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WISCONSIN COURT OF APPEALS
DISTRICT II

05-10-2016

**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 AND APPENDIX OF *AMICUS CURIAE*
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I. INTRODUCTION

When the legislature enacted statewide regulations preventing the illegal possession and consumption of alcohol by underage persons, it expressly authorized counties to enact ordinances consistent with state law restricting adults from knowingly permitting or failing to take action to prevent the illegal consumption of alcohol by an underage person on premises owned or controlled by the adult. In addition, the legislature expressly authorized counties to enact ordinances in conformity with state law restricting an adult from intentionally encouraging or contributing to an underage person possessing or consuming alcohol.

The social host ordinance enacted by Fond du Lac County (“County”), Ordinance § 06-5 (the “Social Host Ordinance” or Ordinance”), conforms to statewide regulations. The Ordinance prohibits a person from hosting an event where alcoholic beverages are present when the person knows that an underage person will or does consume any alcohol or possesses alcohol with intent to consume it and the person fails to take reasonable steps to prevent possession or consumption by the underage person. Because the County acted within its authority by enacting the Social Host Ordinance, the Court should affirm the Circuit Court’s decision finding that Defendant-Appellant Stuart D. Muche violated the Ordinance.

II. ARGUMENT

A. The Legislature Authorized Counties To Enact Social Host Ordinances Prohibiting Adults from Knowingly Permitting the Possession or Consumption of Alcohol by Underage Persons.

Counties have statutory home rule authority pursuant to Wis. Stat. § 59.03, but may not exercise that authority in a way that conflicts with legislative enactments of statewide concern that uniformly affect all counties. Wis. Stat. § 59.03(1); *State ex rel. Ziervogel v. Washington Cty. Bd. of Adjustment*, 2004 WI 23, ¶ 37, 269 Wis. 2d 549, 676 N.W.2d 401. This is consistent with the general rule of limitation on the constitutionally-based home rule authority of other local units of government. *See* WIS. CONST. art. XI, § 3(1); *Ziervogel*, 2004 WI 23 at ¶ 37 (citations omitted).

Wisconsin courts have previously recognized that while some subjects are exclusively a statewide concern, others may be entirely a local concern and some subjects are not exclusively within the purview of either the state or of a county. *Jackson County. v. DNR*, 2006 WI 96, ¶ 19, 293 Wis. 2d 497, 717 N.W.2d 713 citing *Mommsen v. Schueller*, 228 Wis.2d 627, 636, 599 N.W.2d 21 (Ct.App.1999). For those subjects where both the state and a county may act, the county's actions must complement rather than conflict with the state legislation. *Jackson County*, 2006 WI 96 at ¶ 19 citing *Ziervogel*, 2004 WI 23 at ¶ 37.

Four factors (known as the *Anchor* test¹) guide a court's determination of whether a local government's actions are preempted by the state legislation:

- 1) whether the legislature has expressly withdrawn the power of local governments 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 the state legislation.

Jackson County, 2006 WI 96 at ¶ 19 (citations omitted). If any one of the four factors is met by a county's action, that action is without legal effect. *Id.*

With regard to regulating the possession or consumption of alcohol by underage persons, the legislature has enacted uniform statewide regulations in Wis. Stat. § 125.07 while expressly authorizing counties to enact local regulations in strict conformity with state regulations. *See* Wis. Stat. § 125.10(2). Section 125.10(2), Wis. Stat., states:

(2) Regulation of underage persons. A municipality or a 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. A county ordinance enacted under this subsection does not apply within any municipality that has enacted or enacts an ordinance under this subsection.

Id.

¹ Courts refer to the four-factor preemption test as the “*Anchor* test” because it first appeared, in its modern form, in *Anchor Sav. & Loan Ass'n v. Equal Opportunities Comm'n*, 120 Wis.2d 391, 355 N.W.2d 234 (1984). *See Adams v. State Livestock Facilities Siting Review Bd.*, 2012 WI 85, n. 17, 342 Wis. 2d 444, 820 N.W.2d 404.

As authorized by the legislature in Wis. Stat. § 125.10(2), the County enacted the Social Host Ordinance which regulates conduct regulated by Wis. Stat. § 125.07(1). Subsection 125.07(1)(a)3, Wis. Stat., prohibits an adult from knowingly permitting or failing 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.² Subsection 125.07(1)(a)4, Wis. Stat., prohibits an adult from intentionally encouraging or contributing to a violation of subsection 125.07(4)(a) or (b). Wis. Stat. § 125.07(1)(a)4. Section 125.07(4)(b) prohibits an underage person not accompanied by his or her parent, guardian or spouse who has attained the legal drinking age to knowingly possess or consume alcohol. *See* Wis. Stat. § 125.07(4)(b).

