WISCONSIN COURT OF APPEALS
DISTRICT II

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, TO *AMICUS CURIAE* BRIEF

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A. The Legislature Has Not Allowed Counties To Enact Social Host Ordinances.

The Wisconsin Counties Association (the "WCA") alleges counties have implied authority to enact social host ordinances. However, the Legislature in Wis. Stat. § 125.10 has set forth only specific enumerated situations where a local municipality or county can regulate in the alcohol arena – none of which include the right to regulate social hosts.

Municipalities can only:

1. "Enact regulations incorporating any part of this chapter". Wis. Stat. §125.10(1).
2. "[P]rescribe additional regulations" that do not "conflict with [Wis. Stat. Ch. 125]" only if they concern "the *sale* of alcohol beverages". Wis. Stat. § 125.10(1) (emphasis added).
3. Regulate craft alcohol events. Wis. Stat. § 125.10(1).
4. Regulate underage drinking on premises and possession of alcohol on school grounds. Wis. Stat. § 125.10(2).
5. Regulate moving quadricycle beer bars. Wis. Stat. § 125.10(5).

Counties can only regulate underage drinking on premises and possession of alcohol on school grounds, but only to the extent a municipality located therein has not already done so. Wis. Stat. § 125.10(2). A county's right to regulate in the alcohol arena is subordinate even to municipalities.

If the Legislature intended to allow municipalities and counties to regulate freely in this arena, it would not have enacted Wis. Stat. § 125.10 nor continue to change it. *See* 2013 Act 106.

1. Wis. Stat. § 125.02(14m) Defines "Premises" As Those Buildings Holding A Liquor License or Permit And The WCA Cannot Replace The Legislature's Definition With Their Own Nor Show The Legislature Intended to Create Two Definitions of "Premises".

> "'[S]tatutory interpretation `begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry.' (Citations omitted.) Plain meaning may be ascertained not only from the words employed in the statute, but also from the context. (Citations omitted.) We interpret statutory language in the context in which those words are used; 'not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results.' (Citations omitted.) Statutory history aids in a plain meaning analysis. (Citations omitted.)
>
> 'If the words chosen for the statute exhibit a `plain, clear statutory meaning,' without ambiguity, the statute is applied according to the plain meaning of the statutory terms'. (Citations omitted.) However, where the statute is 'capable of being understood by reasonably well-informed persons in two or more senses[,] 'then the statute is ambiguous''. (Citations omitted.) Where the language is ambiguous, we may then consult extrinsic sources, such as legislative history. (Citations omitted.) 'While extrinsic sources are usually not consulted if the statutory language bears a plain meaning, we nevertheless may consult extrinsic sources `to confirm or verify a plain-meaning interpretation.'' (Citations omitted.)
>
> Ultimately, we bear in mind that '[s]tatutory interpretation involves the ascertainment of meaning, not a search for ambiguity.' (Citations omitted.)
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> Sorenson v. Batchelder, 2016 WI 34, ¶¶11-13, ___ Wis.2d ____, ____ N.W.2d ___.

Here, Wis. Stat. § 125.02(14m) specifically describes "premises" as the area described in an alcohol license or permit. Despite this, the WCA alleges Wis.

Stat. § 125 actually has two separate definitions of "premises" – one explicit and the other buried in the minds of a legislator and drafting attorney from 1981 and which the current legislature still knows and has repeatedly readopted. However, an association's belief does not make a statute ambiguous.

Our supreme court has declined to interpret Wis. Stat. § 125.07(1)(a)3 as a basis to establish social host liability, nor establish common-law negligence liability against social hosts. Nichols v. Progressive Northern Ins. Co., 2008 WI 20, ¶7, 308 Wis.2d 17, 746 N.W.2d 220.

Although Justice Abrahamson in her concurring opinion in Nichols tangentially explored the definition of "premises" for purposes of Wis. Stat. § 125.07(1)(a)3., her analysis is not controlling nor developed. (This was likely because no party raised or addressed the definition of premises in Nichols. Id at ¶ 57.)

