Appeal No. 2009AP1874-AC **Cir. Ct. No. 2008CV18220**

WISCONSIN COURT OF APPEALS
DISTRICT I

METROPOLITAN MILWAUKEE ASSOCIATION OF COMMERCE, INC.,

PLAINTIFF-RESPONDENT,

V.

CITY OF MILWAUKEE,

DEFENDANT,

9TO5 NATIONAL ASSOCIATION OF WORKING WOMEN, MILWAUKEE CHAPTER,

INTERVENOR-DEFENDANT-APPELLANT.

FILED

FEB 18, 2010

David R. Schanker
Clerk of Supreme Court

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Vergeront, Lundsten and Higginbotham, JJ.

The parties in this case dispute whether a direct legislation ballot question put before the voters of the City of Milwaukee complied with the statutory requirement that it contain "a concise statement of [the ordinance's] nature," under WIS. STAT. § 9.20(6) (2007-08).[1] The ballot question asked:

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

> Shall the City of Milwaukee adopt Common Council File 080420, being a substitute ordinance requiring employers within the city to provide paid sick leave to employees?

Common Council File 080420 is a reference to the full ordinance that was published in local newspapers and posted at polling places. It is undisputed that the actual ordinance is fairly complex and that the ballot question does not explain significant details about how the ordinance would work, such as how much sick leave employers would be required to provide or the particular situations for which sick leave could be used.

The Milwaukee Chapter of 9to5 National Association of Working Women argues that the direct legislation statute contemplates that a ballot question may be a general statement of the purpose of the legislation and that the education of voters is achieved and measured by compliance with statutory notice provisions and other indications of the public discourse prior to the vote. Under this view, the ballot question itself need only, as the statute says, contain "a concise statement of its *nature*" (emphasis added). Because the nature of the proposed ordinance was that it requires employers to provide paid sick leave to employees, the statutory requirement was met.

In contrast, Metropolitan Milwaukee Association of Commerce (MMAC) contends that the direct legislation statute requires that the ballot question inform voters of "every essential element" of the proposed ordinance. Under this view, the ballot question must specify, among other things, which employers would be covered by the ordinance and how much sick leave covered employers must provide. MMAC also asserts that the ballot question here was affirmatively misleading because the common understanding of sick leave does

not include leave for some of the purposes listed in the ordinance, such as leave to participate in legal proceedings relating to domestic violence.

Accordingly, the heart of the dispute here involves the degree of specificity that WIS. STAT. § 9.20(6) requires. Each party finds support for its position in case law, but our review of those cases shows that none have squarely addressed the specificity issue presented here.

A decision on the degree of specificity required by WIS. STAT. § 9.20(6) is important not only to the people of the City of Milwaukee but also to the cities and villages throughout the state and their electors who wish to make use of the direct legislation procedure. The various policies that may be implicated in a resolution of the issue—fulfilling the purposes underlying the direct legislation statute, informing voters, effectuating the will of the voters—are of great consequence, making this an issue that should be resolved by our state's highest court.

It may be necessary to decide a related issue under WIS. STAT. § 9.20: the effect of the injunction issued in this case on the two-year bar in § 9.20(8) against repeals or amendments of an ordinance validly adopted. We certify this issue as well.

BACKGROUND

A coalition of organizations led by 9to5 initiated a petition drive to place on the ballot a proposed ordinance requiring paid sick leave for employees within the City of Milwaukee. After collecting the needed signatures and filing the petition, the Milwaukee Common Council decided not to enact the ordinance but to place it on the ballot for the November 4, 2008, election. Notice of the

election containing the full text of the proposed ordinance, identified as Common Council File 080420, and the ballot question was published as required by WIS. STAT. § 9.20(5).[2] The ballot question provided: "Shall the City of Milwaukee adopt Common Council File 080420, being a substitute ordinance requiring employers within the city to provide paid sick leave to employees?"

There were 157,117 "yes" votes (68.4%) and 71,131 "no" votes (31.16%). Pursuant to WIS. STAT. § 9.20(7), the ordinance became effective upon its publication on November 12, 2008.