Thus, local governments can enact social host ordinances which, concurrent with Wis. Stat. § 125.07(1)(a)3, prohibits an adult from knowingly failing 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. Similarly,

² Section 125.07(1)(a), Wis. Stat., states in relevant part:

(a) Restrictions.

...

3. 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. This subdivision does not apply to alcohol beverages used exclusively as part of a religious service.

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

local governments can enact social host ordinances which, concurrent with Wis. Stat. § 125.07(1)(a)4, prohibits an adult from intentionally encouraging or contributing to an underage person possessing or consuming alcohol in violation of Wis. Stat. § 125.07(4)(b).

1. Wis. Stat. § 125.07(1)(a)3 Applies to Premises Other Than Licensed or Permitted Premises.

There has been confusion by appellate courts regarding whether subsection 125.07(1)(a)3 applies to private residences due to the definition of “premises” in Wis. Stat. § 125.02. Section 125.02 provides:

Definitions. Except as otherwise provided, in this chapter:

...
(14m) "Premises" means the area described in a license or permit.

Wis. Stat. § 125.02.

Several unpublished court of appeals decisions have found the definition of “premises” in Wis. Stat. § 125.02(14m) applies to the word “premises” in Wis. Stat. § 125.07(1)(a)3. *See Nichols v. Progressive N. Ins. Co.*, 2007 WI App 110, ¶ 10, 300 Wis. 2d 580, 730 N.W.2d 460, rev'd, 2008 WI 20, 308 Wis. 2d 17, 746 N.W.2d 220 (unpublished opinion); *Alderman v. Topper Al Beer & Liquor*, 2004 WI App 88, ¶ 18, 272 Wis. 2d 855, 679 N.W.2d 927 (unpublished opinion); *State v. Willoughby*, 213 Wis. 2d 124, 570 N.W.2d 253 (Ct. App. 1997) (unpublished opinion); Appendix of Wisconsin Counties Association (“WCA App.”), pp. 101-118. By applying the definition of “premises” in section 125.02(14m) to subsection 125.07(1)(a)3, the court of appeals has concluded that no violation

occurs unless the premises owned by the adult or under the adult's control is a licensed or permitted premises. *See id.*

However, as Chief Justice Abrahamson noted in her concurring opinion in *Nichols v. Progressive N. Ins. Co.*, 2008 WI 20, 308 Wis. 2d 17, 746 N.W.2d 220, when read in context of subsection (1)(a)3 and section 125.07 as a whole, the word “premises” appears to mean “property” owned or under the control of the adult. *Nichols*, 2008 WI 20, ¶¶ 50-61 (Abrahamson, C.J., concurring) (describing the court of appeals' interpretation of section 125.07(1)(a)3 as “sketchy” and “puzzling.”)

Chief Justice Abrahamson aptly noted the last sentence of subsection (1)(a)3 provides as follows: “This subdivision does not apply to alcohol beverages used exclusively as part of a religious service.” If the word “premises” in subsection (1)(a)3 means an area described in a municipal license authorizing the sale of alcohol beverages or in a Department of Revenue permit issued under chapter 125, rather than property, the chief justice questioned why the legislature would also explicitly state that the prohibition does not apply to alcohol beverages used exclusively as part of a religious service. *Id.*, 2008 WI 20, ¶ 58.

Chief Justice Abrahamson also noted that subsection(1)(a)3 appears to be the only provision within section 125.07 in which the legislature has used the word “premises” without modifying it. *Id.* at ¶ 59. Elsewhere in section 125.07, the legislature denotes licensed or permitted premises. *See id.* (citing examples at n. 5). If the legislature intended for the word “premises” in subsection (1)(a)3 to

mean licensed or permitted premises, the chief justice questioned why the legislature would not have said so as it did throughout the remainder of section 125.07. *Id.*

The legislative history of Wis. Stat. § 125.07 confirms the chief justice’s analysis. *State v. Williams*, 2014 WI 64, ¶¶ 18-19, 355 Wis. 2d 581, 852 N.W.2d 467 (citation omitted) (legislative history may be used to confirm a plain meaning interpretation of a statute or to discern the meaning of an ambiguous statute). The definition of “premises” in Wis. Stat. § 125.02(14m) was created by 1981 Wisconsin Act 79 as part of a re-codification of alcohol beverage laws into Chapter 125. *See* 1981 Wis. Act 79; WCA App., pp. 119-146. Act 79 also created section 125.07 which restated and revised the substance of a number of statutes including Wis. Stat. § 66.054(20) (1979-80) governing restrictions on alcohol sales to and possession of alcohol by minors. 1981 Wis. Act 79, Section 8 (*see Note 1 to section 125.07*); WCA App., pp. 140-144.