For example, the WCA and Justice Abrahamson point to the last subsection of (1)(a)3 that relieves responsibility for permitting illegal consumption if "used exclusively as part of a religious service" as creating ambiguity justifying an exploration of legislative history. However, religious services can, and routinely take place, in non-church buildings that hold liquor licenses. The Pope has and can conduct a Catholic Mass at an arena that has a liquor license. Startup churches and marrying couples conduct their ceremonies at hotel conference centers that have licenses, and when a tornado damages a church they may temporarily hold

their ceremonies at the local Knights of Columbus banquet facility which has a license. This clause does not create ambiguity.

"[O]wned by the adult or under the adult's control" also does not create ambiguity and represents a legislative decision to limit responsibility to only the operating licensee involved in the area of consumption. Since licensees[1] themselves may frequent other licensee's premises, Wis. Stat. § 125.07(1)(a)3 does not require all licensees to operate as "underage drinking police" and stop underage drinking wherever they see it and while not on the clock at their own establishments.

Similarly, while "premises" appears unmodified by an adjective in Wis. Stat. § 125.07(1)(a)3., this creates no ambiguity either. When "premises" is used elsewhere in Wis. Stat. § 125.07, it is used to identify subsets of premises. *See* Wis. Stat. § 125.07(1)(b)6.c ("licensed premises" vs. premises with Class B permits); § 125.07(3)(a) ("premises … for … retail sale" vs. manufacturing or distribution, etc.); Wis. Stat. § 125.07(3)(a) (presence on premises to transact non-liquor related business).

Second, this Court is not confused as to the definition of "premises" nor has it found it ambiguous. In fact, what the WCA describes as "confusion" is actually

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[1] Wisconsin allows issuance of several different types of licenses: operator license (§ 125.17), manager license (§ 125.18), provisional retail license (§ 125.185), Class "A" sales license (§ 125.25), and Class "B" sales and consumption license (§ 125.26), among others.

this court consistently holding against the WCA's claim that "premises" means more than the area described in a license or permit:

> "'Premises' is defined in ch. 125 as 'the area described in a license or permit.' (Citation omitted.) We are bound by this definition; "[i]f a word is specifically defined by statute, that meaning must be given effect." (Citation omitted.) Because there is no allegation in the Nichols' complaint that the Neisen property was 'area described in a license or permit,' it is not a 'premises' under § 125.07(1)(a)3."
>
> Nichols v. Progressive Northern Ins. Co., 2007 WI App 110, ¶10, 300 Wis. 2d 580, 730 N.W.2d 460 (unpublished).

> "Although Means makes a credible argument that 'premises' should include the home owned by the social host, we must reject it because the statute specifically defines the term 'premises,' and the Helinski home does not fit that definition."
>
> Alderman v. Topper A1 Beer & Liquor, 2004 WI App 88, ¶18, 272 Wis.2d 855, 679 N.W.2d 927 (unpublished).

> "[W] determined that the clear language of § 125.07(1)(a)3 must govern, and that if a word is specifically defined by statute, that meaning must be given effect. Therefore, consistent with our previous holdings and discussions on statutory construction and § 125.07(1)(a)3, this section does not apply to Willoughby's apartment."
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> State v. Willoughby, 213 Wis.2d 124, 570 N.W.2d 253 (Ct. App. 1997) (unpublished).

Third, when our supreme court did have an occasion to examine "premises" in Ch. 125, it did not find it ambiguous, unclear or irreconcilable. Wisconsin Dolls, LLC v. Town of Dell Prairie, 2012 WI 76, ¶¶31, 35, 342 Wis.2d 350, 815 N.W. 690.

In Dolls, our supreme court confirmed "premises" is not every place in Wisconsin, but the area specifically described in a license or permit – exactly what § 125.02(14m) states. It also had no difficulty reconciling the term "licensed

premises" with that statutory definition; and Justice Abrahamson apparently no longer found this adjective "puzzling" as she wrote no separate opinion.

"Premises" is the area described in the license -- which may be a building or something larger like "'8 acres' of [a] resort", Lambeau Field or Camp Randall Stadium. Id at ¶¶31, 35. "Licensed premises" refers to more than the point of sale, but not necessarily the entire permitted area of consumption. In essence, the area described in a license (i.e. "premises") has two parts -- the area of consumption and the area of sale – which may[2] be the same or a subset thereof. Id at ¶39. When the legislature refers to a licensed premises it is referring to part of the total described premises. After all, a licensee is taking responsibility for alcohol sales, consumption and possession in that defined area only.