Shortly after the ordinance became effective, MMAC filed this action seeking a declaration that the ordinance was invalid on a number of grounds and requesting temporary and permanent injunctive relief.[3] The circuit court granted a temporary injunction and subsequently granted summary judgment in favor of MMAC, as well as a permanent injunction.

With respect to MMAC's challenge to the ballot question, the court concluded that the ballot question did not meet the "concise statement" requirement of WIS. STAT. § 9.20(6) because it did not contain enough information about the ordinance. In particular, the ballot question failed to state that the

[2] WISCONSIN STAT. § 9.20(5) provides: "The clerk shall cause notice of the ordinance or resolution that is being submitted to a vote to be given as provided in s. 10.06(3)(f)." In addition, WIS. STAT. § 5.35(6)(a)1. requires that, for each referendum on the ballot, the notice prescribed in WIS. STAT. § 10.01(2)(c) must be posted at each polling place on election day, and that notice includes the entire text of the proposed enactment. The affidavit of the assistant executive director of the Milwaukee Board of Elections specified the newspapers, with dates, in which the notice of referendum, containing the full text of the ordinance and the ballot question, was published. There is no dispute that there was compliance with the statutorily required notices.

[3] The action was filed against the City of Milwaukee, but 9to5 was permitted to intervene as a defendant.

ordinance required paid sick leave for reasons outside the traditional notion of sick leave: to seek relocation due to domestic or sexual violence or stalking and to prepare for or participate in a civil or criminal legal proceeding related to domestic or sexual violence.[4] The court reasoned that absences for these reasons were separate matters that had to be detailed in the concise statement. The court also concluded that these provisions were beyond the police powers of the City and rendered the ordinance unconstitutional. The court rejected the request of the City and 9to5 to sever these portions from the rest of the ordinance. There were a number of other challenges by MMAC to the validity of the ordinance on which the court ruled against MMAC.

DISCUSSION

9to5 contends on appeal[5] that the ballot question is "a concise statement of [the ordinance's] nature" because the nature of the ordinance—its purpose—is to provide paid sick leave to employees in the City. According to 9to5, more detail is not required because the purpose of this concise statement is not to inform voters of the provisions of the ordinance; that function is fulfilled by the published notices required by WIS. STAT. § 9.20(5) and the posting at the polling place, *see* WIS. STAT. §§ 5.35(6)(a) and 10.01(2)(c). 9to5 asserts that, in evaluating a ballot question, courts are concerned with whether it is misleading and do not require any greater specificity than that on the ballot here. 9to5 relies

[4] MILWAUKEE CODE OF ORDINANCES § 112-5.1(c-4), (c-5).

[5] The City is not an appellant. The Wisconsin Democracy Campaign has filed an amicus brief, and another amicus brief has been filed by the Wisconsin Coalition Against Domestic Violence, the Wisconsin Coalition Against Sexual Assault, and the National Partnership for Women and Families.

primarily on ***City of Milwaukee v. Sewerage Commission***, 268 Wis. 342, 67 N.W.2d 624 (1954); ***Morris v. Ellis***, 221 Wis. 307, 266 N.W. 921 (1936); and ***State ex rel. Elliott v. Kelly***, 154 Wis. 482, 143 N.W. 153 (1913).

MMAC's position is that a "concise statement of [the] nature" of the ordinance requires a statement that "reasonably, intelligently, and fairly comprise[s] or [has] reference to every essential" of the ordinance. This language is originally from ***State ex rel. Ekern v. Zimmerman***, 187 Wis. 180, 201, 204 N.W. 803 (1925), and was cited later in ***State ex rel. Thomson v. Zimmerman***, 264 Wis. 644, 60 N.W.2d 416 (1953). MMAC disagrees that the statutorily required notices of the contents of the ordinance were intended to, or do, adequately inform the voter of the contents and asserts that this is the function of the ballot question. MMAC finds support for this position in ***State ex rel. Thomson v. Peoples State Bank***, 272 Wis. 614, 76 N.W.2d 370 (1956).