Subsections 125.07(1)(a)3 and 4 were added later as part of 1983 Assembly Bill 169 authored by Representative Nelsen and enacted as 1983 Wisconsin Act 472. *See* 1983 Wis. Act 472, Section 2; WCA App., pp. 147-148; 1983 Assembly Bill 169 (as introduced); WCA App., pp. 149-150. However, the drafting records of 1983 Assembly Bill 169 reveal that the genesis of the bill was 1981 Assembly Bill 971 also authored by Representative Nelsen and introduced during the 1981-82 legislative session. *See* 1981 Assembly Bill 971; WCA App., pp. 151-153.

1981 Assembly Bill 971 amended Wis. Stat. § 66.054(20) (1979-80) to create two subsections as follows:

Section 3. 66.054(20)(c), (d) and (e) of the statutes are created to read:

66.054 (20)(c) No person 18 years of age or over may knowingly permit or fail to take action to prevent the illegal consumption of fermented malt beverages by a person under 18 years of age on premises owned by the person or under the person's control.

(d) No person 18 years of age or over may intentionally encourage or contribute to a violation of par. (b).

...

See id., Section 3; WCA App., p. 152. Importantly, the word “premises” was used by the bill’s author in 1981 Assembly Bill 971 before section 66.054 was re-codified as section 125.07 and before the definition of “premises” appeared in section 125.02(14m).

The drafting records of 1983 Assembly Bill 169 show that 1981 Assembly Bill 971 was used by the Legislative Reference Bureau drafting attorney to draft Assembly Bill 169, as indicated by the handwritten notes on a copy of Assembly Bill 971 preserved in the drafting file for Assembly Bill 169. *See* WCA App., pp 151-153. One of the markings on Assembly Bill 971 shows the drafting attorney crosses out the reference to section 66.054 and inserts “125.07(1)(a)3.” *Id.*, p. 152. Thus, the legislative history of subsection 125.07(1)(a)3 shows that the use of the word “premises” in the subsection predates the definition of “premises” in section 125.02(14m) and was not intended to be limited to only licensed or permitted premises.

Based upon the plain meaning of the word “premises” in subsection (1)(a)3, the context in which it is used in section 125.07 as a whole, and as confirmed by the legislative history of the subsection, a violation of subsection 125.07(1)(a)3, or an ordinance in conformity therewith, may occur on property owned by an adult or under the adult’s control regardless of whether the property is a licensed or permitted premises.

2. Even if Wis. Stat. § 125.07(1)(a)3 Applies Only to Licensed or Permitted Premises, Wis. Stat. § 125.07(1)(a)4 Provides Authority For Counties to Enact Social Host Ordinances.

Even if subsection 125.07(1)(a)3 is limited to licensed or permitted premises, counties are authorized by Wis. Stat. § 125.07(1)(a)4 to regulate conduct that intentionally encourages or contributes to a violation of subsections 125.07(4)(a) or (b). Subsection (4)(b) prohibits an underage person (with certain exceptions) from knowingly possessing or consuming alcohol. *See* Wis. Stat. § 125.07(4)(b). Because counties have the authority to regulate conduct that encourages or contributes to a violation of section 125.07(4)(b), counties therefore have authority to enact social host ordinances prohibiting a person from encouraging or contributing to an underage person possessing or consuming alcohol regardless of where the act or omission occurs.

B. The County’s Social Host Ordinance is Not Preempted by State Regulations.

1. The Social Host Ordinance Strictly Conforms to State Regulations.

Under the first factor of the *Anchor* test, the Social Host Ordinance is preempted if the legislature has expressly withdrawn county authority to act. In this case, section 125.10(2) specifically authorizes counties to regulate conduct in “strict conformity” with Wis. Stat. § 125.07(1).

The use of the term “strict conformity” may be evidence that the legislature has totally restricted local power to act outside of state mandates, but the use of such language alone does not *per se* preclude local governments from regulating areas where state regulations are silent. *U.S. Oil, Inc. v. City of Fond Du Lac*, 199 Wis. 2d 333, 348, 544 N.W.2d 589 (Ct. App. 1996). Rather, the true legislative intent must be found in the language and structure of the statutes as a whole. *See id.*, 199 Wis. 2d at 348.