Further, even if this court found "premises" ambiguous, the Legislative history of Ch. 125 does not support the WCA's speculation that one legislator 30 years ago may have originally intended "premises owned by the person or under the person's control" to include personal residences.

That legislator's proposed changes to § 66.054(20)(c) (1979-80) were never enacted to Ch. 66, and were not added to the November 1981 recodification of Chs. 66 and 176 into Ch. 125. The purpose of that 1981 recodification was to

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[2] Different agents of the state determine the parts. The local municipality sets the geographic confines of the area of consumption and sale in a retail license. Id; Wis. Stat. § 125.02(9). The Department of Revenue sets it in permits for manufacturing, distribution and larger retail situations. Wis. Stat. § 125.02(13); e.g. sports clubs (§ 125.27), wholesalers (§ 125.28), brewers (§ 125.29), out-of-state shippers (§ 125.30), wineries (§ 125.53), etc.

make "numerous changes … to interpret and clarify the law, … remove conflicts and provide for consistency in the law." 1981 Act 79, 650; WCA-App. 120.

After this recodification, reinterpretation and clarification, a change was proposed to § 125.07(1)(a)3. WCA speculates that because a drafting attorney used some of an old bill's language that the legislature somehow wanted to defeat the intent of its recodification and reintroduce ambiguity and conflict into the statute.

However, WCA provides no evidence that the drafting attorney was instructed to use an unspecified pre-codification definition versus the defined statutory definition. It may simply have been more convenient to copy a prior draft. The WCA also provides no evidence the legislature discussed at a hearing any expectation that "premises" meant anything other than the statutory definition.

In addition, while a *draft* of Act 472 used similar language to the legislator's prior proposal, the final enacted version of Act 472 contained numerous changes consistent with the stated legislative intent to create clarification and standardization. For example, the final enacted Act 472 replaced the remaining non-standard terms used in the prior draft:

1. "person 18 years of age or over" replaced with "adult" (as defined in Wis. Stat. § 48.02(1) (1979-80);
2. "person under 18 years of age" with "underage person" (as defined in Wis. Stat. §125.02 (20m) per 83 Act. 74), and

3. "fermented malt beverages or intoxicating liquor" with "alcohol beverages" (defined in Wis. Stat. §125.02(1). *See* WCA-App. 150 vs. 148.

The legislature was clearly trying to keep Wis. Stat. § 125.07(1)(a)3 consistent with the terminology of its recent codification. Act 472 was not creating new terms. It would be a perversion here to claim that as part of the recodification and later, that the legislature intended to create entirely new definitions of "adult", "underage person", "alcohol beverages" and "premises" in Wis. Stat. § 125.07(1)(a)3.

Similarly, since Act 472, Wis. Stat. § 125.02 has been changed more than a dozen times, and Wis. Stat. § 125.07 at least four times, yet none of those changes modified or clarified[3] the definition of "premises" further. If the legislature thought "premises" was unclear – or had different meanings for different sections – it would have changed it or adopted an expansive definition like Fond du Lac County did in Ord. 6-5.

Also, interestingly, the language cited by the WCA was proposed to be made to former Ch. 66 entitled "Municipal Law"; not Ch. 59 – Counties. If this court were to improperly construed the legislature intended Wis. Stat. § 125.07(1)(a)3 to apply to every square inch of Wisconsin land, it would also have

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[3] WCA implies the use of "premises" in Wis. Stat. § 125.07(1)(a)3 is accidental. However, the legislative history over the years shows the legislature has intentionally made changes to Ch. 125 in a manner showing close attention to semantics and precise diction.

to use this same logic to determine that the legislature never intended to give a county authority to locally regulate this situation.

Wis. Stat. 66.054(16) (1979-80) also confirmed 30 years ago that alcohol distribution and possession was an issue of state-wide concern and required uniform regulation.

Even if the Court were to conclude the statutory language of "premises" is ambiguous, the legislative history does not *clearly* set forth the legislature's intent to use a different definition of "premises" for purposes of Wis. Stat. § 125.07(1)(a)3. Legislative drafting notes are not a way to replace the actual statutory language enacted with a never enacted draft or worse yet a party's interpretation of an act that was never passed. In the end WCA is asking this Court to go even further, and give counties, like Fond du Lac, authority to define a second definition of "premises" when the legislature itself has not done so. No tortured reading of Ch. 125 gives a Wisconsin county that power.

