects every county.” Mommsen v. Schueller, 228 Wis.2d 627, 635, 599 N.W.2d 21(Ct. App. 1999). A county cannot enact ordinances that “conflict with the state’s interest in uniformly treating [matters of statewide concern] that arise in many counties across the state.” Jackson Cnty v. Dept. of Natural Resources, 2006 WI 96, ¶31,

¹ The language of Wis. Stats. §59.03, which applies to counties, is very similar to the language of Wis. Const. Art. XI, §3(1) which applies to cities. Our Supreme Court recently addressed the constitutional home rule of cities in Madison Teachers, Inc. v. Walker, 214 WI 99, 851 N.W.2d 337 (2014). There, the Teachers challenged whether Act 10 was of statewide concern and therefore could override the city’s constitutional home rule. The Court recognized there were local interests at play, but Act 10 was primarily a statewide concern because it impacted the entire state versus just a certain geographic area or group of individuals in a few cities. Id., 214 WI at ¶ 122 and 851 N.W. 376. Even though Teachers is not on point with Wis. Stats. § 59.03, it demonstrates that statewide concern can exist not just with formalized Legislative intent, but based solely upon whether it applies in practice to a broad part of the state. Certainly, the County cannot credibly argue here that underage drinking exists solely in Fond du Lac, and therefore it is a local issue only.

293 Wis.2d 497, 717 N.W.2d 713, 724 (2006).

“For those subjects where both the state and a county may act, the county’s actions must ‘compliment rather than conflict with the state legislation.’” Jackson, ¶19, 293 Wis.2d 497, 717 N.W. at 721, *citing* St. ex rel. Ziervogel v. Washington Co. Bd. of Adj., 2004 WI 23, 269 Wis.2d 549, 676 N.W.2d 401 (2004).

B. When a county ordinance implicates a statewide concern, the Court follows the four factor U.S. Oil line of cases test to determine if the county’s ordinance is valid. If the ordinance violates *any* factor, the ordinance is void.

In assessing whether a county ordinance violates Wis. Stats. §59.03, the Court looks at the following four factors:

- “(1) whether the legislature has expressly withdrawn the power of municipalities to act;
- (2) whether the ordinance logically conflicts with the state legislation;
- (3) whether the ordinance defeats the purpose of the state legislation; or
- (4) whether the ordinance goes against the spirit of state legislation.”

U.S. Oil v. City of Fond du Lac, 199 Wis. 2d 333, 345, 544 N.W.2d 589, 594 (Ct. App. 1996); *see also*: Mommsen, 228 Wis.2d at 636, 599 N.W.2d 21, and Jackson, 2006 WI at ¶20, 717 N.W.2d at 721.

“If any one of the four factors set ... is met by a county’s action, that action is without legal effect.” Jackson, 2006 WI at ¶20, 717 N.W.2d at 721.

C. Fond du Lac County’s Social Host Ordinance violates all four factors.

1. The Legislature specifically withdrew the county’s power to regulate distribution, possession and consumption of alcohol by underage persons.

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(1)(a) states:

“1. No person may ... dispense or give away any alcohol beverages to any underage person...

...

4. No adult may intentionally encourage or contribute to a violation of sub. (4) (a) or (b).”

Wis. Stats. §125.07(1).

Wis. Stats. §125.07(4)(b) states:

“... any underage person not accompanied by his or her parent ... who knowingly possesses or consumes alcohol beverages is guilty of a violation.”

Wis. Stats. §125.07(4).

The County’s ordinance regulates a situation where an adult intentionally contributes to an underage person possessing or consuming alcohol:

“It is unlawful for any person(s) to ... allow [a] ... gathering at any ... private or public property ... where alcohol ... are present when the person knows that an underage person ... will or does possess any alcohol .. with the intent to consume it and the person fails to take reasonable steps to prevent possession or consumption by the underage person(s).

FDL Cnty. Ord. 6-5(d).

The County’s ordinance addresses “conduct regulated by s. 125.07(4)(b).”

Under Wis. Stats. §59.03, the Legislature has enacted legislation concerning the area of contributing to underage possession and consumption of alcohol, and this ordinance applies equally to every county. The County has no authority under Wis. Stat. §59.03 to enact a Social Host Ordinance that addresses the same conduct already regulated by Wis. Stats. §125.07.

The County also curiously argues that Wis. Stats. §125.07(2) implies it can legislate private action on private property. (Resp. Brief p.2.) Wis. Stats. §125.07(2) implies nothing of the sort. It addresses sales or dispensing of alcohol to intoxicated persons, not underage persons. If this cite is an error and the County intended to refer to Wis. Stats. §125.10(2), it is equally mistaken. Wis. Stats. §125.10(2) could not be clearer that it only permits county ordinances in specific limited situations. The argument that this creates a broad implied power to do anything the county desires is without sound logic.

Second, under the U.S. Oil four-part test, Wis. Stats. §125.10(2) is a withdrawal of power to the county to regulate in the arena of possession and consumption of alcohol by underage persons. The phrase “strictly conforms” used therein supports the interpretation that the Legislature withdrew any otherwise existing power of the county to regulate in this arena. U.S. Oil, 199 Wis.2d at 348-49, 544 N.W.2d 589.