With regard to Wis. Stat. § 125.10(2), the legislature allows county regulation “only if it strictly conforms to the statutory subsection.” In contrast, Wis. Stat. § 125.10(1) allows municipalities to prescribe additional regulations for the sale of alcohol beverages, “not in conflict with this chapter.” *Cf.* Wis. Stat. §§ 125.10(1) and (2). The use of the “strictly conforms” language in Wis. Stat. § 125.10(2) when compared to the more permissive language in Wis. Stat. § 125.10(1) suggests the legislature intended to withdraw local regulation of underage persons outside of state mandates.

Thus, under the first factor of the *Anchor* test, the Ordinance is preempted if it regulates conduct regulated by Wis. Stat. § 125.07(1) more restrictively than state regulations. The Social Host Ordinance prohibits the following conduct:

Prohibited acts. It is unlawful for any person(s) to host or allow an event or gathering at any residence, premises or on any other private or public property 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).

Fond du Lac County Code § 6-5(d). The conduct regulated by the Ordinance is the failure to take reasonable steps to prevent possession or consumption of alcohol by underage persons when the person has knowledge that possession or consumption of alcohol are occurring or will occur.

Likewise, subsection (1)(a)3 prohibits an adult from knowingly permitting or failing to take action to prevent the illegal consumption of alcohol by an underage person on premises owned by the adult or under the adult's control. Both the Ordinance and subsection (1)(a)3 prohibit the failure to act when the person knows that an underage person is consuming or will consume alcohol. The Ordinance does not regulate such conduct more restrictively than the statute.

Similarly, subsection (1)(a)4 prohibits an adult from intentionally encouraging or contributing to a violation of subsection (4)(b) which, in turn, prohibits an underage person (not accompanied by his or her parent, guardian or

spouse who has attained the legal drinking age)³ from knowingly possessing or consuming alcohol. Concurrent with subsection (1)(a)4, the Ordinance prohibits a person from encouraging or contributing to an underage person possessing or consuming alcohol by failing to take reasonable steps to prevent the possession or consumption of alcohol. Thus, the Ordinance is not more restrictive than subsection (1)(a)4.

In sum, the Social Host Ordinance requires a person to act when the person knows an underage person possesses alcohol or is consuming alcohol or intends to do so. State regulations also require a person to act under such circumstances. Therefore, the Ordinance strictly conforms to state regulations in accordance with Wis. Stat. § 125.10(2).

2. The Social Host Ordinance Does Not Logically Conflict with, Defeat the Purpose of, or Go Against the Spirit of State Regulations.

If the Social Host Ordinance strictly conforms to state regulations by prohibiting the same conduct in the same manner as state regulations, then it naturally follows that the Ordinance does not logically conflict with, defeat the purpose of, or go against the spirit of state regulations. Thus, the Ordinance does not fail any of the remaining factors of the *Anchor* test and is therefore not preempted by state law.

³ The Ordinance creates a similar exemption for conduct between an underage person and his or her parent or spouse who has attained the legal drinking age while the parent or spouse is present and in control of the underage person. Fond du Lac County Code § 6-5(e).

III. CONCLUSION

Based on the foregoing, the Wisconsin Counties Association respectfully requests that the Court affirm the decision of the Circuit Court.

Dated this 10th day of May, 2016.

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FORM, LENGTH AND ELECTRONIC COPY CERTIFICATION

I certify that this Brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. This brief contains 13 point font size for body text and 11 point font size for footnotes. The length of this brief is 2,943 words. This certification is made in reliance on the word count feature of the word processing system used to prepare this brief.

I further certify that I have submitted an electronic copy of this brief, excluding the contents of the appendix, which complies with the requirements of Wis. Stat. § 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 certification has been served with the paper copies of this brief filed with the Court and served on all opposing parties.

Dated this 10th day of May, 2016.

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APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; and (2) a copy of any unpublished opinion cited under s. 809.23 (3) (a) or (b).

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 10th day of May, 2016.

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WISCONSIN COURT OF APPEALS
DISTRICT II

COUNTY OF FOND DU LAC,

Plaintiff-Respondent

v.

Appeal No. 2015AP002223

STUART D. MUCHE,

Defendant-Appellant.

CERTIFICATE OF MAILING

I, Amanda Udell, certify that on May 10, 2016, I hand delivered ten (10) copies of the Brief and Appendix of *Amicus Curiae* Wisconsin Counties Association to the Clerk of the Wisconsin Court of Appeals and deposited into the U.S. Mail via First Class Mail, postage pre-paid, three (3) copies to all counsel of record.

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