2. A County Can Only Regulate Conduct Prohibited In § 125.07(1)(4)(A)-(B) If It Strictly Conforms To That Statute; It Does Not Give It Power To Expand It To Social Hosts.

Wis. Stat. § 125.10(2) is clear – counties can regulate underage possession and consumption of alcohol beverages under Wis. Stat. § 125.07(1) and (4) only in the same manner the State does. No party here disputes that requirement.

Wis. Stat. § 125.07(1)(a)4 and § 125.07(4)(b) state no adult may intentionally encourage or contribute to an underage person, not accompanied by a parent, guardian or spouse or engaged in certain employment, knowingly

possessing or consuming alcohol beverages at any location. Fond du Lac County has authority to regulate this activity, but it must strictly conform its local ordinances to the manner in which the State has chosen to regulate it.

Fond du Lac County wants to regulate more, and that is not permitted.

Fond du Lac County wants to regulate merely allowing a gathering where alcohol is present (even if unknown to the host) and that adult knows an underage person intents to possess or consume alcohol. Ord. 6-5(d). The host does not even need to be present. Ord. 6-5(d)(2). However, Wis. Stat. § 125.07(4)(b) requires the underage person to actually be in possession of or knowingly consuming alcohol beverages; and the host must intentionally encourage or contribute to that possession or consumption versus just knowing it may occur.

Fond du Lac County wants to require parents to be directing, managing and overseeing their children during the possession and consumption. Ord. 6-5(e)(1); (b) ("in control"). However, Wis. Stat. § 125.07(4)(b) only requires the parents to be present during the possession or consumption.

Fond du Lac County wants step-parents to be allowed to permit underage drinking. Ord. 6-5(b) ("parent"). Wis. Stat. § 48.02(13) does not include step-parents.

Fond du Lac County wants to permit underage persons to be in possession of alcohol during any employment, not just the specific employment identified in Wis. Stat. § 125.07(4)(bm). *See* Ord. 6-5(e)(3).

Fond du Lac County wants to restrict underage persons from being in possession of any form of alcohol. Ord. 6-5(d)[4]. Fond du Lac defines "alcohol" to include any distilled spirits and any dilutions and mixtures thereof. Ord. 6-5(b) ("Alcohol"). Wis. Stat. § 125.02(1) and (8) states only distilled spirits containing 0.5% or more of alcohol by volume, which are beverages, are prohibited.

Fond du Lac County's ordinance does not strictly conform to Wis. Stat. § 125.07(4)(b) and therefore is invalid. The County can choose to pass an ordinance that strictly conforms, but it has not done so here.

B. The Pervasiveness Of The Legislature's Regulation Of Alcohol Sales, Possession And Use, Specifically As To Underage Persons, And Its Self-Stated Characterization That These Are Issues of State-Wide Concern that Require Uniform State Law, Make It Clear That The County's Authority In This Arena Has Been Preempted.

Pervasive regulation means counties cannot fill in statutory silences with their own regulatory ideas. The legislature can choose to regulate or not regulate.

1. Fond du Lac's Ordinance 6-5 Does Not Strictly Conform To Ch. 125.

The WCA admits Wis. Stat. § 125.10(1)-(2) provides the legislature intended to withdraw local regulation of underage persons contrary to the State determined mechanism.

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[4] "It is unlawful for any person … to allow an … gathering at any residence … on any .. private … property where alcohol … are present when the person knows that an underage person will … consume any alcohol … or will 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." Ord. 6-5.

Even if this Court were to improperly construe "premises" in Wis. Stat. § 125.07(1)(a)3 to include a private residence, Ord. 6-5 still does not conform to Wis. Stat. § 125.07(1)(a)3. Wis. Stat. § 125.07(1)(a)3 requires (1) the adult to knowingly fail to take action (2) to prevent illegal underage consumption[5] on (3) premises owned by the adult or under the adult's control.