In U.S. Oil², the Court of Appeals struck the City of Fond du Lac’s attempt to regulate tobacco sales to teenagers. The court found that the legislature’s

² While U.S. Oil involves a municipality, versus a county like here, the analysis of the four-part test is the same. See Mommsen, 228 Wis.2d at 636, 599 N.W.2d 21.

statutory stated intent of “providing a uniform regulation of the sale of cigarettes” and allowing local ordinances only in “strict conformity” with the state law demonstrated the matter was a statewide concern and constituted an express withdrawal of the municipality’s power to act in the entire arena. U.S. Oil, 199 Wis.2d at 348, 544 N.W.2d at 594.

There is no miracle language for the Legislature to use in “expressly withdrawing” local authority:

“The first ... guidepost requires only a determination of whether the state has ‘expressly withdrawn’ the locality’s power to act. (Citation omitted.) We believe that this could be accomplished through an endless variety of statutory language.”

U.S. Oil, 199 Wis.2d at 348, 544 N.W.2d at 595.

The court was unimpressed with the city’s argument that the state law only addressed taxation of the cigarettes and was silent on other issues, and therefore that it could regulate sales for other reasons. U.S. Oil, 199 Wis.2d at 349, 544 N.W. at 595. The tobacco statute governed a wide variety of issues from taxation to possession including affirmative defenses thereto. Id. 199 Wis.2d at 349, 544 N.W. at 595.

Here, like tobacco regulation, the Legislature created and intended to create a statutory scheme to create uniform statewide regulation of the sale, possession and consumption of alcohol by all persons including underage persons. Wis. Stats. §125.01 specifically sets forth the Legislature’s intent to create that “uniform statewide regulation” of the “distribution ... and consumption of alcoholic beverages by and to its citizens” (of age and under age). Compared to

state regulation of tobacco, Chapter 125 much more comprehensively regulates alcohol. It provides for strict licensing of production, distribution and use of alcohol, civil liability for injury or death resulting from the distribution of alcohol, the use of fake identification to procure alcohol, impersonation of governmental employees associated with such regulation, and other things.

The State also regulates prices of alcohol and taxes due thereupon (Wis. Stats. Ch. 139), use of vehicles after consumption of alcohol (Wis. Stats. §346.61), absolute sobriety for underage drivers (Wis. Stats. §346.63(2m)), vehicle transport of intoxicants around underage persons (Wis. Stats. §346.93), seizure of alcohol beverages on buses (Wis. Stats. §947.04), use at fairgrounds (Wis. Stats. §93.23(4)) and use at sporting events (Wis. Stats. §938.17(3)), and possession by prisoners (Wis. Stats. §302.37), among other things. This Court certainly cannot ignore the pervasiveness of alcohol regulation by the Legislature.

The State also continues to tweak the areas of alcohol regulation in which local municipalities may act. *See* 2013 Act. 106, which authorized municipalities to prohibit beer use on commercial quadricycles. Wis. Stats. §125.10(5).

Like in U.S. Oil, the county here tries to use City of Janesville v. Garthwaite and Oshkosh v. Campbell to support a contention that it can always pass complementary ordinances despite “strict conformity” language in a statute. However, Janesville involved a situation where a separate statute allowed such complimentary ordinances; no such statute exists in this situation. Oshkosh was similar in that the “statutes relied on expressly reserve to municipalities the usual

powers of regulation not inconsistent therewith.” 139 N.W. at 317. Wis. Stats. §125.10 does not expressly reserve powers to municipalities; it requires strict conformity.

Here, Wis. Stats. §125.10 shows the Legislature withdrew the power of the county to act in regulating alcohol distribution and possession of underage persons, except if it strictly conforms with Wis. Stats. §125.07. The County admits its ordinance does not strictly conform to Wis. Stats. §125.07 as required in Wis. Stats. §125.10. (Resp. Brief p.6.)

The Ordinance is void for contradicting Wis. Stats. §125.07 in violation of Wis. Stats. §59.03, and for violating the first guidepost of the four-part test under U.S. Oil.

2. The Ordinance specifically and logically conflicts with Wis. Stats. Ch. 125, by prohibiting underage persons from possessing or consuming alcohol while accompanied by their spouse.

Wis. Stats. §125.07(1) specifically addresses dispensing alcohol to underage persons and contributing to their possession and consumption. The Ordinance addresses contributing to possession and consumption and sets different rules.

Under Wis. Stats. §125.07, an underage person can possession or consume alcohol if accompanied by a spouse who has attained the legal drinking age. Wis. Stats. §125.07(1)(a)1., (4)(a)2. Under the Ordinance, only a spouse who is the legal guardian or court appointed custodian may permit possession and consumption on a licensed premises. FDL Cnty. Ord. 06-5(b) (“Parent”).

