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Recreational Immunity Applied When Grandparent Injured While Supervising Grandchildren at City-Owned Pool

A recent Wisconsin Court of Appeals case held that recreational immunity shielded a city from liability for injuries to someone who was supervising others engaged in recreational activities on city-owned land. *Wilmet v. Liberty Mut. Ins. Co.*, No. 2015AP2259 (Wis. Ct. App. Feb. 28, 2017). Carol Wilmet was a grandma watching her grandchildren as they swam at a swimming pool owned and operated by the City of Du Pere. Carol was not swimming herself, merely watching as her grandchildren swam. Her grandson shouted that he was going to jump off the high dive. Concerned for his safety, Carol told her grandson to wait and moved to supervise him better. As she headed toward the high dive, Carol tripped. She sued the City for damages based on her injuries, but the court held that the City was entitled to immunity under Wisconsin's recreational immunity statute, Wis. Stat. § 895.52.

The recreational immunity statute generally protects landowners from liability when they open their land for recreational activities. The question in this case was whether Carol was engaged in recreational activity at the time of her injury. Carol was only supervising her grandchildren's recreational activity, not physically participating in recreational activity. The statutory definition of recreational activity is "any outdoor activity undertaken for the purpose of exercise, relaxation or pleasure, including practice or instruction in any such activity." The statute also provides that over two dozen enumerated activities and "any other outdoor sport, game or educational activity" constitute recreational activities.

The court explained that swimming and diving were activities covered under the statute, but Carol was not swimming and diving. Supervising is not an enumerated recreational activity. However, a statement of legislative intent included in the law that created the recreational immunity statute stated that the statute "should be liberally construed in favor of property owners to protect them from liability." The Wisconsin Supreme Court explained in past cases that recreational activities include activities that are substantially similar to the enumerated activities. Practice and instruction of outdoor activities are enumerated in the statutory definition of "recreational activity." Looking at dictionary definitions for "supervise," the court reasoned that "supervise" was substantially similar to "practice" and "instruction."

Additionally, the court reasoned that a supervisor has some degree of control over the circumstances under which the recreational activity takes place. The recreational activity of the supervisee is the reason the supervisor is on the property, and so "the recreational activity of the supervisee also becomes a recreational activity of the supervisor." Therefore, Carol was engaged in a recreational activity at the time of her injury, and the City was entitled to immunity.

The court explained that its holding was consistent with the purpose of the statute. Drawing a distinction between activity participants and activity supervisors would be illogical. A Wisconsin Supreme Court case had previously held that the statute did

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Court of Appeals Upholds Oshkosh Special Events Ordinance

In its recent decision in *City of Oshkosh v. Kubiak*, 2016AP804 (Feb. 15, 2017), the Wisconsin Court of Appeals held that the City of Oshkosh special events ordinance was not unconstitutionally vague because it used the term "organizer" without defining it.

The City of Oshkosh had a special events ordinance that attempted to defray the extra costs incurred by the City during special events. The ordinance required the "person or entity acting as an event organizer" to obtain a permit from the City prior to holding certain types of special events. It also allowed the City to demand reimbursement for extraordinary services provided by the City in connection with the event—for example, police protection, traffic control, or paramedic services.

The lawsuit arose from the semi-annual Oshkosh Pub Crawl, an event during which college students patronize taverns in downtown Oskhosh en masse. Because of the increased foot traffic and intoxicated bar patrons, the City provides a number of costly extraordinary services on the night of the event. In prior years, Joseph Kubiak, through Oshkosh Pub Crawl, LLC, had applied for a permit and paid the City for extraordinary services pursuant to the ordinance. In 2014, however, the event was held without a permit and Kubiak refused to reimburse the City for the services it provided in connection with the event. The City sued Kubiak to recover its costs.

In general, procedural due process requires that an ordinance be clear enough to provide fair notice to the public of what the ordinance prohibits and to provide reasonably clear guidelines to law enforcement and courts about how to enforce the ordinance. The Circuit Court sided with Kubiak, ruling that the ordinance, which applied to the "organizer" of an event but did not specifically define the term "organizer," was so vague that it was impossible to determine whether Kubiak had violated it.

The Court of Appeals disagreed, noting that ordinances are initially presumed to be constitutional. When interpreting an ordinance, a court gives an undefined, nontechnical word like "organizer" its "ordinary and accepted meaning," which is often determined by referring to a dictionary. The court compared a number of dictionary definitions for the word "organizer" and concluded that the definition was sufficiently definite that "people of ordinary intelligence can read and sufficiently understand the requirements" of the ordinance. In addition, the court pointed to criminal statutes using the undefined term "organizer" which have been held by other courts to be enforceable. Ultimately, the Court of Appeals reversed the Circuit Court's holding and concluded that the ordinance was not unconstitutionally vague and was therefore enforceable.