Fond du Lac County's ordinance (1) makes it unlawful to merely allow a gathering where alcohol is present, even if the adult is unaware it is present [6-5(d)], (2) does not require the adult to actually be present during the consumption transforming intent from knowledge to negligence [6-5(d)(2)], (3) makes it unlawful based solely upon an underage person's intent to possess, not actually consuming the alcohol [6-5(d)], and (4) the premises need not be owned by the adult and includes areas the adult is trespassing upon and has no legal control [6-5(b)-"Residence, premises…"]. Fond du Lac County also wants all violations of Wis. Stat. § 125.07(1)(a) to be punished by a $1,000-5,000 forfeiture. Ord. 6-5(f). Wis. Stat. § 125.07(1)(b)2.a only allows forfeitures of $500.

As discussed above, Ord. 6-5 also does not strictly conform to Wis. Stat. § 125.07(4)(b) either.

Ord. 6-5 does not strictly conform to multiple areas of Wis. Stat. § 125.07 and per Wis. Stat. § 125.10 is invalid.

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[5] Wis. Stat. § 125.07(1)(a)3 does not require an adult to fail to take action to prevent possession.

2. Fond Du Lac's Ordinance Conflicts With The Purpose and Spirit Of The Legislature's Larger Regulatory Scheme Of Alcohol Possession And Use By Underage Persons.

Ord. 6-5 attempts to dramatically change the responsibilities home owners have with regard to alcohol located upon their property. Homeowners can be held responsible for underage persons merely touching alcohol beverages they may maintain in unlocked cabinets.

Alcohol possession and consumption has been regulated for over 80 years in Wisconsin. Still today, the legislature continues to tweak the areas[6] in which alcohol may be possessed and consumed by its citizens and underage persons. The legislature also continues to tweak the areas municipalities and counties can regulate in this arena. *See* 2013 Act 106 (Allowing municipalities, not counties, to restrict quadricyle bars.) However, with the exception of a few years during Prohibition, the legislature and our supreme court have never entertained such a broach reach into the home with regards to alcohol possession.

Fond du Lac County believes the legislature should go further and start regulating alcohol possession in private homes; but the legislature has declined to do so. Allowing counties to regulate in this area would clearly defeat the legislature's spirit of pervasive regulation in this arena. Ord. 6-5 violates the spirit of Ch. 125.

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[6] The Legislature has continued to add premises underage persons can frequent. Underage persons can be in the following premises: 1985 Act 317 ("curling clubs"), 1985 Act 29 ("soccer clubs"), 1991 Act 39 ("tennis clubs"), 1997 Act 98 ("indoor volleyball courts"), 2003 Act 246 ("recreational fishing resorts"), etc.

CONCLUSION

The WCA appears more interested in trying to convince this court that Wis. Stat. § 125.07(1)(a)4 and § 125.07(4)(a)-(b) allow counties to pass some sort of social host ordinance versus talking about the expansive and impermissible ordinance Fond du Lac County enacted.

However, the conduct described in those statutory sections, and which municipalities and counties are permitted to locally enact, is not social host liability – it is liability arising from contributing to the delinquency of an underage person. These sections prohibit intentionally permitting underage drinking (not possession), or intentionally encouraging underage persons to be at or try to possess or consume alcohol from retail purveyors.

The WCA wants to go further – it, and its member counties apparently, are not happy with the decisions the legislature has made to limit other adults liability in regards to underage drinking only to delinquency situations. They want the power to enact ordinances that require adults not only to refrain from contributing to the delinquency, but affirmatively keep underage persons from ever touching an alcohol beverage. The legislature is unwilling to go that far, and our supreme court in Nichols reaffirms it is its decision alone to make.

It also appears that local county sheriffs want or approve of these social host ordinances because they give them a "tool" to get consensual access to personal residences without a warrant. It is believed that when owners of a property are not present at an underage drinking party, the sheriff uses the threat of

issuing a citation for social host liability to obtain the owner's consent to quickly enter the home without a warrant. *See* http://www.fdlreporter.com/story/news/local/2016/05/17/42-underage-drinkin-citations-issued-eden-party/84505936/.

Any way one looks at it, Fond du Lac County's Ord. 6-5 does not comply with Ch. 125 and is invalid. The citation against Mr. Muche therefore must be dismissed.

Dated May 24, 2016.

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CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c), for a brief produced using proportional serif font. The length of this brief (comprising the statement, argument and conclusion) is 3,640 words.

Dated May 24, 2016.

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

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

Dated May 24, 2016.

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CERTIFICATE OF MAILING

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