The County alleges its Ordinance does not apply to licensed premises. (Resp. Brief p.5.) However, the Ordinance defines “‘premises’ ... [as] any ... place of assembly ... whether occupied on a temporary or permanent basis.” FDL Cnty. Ord. 06-5(b). This definition includes any business already licensed to so provide alcohol. In fact, the Ordinance contemplates it applies to licensed premises as underage persons in possession of alcohol for employment purposes are excluded from the Ordinance. FDL Cnty. Ord. 06-5(e)(3).

The Ordinance logically conflicts with the state legislation, violates the second guidepost of the four-part test, and therefore is void.

3. The Ordinance violates the purpose of Wis. Stats. Ch. 125 by interjecting patchwork local regulation into a uniform statewide regulatory scheme.

The Legislature explicitly enacted Wis. Stats. Ch. 125 to create and maintain a uniform statewide regulation of the distribution, possession and consumption of alcohol by all its citizens – including those who are underage:

“[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).

The purposes of Ch. 125 is to create uniform statewide regulation. The Legislature has given local municipalities only limited ability to enact ordinances in this arena.

Wis. Stats. § 125.10, entitled “Municipal Regulation,” specifically

discusses the types of local ordinances that may be enacted concerning alcohol beverages.

Municipalities can only enact complimentary rules affecting the sale of alcohol, distribution of wine and beer tasting events, and, recently, on beer quadricycles. Wis. Stats. §125.10(1); (5). Municipalities cannot regulate retail premises when they are closed and employees are working. Wis. Stats. §125.10(4).

Municipalities and counties can control underage drinking only if they strictly conform to Wis. Stats. §125.07-125.09, and municipal ordinances in that arena trump county ordinances. Wis. Stats. §125.10(2). That section is also entitled “Regulation of Underage Persons,” not “Regulation of Underage Persons in Licensed Premises.”

The Legislature specifically pointed out that Wis. Stats. §125.10 does not overrule existing zoning regulations. Wis. Stats. §125.10(3). If the legislature did not intend to control this arena, it would have no reason to make this clear.

Wis. Stats. §125.10 comports with the Legislature’s stated purpose of creating Ch. 125 as a uniform set of laws governing alcohol in Wisconsin. Local municipalities and counties can only act in certain limited areas. If the Court were not to construe Wis. Stats. §125.10 as a limitation on the County’s authority here, Wis. Stats. §125.10 would be superfluous. Such an interpretation is contrary to black letter rules of statutory construction.

The Ordinance defeats the purpose of the state legislation to create

uniformity statewide, and therefore violates the third guidepost of the four-part test and is void.

4. The Ordinance violates the spirit of the larger regulatory scheme of Wis. Stats. Ch. 125 and other sections which regulate the entire distribution scheme of alcohol in Wisconsin – not just the distribution of alcohol to underage persons in licensed premises.

Wis. Stats. §125.01 specifically states the Legislature intended to create a uniform statewide regulation of the distribution and consumption of alcohol by all persons, including underage persons. The Legislature pervasively and broadly regulates alcohol use in Wisconsin – from distribution to taxes to activities one can participate in after consuming alcohol to injuries resulting therefrom. *See: Supra.* Even if Wis. Stats. §125.01 did not specifically call out the Legislature’s intent, its pervasive and comprehensive action in this arena would make its intent equally clear.

The Legislature gave municipalities and counties permission to regulate only limited areas and, for counties, only when in strict conformity with the statutes. Wis. Stats. §125.10(2).

The County argues the Legislature is silent on whether it can expand underage drinking regulations into the private home. However, as U.S. Oil demonstrates, silence is not a license for subordinate governing authorities to interject their own policies. Silence in the presence of pervasive regulation in the arena merely demonstrates that the Legislature has made its own policy determination not to regulate that situation. An overzealous county must stand

behind its parent and respect the decision of its parent not to regulate the activity the county is interested in.

The Ordinance goes against the spirit of Ch. 125 and therefore violates the fourth and final guidepost of the four part test, and is void.

CONCLUSION

Fond du Lac County exceeded its authority under Wis. Stats. §59.03 and Wis. Stats. §125.10 in enacting Ordinance 06-5.

Wis. Stats. §125.07 and 125.10 withdrew the County's limited power to enact complementary ordinances concerning distribution, possession and consumption of alcohol. The County's ordinance conflicts with Wis. Stats. §125.07, and therefore is void.

In addition, the Ordinance specifically and logically conflicts with and violates the purpose and spirit of Ch. 125 and the Legislature's other legislation enacting uniform statewide regulation of alcohol possession and consumption by its citizens including underage persons. Under each measure of the U.S. Oil four-part test, the Ordinance is fails and is void. Mr. Muche need show the ordinance violates only one part for it to be void.

The Circuit Court erred in convicting Mr. Muche of a violation of the Ordinance, and he requests the Court reverse the Circuit Court, vacate the judgment of conviction, and remand with instructions to dismiss with prejudice.

Dated this 19th day of February, 2016.

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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 argument and conclusion) is 2,953 words.

Dated this 19th day of February, 2016.

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**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 19th day of February, 2016.

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CERTIFICATE OF MAILING

I hereby certify that on February 19, 2016, I personally caused copies of the Defendant-Appellant’s Reply Brief to be mailed by first-class postage prepaid mail to:

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Dated this 19th day of February, 2016.

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