Drafting a good ordinance is a balancing act. Failing to define key terms in ordinances can give rise to costly litigation, as happened in this case. However, it is neither possible nor desirable to define every single word. As this case confirms, courts will generally interpret nontechnical words according to their commonly understood definitions.

— Julia Potter

Wisconsin Supreme Court Rules That The Public Can Carry Concealed Weapons On Public Transportation

On Tuesday, March 7, 2017, the Wisconsin Supreme Court issued a decision in *Wisconsin Carry, Inc. v. City of Madison*, 2017 WI 19, that prohibits municipalities from enacting rules that bar individuals from carrying guns on public transportation. The lawsuit arose from a Madison Metro Transit rule that banned guns on City of Madison buses. The rule was challenged by pro-gun group Wisconsin Carry, Inc., which argued that the law violated Wis. Stat. § 66.0409(2), which states in pertinent part:

> Except as provided in subs. (3) and (4), no political subdivision may enact or enforce an ordinance or adopt a resolution that regulates the . . . possession, bearing, [or] transportation . . . of any knife or any firearm . . . unless the ordinance or resolution is the same as or similar to, and no more stringent than, a state statute.

Wisconsin law authorizes residents to carry concealed weapons upon obtaining the required license. Wisconsin Carry argued that Wis. Stat. § 66.0409(2) prohibits municipalities from enacting gun control "ordinances" or "resolutions" that are stricter than state law limitations and the Madison Metro "rule" was the same as a municipal ordinance or resolution that was preempted by state law.

A Dane County Circuit Court and the Wisconsin Court of Appeals ruled in favor of the City of Madison, finding that the rule did not amount to an ordinance or resolution. The Wisconsin Supreme Court disagreed. In a 5-2, 74-page decision, the court held that when a municipality loses authority to legislate on a subject, its sub-units also lose the ability to legislate on the subject. In reaching this decision, Justice Daniel Kelly noted that "Consequently, if a statute removes the authority of a municipality's governing body to adopt an ordinance or resolution on a particular subject, the governing body loses all legislative authority on that subject." "Thus, the plain meaning of the Local Regulation

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Recreational Immunity

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not distinguish between classes of people involved in an organized team sport activity—the statute covered coaches as well as players. Similarly, people are no less engaged in a recreational activity when they are supervising as opposed to physically participating in the activity.

This case reiterates Wisconsin's strong public policy in favor of recreational immunity for landowners that open their land for recreational purposes. The law does not draw distinctions between supervisors and physical participants because that would be a disincentive for landowners. Wisconsin's recreational immunity statute is designed to encourage municipalities and other landowners to open up their land for recreational activities.

— Brian P. Goodman

Employer Attendance Policies and Unemployment Compensation

An employee who is terminated for "misconduct" has reduced eligibility for unemployment benefits. Whether an employee engaged in "misconduct" was previously addressed solely under a broad standard which defined misconduct to include employee conduct such as "deliberate violations of standards of behavior, carelessness that manifests wrongful intent, and substantial disregard of the employer's interests." Wis. Stat. § 108.04(5). This standard is generally considered employee-friendly. In 2013, the legislature adopted Wis. Stat. § 108.04(5)(e) ("the amended statute") which provides an additional statutory definition of "misconduct" for unemployment compensation purposes for different types of conduct, including absenteeism. This standard is more employer-friendly. For example, with respect to absenteeism, the amended statute defines misconduct as follows:

"Absenteeism by an employee on more than 2 occasions within the 120-day period before the date of the employee's termination, *unless otherwise specified by his or her employer in an employment manual* of which the employee has acknowledged receipt with his or her signature" (emphasis added)

A recent Wisconsin Court of Appeals interpreted this provision with respect to an employee's eligibility for unemployment compensation when an employee is terminated for absenteeism. *DWD v. LIRC*, No. 2016AP1365 (Wis. Ct. App. Mar. 8, 2017).

In this case, Valarie Beres was employed as a probationary employee by the Mequon Jewish Campus (MJC) as a registered nurse. She signed a written attendance policy which stated that probationary employees could be terminated for a single instance of a "no call, no show." Beres was ill one day and did not call in before her shift. MJC terminated Beres pursuant to its policy. The Department of Workforce Development (DWD) denied Beres' unemployment compensation claim for benefits. DWD interpreted the statute to allow employers to adopt an attendance policy which establishes a stricter standard than "2 absences in 120 days" and that an employee terminated for violating the stricter policy would be considered to have engaged in "misconduct" under the statute for unemployment compensation purposes.

