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## Has the Wisconsin Supreme Court Marked the End for Liability Waivers?

The Wisconsin Supreme Court recently addressed the enforceability of liability waivers in *Atkins v. Swimwest Family Fitness Center*, 2005 WI 4, \_\_\_ Wis. 2d \_\_\_, 691 N.W.2d 334. In a 6-1 decision, the court ruled that a liability waiver signed by Dr. Charis Wilson did not immunize Swimwest from liability for Dr. Wilson's death. Dr. Wilson's minor son instituted a wrongful death lawsuit against the swimming facility after his mother drowned in four feet of water while using the pool.

While cases had identified limits to the use of such waivers previously, the supreme court's recent decision has imposed further restrictions on the use of liability waivers. What protection, if any, these liability waivers offer businesses or municipalities is now uncertain.

The liability waiver used by Swimwest stated that the signor agreed "to assume all liability for [herself] without regard to fault" and agreed "to hold harmless Swimwest Fitness Center, or any of its employees for any conditions or injuries that may result" while using the facility. *Id.* at ¶ 4. The liability waiver appeared on a five-and-one-half inch by five-and-one-half inch red card, with a heading "Guest Registration" on the top of the card and a heading

"Waiver Release Statement" in the middle of the card, just above the release language. *Id.*

The court determined that Swimwest's liability waiver was unenforceable because it was contrary to public policy for three reasons. *Id.* at ¶ 2. First, the court held that the language of the waiver was overly broad and all-inclusive. The court indicated that the liability waiver did not make clear to Dr. Wilson that she was releasing Swimwest from both intentional as well as negligent acts. Second, the court found that the liability waiver served two purposes, both as a guest registration and a waiver of liability. Because of the dual purpose, the court determined that the form failed to highlight the waiver portion of the document, and thereby made it uncertain whether Dr. Wilson understood the nature and significance of the document she was signing. Third, the court determined that Dr. Wilson did not have an opportunity to bargain over the liability waiver. The court determined that had Dr. Wilson not signed the waiver, she would not have been allowed to use the swimming facility.

Most striking about the court's opinion is its determination that Dr. Wilson did not have an opportunity to bargain over the liability

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# Supreme Court Clarifies Nuisance and Immunity Rules In Dispute Over Water Main Break

Nuisance is a confusing area of law. Combined with the ambiguities in applying the rules on governmental immunity, this was a very difficult area for municipalities to analyze their liability exposure. In a dispute between the Milwaukee Metropolitan Sewer District (MMSD) and the City of Milwaukee over the collapse of a sewer, the Supreme Court conducted a comprehensive review of nuisance law and the interplay with governmental immunity in *MMSD v. Milwaukee*, 2005 WI 8 (Jan. 27, 2005).

On December 9, 1999, MMSD's interceptor sewer line collapsed near the site of the rupture and collapse of the city's water main. MMSD subsequently filed suit against the city for the cost of repair and replacement of its sewer line, alleging that the water main break had led to the collapse of the sewer line. MMSD's complaint sounded in negligence and nuisance. With respect to nuisance, MMSD alleged that the city had permitted a nuisance condition to exist in the form of a broken water main that continued to leak until it undermined the sewer line.

The city filed a motion for summary judgment, arguing that: a) it had no notice of any alleged defect in the water main, b) it did not breach any duty it

owed to MMSD, c) it was statutorily immune from suit for both nuisance and negligence, and d) there was no nuisance. The circuit court found that the city did not have notice regarding any defective condition and that such lack of notice was a viable defense to both the nuisance and negligence claims and that the city was immune from suit under both claims. The court of appeals then reversed the circuit court, holding that notice was not an element of a claim for private nuisance and that statutory immunity under section 893.80(4), Stats., did not apply to claims for private nuisance based on *Winchell v. City of Waukesha*, 110 Wis. 101, 109, 85 N.W. 669 (1901), and several later cases relying on *Winchell*.

On review, the Supreme Court affirmed the result reached by the court of appeals, but on an entirely different rationale. It agreed that summary judgment was not appropriate under the facts of the case, but only because there were disputes of fact concerning notice and whether the alleged negligence by the city involved ministerial or discretionary acts.