Beres appealed that decision to LIRC which reversed DWD's determination. LIRC applied a three-part test. First, it determined that Beres was terminated pursuant to an employer attendance policy that was stricter than the statute. LIRC concluded that an employer could not prevail under the statute if the employer adopted and enforced an absenteeism standard stricter than outlined in the statue. Therefore, LIRC determined that Beres was not terminated for "misconduct" due to absenteeism as defined in the statue.

Second, LIRC determined that Beres was not terminated for "misconduct" under the broader statutory provision since Beres' absence was an isolated incident of ordinary negligence due to her illness and did not constitute "misconduct" under the broader statutory provision.

Third, LIRC determined that Beres was not terminated for "substantial fault" because she did not have reasonable control over her absence because she was ill. Therefore, Beres qualified for unemployment compensation.

This decision was appealed to the Wisconsin Court of Appeals which held that LIRC's interpretation of the statute was reasonable. The court held that while the statute allows an employer to establish an attendance policy that is more generous to employees, the violation of which would constitute "misconduct," the statute could not be reasonably interpreted to allow an employer to apply a stricter standard in order to establish "misconduct" for unemployment insurance benefits (although such a policy would provide a basis for termination). If the employer adopts a stricter standard, the determination of whether an employee has engaged in "misconduct" will be reviewed instead under the broader, employee-friendly standard.

DWD can appeal the case to the Wisconsin Supreme Court. Of note, however, is that Governor Walker's proposed 2017-19 budget seeks to eliminate the LIRC, whose interpretation was adopted by the Court of Appeals and was at odds with DWD's Unemployment Insurance Division Administrator. The proposed budget provides that all unemployment appeals would be handled by the UI Division Administrator.

Regardless of the budget proposal, the Court of Appeals has made it clear that while employers may establish an attendance policy that is stricter than " 2 absences in 120 days," an employee terminated under this stricter standard will not fall within the new statutory definition of "misconduct," but may be considered to have engaged in "misconduct" if the conduct meets the broader definition of "misconduct" or if the employee's absences constitute "substantial fault."

— Brian P. Goodman

Concealed Weapons On Public Transportation

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Statute [Wis. Stat. § 66.0409(2)] is that the Legislature withdrew from the city's governing body all authority to legislate on the subjects it identifies."

In the dissent, Justice Ann Walsh Bradley noted that the majority's decision abandoned rules of statutory construction because Madison Metro Transit's "rule" is not the same as an "ordinance" or "resolution" as required by the plain language of Wis. Stat. § 66.0409(2). Justice Bradley noted that "Discarding seminal rules of statutory interpretation, the majority slips into legislative mode, and ignores the plain meaning of the words chosen by the legislature. It rewrites the statute in a manner it wishes the legislature had chosen, a manner chosen by several other states, but not Wisconsin." This was the same reasoning adopted by Dane County Circuit Court Judge Ellen Berz and the 4th District Court of Appeals. In response to this argument, Justice Kelly indicated that it would have been impossible and unreasonable for the legislature to include every label for a legislative act in § 66.0409(2).

City of Madison Mayor Paul Soglin indicated that he plans to ask the legislature to amend the law to allow cities to regulate guns on buses, similar to their authority to regulate guns in public buildings.

— Kathryn A. Harrell

boardman & clark llp
LAW FIRM

Boardman & Clark LLP
Fourth Floor
1 South Pinckney Street
P.O. Box 927
Madison, WI 53701 -0927

Certified ABA-EPA Law Office
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Eileen A. Brownlee	822-3251	ebrownlee@boardmanclark.com
Jeffrey P. Clark	286-7237	jclark@boardmanclark.com
Anita T. Gallucci	283-1770	agallucci@boardmanclark.com
Brian P. Goodman	283-1722	bgoodman@boardmanclark.com
Kathryn A. Harrell	283-1744	kharrell@boardmanclark.com
JoAnn M. Hart	286-7162	jhart@boardmanclark.com
Richard A. Heinemann	283-1706	rheinemann@boardmanclark.com
Paul A. Johnson	286-7210	pjohnson@boardmanclark.com
Michael J. Julka	286-7238	mjulka@boardmanclark.com
Lawrie J. Kobza	283-1788	lkobza@boardmanclark.com
Julia K. Potter	283-1720	jpotter@boardmanclark.com
Mark J. Steichen	283-1767	msteichen@boardmanclark.com
Douglas E. Witte	283-1729	dwitte@boardmanclark.com
Steven C. Zach	283-1736	szach@boardmanclark.com