## Nuisance Law

Noting that the term "nuisance" has come to mean "all things to all people," the court started its analysis with an extensive discussion of nuisance law generally, not just with respect to claims against governmental entities. *Id.* at ¶ 24. Going back to fundamentals and relying heavily on Prosser and the Restatement, the court distinguished between a nuisance and liability for a nuisance. It defined a nuisance as "a condition or activity that unduly interferes with the use of land or of a public place." A nuisance is simply the type of harm suffered. The distinction between public and private nuisance is determined by the nature of the interest invaded. A private nuisance involves an interference with the use and enjoyment of land. *Id.* at ¶ 27. A public nuisance involves interference with a right common to the general public—it need not involve the use and enjoyment of land. *Id.* at ¶ 28.

Whether there is liability for the nuisance depends on whether the harm is caused by underlying tortious conduct. *Id.* at ¶ 25. Citing section 822 of the Restatement (Second) of Torts, the court concluded that liability for a private nuisance must be predicated on either: a) intentional and unreasonable conduct, or b) unintentional, but negligent, conduct. *Id.* at ¶ 32. The court explained that cases referring to liability for the creation or maintenance of a nuisance are not

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## Has the Wisconsin Supreme Court Marked the End for Liability Waivers?

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waiver. The record demonstrated that Dr. Wilson had read the form, had an opportunity to ask questions, and Swimwest told her before she signed the form that it was a waiver of liability. *Id.* at ¶ 25. However, the court held that this was not enough to demonstrate an opportunity to bargain. The court suggested that a person must be given the option of not signing the waiver (with the facility presumably charging a higher fee for that option) in order for a liability waiver to be enforceable.

The court's decision likely will have an impact upon businesses and municipalities that rely upon liability waivers to hold down costs. Insurance rates may increase for entities that use liability waivers because of the increased difficulty in enforcing them and the uncertainty that they will survive any legal challenge. Given the stringent requirement by the court that a person must have the opportunity to bargain—that is, the option of not signing the liability waiver—it is likely that there will be more challenges to liability waivers in the future, and those challenges will have a greater chance of success.

— Sarah A. Zylstra

*Continued on next page*

based on any theory of strict liability for nuisance, but rather involve conditions that are intentionally created and, although lawful, pose an unreasonable interference with the rights of others. *Id.* at ¶ 33 (quoting examples from *Brown v. Milwaukee Ry. Co.*, 199 Wis. 575, 227 N.W. 385 (1929) of cases dealing with operation of a tannery or slaughterhouse in a residential area). An interference is deemed intentional if the defendant intends to cause it, or if he acts knowing that the interference is happening or is substantially certain to happen. *Id.* at ¶ 37. Where the conduct or condition giving rise to the nuisance does not necessarily cause damage to others and where the nuisance develops over time, the rules and defenses applicable to negligence come into play.

Applying the nuisance rules to the facts of the case, the Supreme Court concluded that there was no evidence that Milwaukee intended to interfere with MMSD's sewer line or that it was aware of any such alleged interference until the collapse occurred. The court rejected a number of MMSD's theories on notice for lack of evidence. Citing treatises, the court found that there is no duty by a water utility to inspect and repair buried water mains unless it has notice of a leak that is likely to cause damage. The court found no evidence in the record that Milwaukee had historically done regular and systematic pressure testing of its lines or that it had abandoned this practice. However, the city had done construction work in the area in 1992-93 that might have affected the water line and there were records indicating that the city had planned to inspect the line after construction. The inspections apparently never took place. Combined with evidence that the line had been leaking for months before the break in December 1999, the court found that this was sufficient to create a dispute over whether the city had constructive notice of the leak.

## Governmental Immunity

Turning to the immunity issue, the court observed that *Winchell* and other early cases rejecting immunity for creating or maintaining a nuisance arising from operation of a sewer system regardless of negligence were based on the distinction between the municipality engaging in a "proprietary" versus a "governmental" function. *Id.* at ¶ 51. That distinction was abandoned in *Holytz v. City of Milwaukee*, 17 Wis. 2d 26, 115 N.W.2d 618 (1962), in which the Supreme Court abrogated the general rule of governmental immunity and created an exception for municipal acts done in the exercise of legislative, quasi-legislative, judicial, or quasi-judicial acts. This new formulation was then codified in what is now section 893.90(4), Stats. This

type of conduct is deemed synonymous with the term "discretionary" acts. Under this rule, there is no immunity for "ministerial" acts, where the duty to act "is absolute, certain and imperative, involving merely the performance of a specific task when the law imposes, prescribes and defines the time, mode and occasion for its performance with such certainty that nothing remains for judgment or discretion." *Id.* at ¶ 54 (citations omitted).

Despite the change in formulation for governmental immunity, cases such as *Hillcrest Golf & Country Club v. City of Altoona*, 135 Wis. 2d 431, 400 N.W.2d 493 (Ct. App. 1986), continued to hold that there was no immunity for creating or maintaining a nuisance. The Supreme Court rejected these holdings. Applying the current rule, the court held that whether there is immunity from liability in nuisance cases depends on whether the underlying tortious conduct is discretionary or ministerial. The court stated that there is no doubt that "decisions regarding the adoption, design, and implementation of public works are discretionary." *Id.* at ¶ 60. Even if a water system is poorly designed, a municipality is immune from suit regarding decisions such as the selection of a specific type of pipe, the placement of the pipe in the ground, and the continued existence of the pipe. The only act for which Milwaukee could potentially be found liable under the circumstances of the instant case would be for failing to repair the leaking water main before it broke. Under the facts of the case, the court concluded that Milwaukee could be held liable, but only if MMSD could prove that: a) the earlier construction project damaged the water main, and b) a reasonable inspection after the construction project would have revealed the defect in the pipe, and c) the water main break caused the sewer collapse. Moreover, in order for the city not to be immune, the duty to repair would have to be ministerial. *Id.* at ¶ 61. The decision does not reveal whether city records set out any particular manner or time for the inspection and testing after the construction project. In a concurring opinion, Justice Prosser argued that the definition of ministerial duty was so narrow that it would be practically impossible for MMSD to meet.

In summary, the *MMSD* case clarifies that there is no strict liability for nuisance in Wisconsin. There must be proof of underlying tortious conduct in order for a party to be liable for causing a nuisance. Moreover, the decision clarifies that discretionary immunity extends to nuisance claims. The courts must apply the same analysis of discretionary versus ministerial conduct that applies in any other claim.

— Mark J. Steichen

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## Denial of Rezoning Imposes Substantial Burden under RLUIPA

In a first-of-its-kind decision, the United States Court of Appeals for the Seventh Circuit held in February that the denial of a rezoning request imposed a substantial burden on a church in violation of the federal Religious Land Use and Institutionalized Persons Act (“RLUIPA”). No other federal appeals court has upheld a “substantial burden” challenge under RLUIPA.

The Church in *Sts. Constantine and Helen Greek Orthodox Church, Inc. v. City of New Berlin* (Appeal No. 04-2326, decided February 1, 2005), purchased land in a section of New Berlin zoned residential. In 2002, it applied to rezone the property to institutional so that it could build a church on it. The New Berlin Planning Department expressed concern that the zoning change would allow other institutional uses, such as a school, to be built on the property. To allay this fear, the Church proposed subjecting its property to a planned unit development (“PUD”) overlay ordinance, which would restrict the parcel to church-related uses. The Planning Department endorsed this proposal.

Nevertheless, the Plan Commission and City Council rejected it. Plan Commission members worried that the Church might sell its land after the rezoning, and the new purchaser would not be bound by the PUD ordinance.

The City’s mayor suggested that the Church abandon rezoning the property from residential and instead pursue either of two alternatives. First, the Church could apply for a conditional use permit allowing it to build a Church under the existing residential zoning. Second, the Church could seek PUD overlay zoning over the existing residential zoning. The mayor reasoned that, under this approach, if the Church sold its land rather than build a church on it, the property would revert to residential zoning.

The Church declined to pursue either alternative. A conditional use permit was unsatisfactory because the permit would lapse within a year unless construction began, and the Church needed more than a year to raise funds for the new building. However, raising those funds would be difficult if there was no firm assurance that a church could be built on the property. Thus, this alternative presented something of a catch-22 for the Church.

The Church rejected the second alternative because of the delay and uncertainty involved in starting the PUD zoning process all over again. The Church chose instead to bring a RLUIPA claim.

RLUIPA requires land-use regulations that

substantially burden religious exercise to be the least restrictive means of advancing a compelling government interest. The strongest part of the Church’s case was that the City’s refusal to rezone the Church property failed to advance a compelling government interest. As the Seventh Circuit found, the Plan Commission was simply wrong in its belief that PUD overlay zoning would not bind subsequent purchasers. Like any zoning ordinance, the restrictions imposed by the PUD overlay ordinance would remain in place even after the property changed hands. Thus, the City had no legitimate reason to reject the Church’s request that the City rezone its property and subject it to a PUD overlay.

However, the weakest part of the Church’s case related to whether the City’s refusal to rezone its property imposed a substantial burden on the Church’s religious exercise. After all, the Church knowingly purchased residential property. Churches were not permitted uses within the residential zoning district at that time. It seemed inappropriate for the Church to now complain that it is not permitted to build a Church on its land.

Nevertheless, the Seventh Circuit sided with the church. It explained:

The burden here was substantial. The Church could have searched around for other parcels of land . . . , or it could have continued filing applications with the City, but in either case there would have been delay, uncertainty and expense. That the burden would not be insuperable would not make it insubstantial.

The Court seems to place the bar for measuring “substantial burden” unusually low. After all, a landowner’s alternatives after a municipality denies a land use application will almost always involve “delay, uncertainty and expense.” Thus, the Seventh Circuit’s decision in one respect seems to sweep broadly.

However, it is important to remember that the stated rationale for New Berlin’s refusal to rezone the Church property simply could not be supported. This fact likely does more to explain the result in *Sts. Constantine* than the alleged “burden” imposed on the Church. Thus, the case could be understood to hold that it was the incompetent or unjustified *administration* of New Berlin’s zoning code—as opposed to merely the refusal to rezone itself—that imposed a substantial burden on the Church’s religious exercise. Thus, in other cases, a justifiable refusal to rezone property which causes expense, uncertainty and delay for the landowner may not be enough for a finding of “substantial burden.”

— Matthew D. Weber

# FCC Releases Video Competition Report

In February, the Federal Communications Commission ("FCC") released its "Eleventh Annual Report on the Status of Competition in the Market for the Delivery of Video Programming" (the "2004 Competition Report"). This report is released annually and focuses on the current status of the cable industry and other multichannel video programming distributors ("MVPDs").

According to the 2004 Competition Report, cable operators have maintained their top position, having the largest market share with respect to the distribution of video programming service. However, cable's market share declined from 73.6% in 2003 to 71.6% in 2004. At the same time, direct broadcast satellite ("DBS") providers gained market share. Their share of the market increased from 22.7% to 25.1%. Moreover, while cable television subscribership increased just slightly from the previous year, the DBS industry experienced close to double-digit growth rates. DirecTV and EchoStar now rank as the second- and fourth-largest MVPDs, respectively.

The FCC believes that much of DBS's subscriber growth can be attributed to the enactment of the Satellite Home Viewer Improvement Act of 1999. That law allows DBS providers to offer local and network broadcast signals in their local markets. The 2004

Competition Report also stated that, despite the fact that rates for DBS service increased over the past year, surveys showed that DirecTV and EchoStar had the highest customer satisfaction rates among the 13 major MVPDs.

The 2004 Competition Report found that other competitive alternatives to traditional cable television providers were on the rise. For example, the report noted that several providers of local phone service had announced plans to provide video service over fiber-to-the-premises networks. In contrast, the FCC found that competition from wireless video providers remained relatively unchanged, at 0.22% of all MVPD subscribers, and that the market share of SMATV (satellite master antenna television) systems declined to about 1.20% in 2004. With regard to the development of Broadband-Over-Powerline ("BPL") technologies, the FCC reported that electric and gas utilities are currently providing service in small, "scattered locations." The FCC also noted that Internet video has yet to provide any significant competition to the cable industry.

Finally, the report found that about 95% of television households had access to cable television service in 2004.

— Anita T. Gallucci

## SPEAKERS' FORUM

April 7, 2005

### **Manager's Duty of Care for the Respectful Workplace**

Rock County Job Center, Janesville, WI

*Robert E. Gregg*

April 7 & 8, 2005

### **Practical Guide to Zoning and Land Use Law in Wisconsin**

National Business Institute, Milwaukee & Madison, WI

*Matthew D. Weber*

April 11-12, 2005

### **EEO Law Course**

American Association for Affirmative Action National Conference

St. Louis, Missouri

*Robert E. Gregg*

April 12, 2005

### **Hair-Raising Employment Tales by the Bald Guy**

American Association for Affirmative Action National Conference

St. Louis, Missouri

*Robert E. Gregg*

April 13, 2005

### **Are You in the Cross-Hairs for Personal Liability?**

American Association for Affirmative Action National Conf.

St. Louis, Missouri

*Robert E. Gregg*

April 19 & 26, 2005

### **401(k)**

EBIA, Cleveland & Chicago

*Cynthia A. VanBogaert*

April 29, 2005

### **Ten Current Hot Issues in Land Use**

Annual Town Law Institute, Madison, WI

*Richard A. Lehmann*

April 29 & May 13, 2005

### **COBRA**

EBIA, Chicago & Minneapolis

*Cynthia A. VanBogaert*

May 17, 2005

### **401(k)**

EBIA, Boston

*Cynthia A. VanBogaert*

# MUNICIPAL LAW NEWSLETTER

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