Turning first to the cases on which 9to5 relies, we note that ***Elliott*** and ***Morris*** are both cases in which there was an error in the ballot questions but the courts nonetheless found the ordinance (***Elliott***) and the referendum (***Morris***) were validly passed.[6] In ***Elliott***, the proposed ordinance called for establishing the

[6] ***State ex rel. Elliott v. Kelly***, 154 Wis. 482, 485, 143 N.W. 153 (1913), involved 1911 Wis. Laws, ch. 513, § 4, the first enactment of the direct legislation statute. (*See* ***Mount Horeb Community Alert v. Village Bd.***, 2003 WI 100, ¶14 n.5, 263 Wis. 2d 544, 665 N.W.2d 229, for the history of the direct legislation statute.) ***Morris v. Ellis***, 221 Wis. 307, 315, 266 N.W. 921 (1936), did not involve the direct legislation statute but another statute, WIS. STAT. § 6.23(8) (1927), that covered "a proposed amendment to the constitution, or any measure or other question [that] shall be submitted to a vote of the people …." Section 6.23(8) (1927), similar to WIS. STAT. § 9.20(6) and its predecessor, required that "*a concise statement of the nature thereof* shall be printed in accordance with the act or resolution directing its submission" (emphasis added). Section 6.23(8) (1925 and 1927), not the predecessor to § 9.20, is the applicable statute in ***State ex rel. Ekern v. Zimmerman***, 187 Wis. 180, 199, 204 N.W. 803 (1925), and ***State ex rel. Thomson v. Zimmerman***, 264 Wis. 644, 657, 60 N.W.2d 416 (1953), which both concern constitutional amendments, and the applicable statute in ***City of Milwaukee v. Sewerage*** (continued)

office of superintendent of trade and commerce, while the ballot stated the proposed office was that of chamber of commerce. The court concluded this error was not "fatally material" because the voters knew what the ordinance was for, since it "had been brought to their attention in the manner provided by law." ***Elliott***, 154 Wis. at 485. The court rejected the idea that the clerk's error should invalidate the results, stating:

> So long as it is reasonably clear that the electors expressed their will respecting the adoption of the ordinance, the fact that they did it somewhat inartificially should not be regarded as rendering their effort inefficient. The statute requires the ballot in such a case to contain "a concise statement of the nature" of the ordinance. Any brief collection of words which will fairly accomplish that is sufficient.

Id. at 486.

The second case 9to5 relies on, ***Morris***, involved a ballot question setting forth the village board's resolution to submit a referendum to approve a contract; thus the question on the ballot did not directly ask the voters to approve or disapprove of the contract. ***Morris***, 221 Wis. at 310. In response to the argument that the ballot was defective because it did not contain "a concise statement" of the question to be voted on, the court stated this was a "hypercritical" objection and that the ballot's "true import is obvious and not calculated to mislead a voter." ***Id.*** at 317.

Neither ***Elliott*** nor ***Morris*** provides guidance on how specific the "concise statement" must be. However, ***Elliott*** does lend support to 9to5's view that even incorrect information in a ballot question is not fatal if the correct

---

Commission, 268 Wis. 342, 67 N.W.2d 624 (1954), which concerns a referendum for consolidation.

information is otherwise supplied in compliance with the statute. ***Elliott*** supports 9to5's position that the notices required by statute are intended to perform the function of informing voters of the specifics of the ordinance and, if the required notice has been given, the adequacy of the ballot question is evaluated in that context.

The third case 9to5 relies on, ***City of Milwaukee***, comes closer to addressing the specificity required in a ballot question—there, a referendum on whether a town should be consolidated with the City of Milwaukee. In rejecting the argument that the consolidation statute implied a submission to the voters of the full text of the ordinances on the ballot, the court concluded this was not required by the phrase "concise statement of the nature of the [ordinance]." ***City of Milwaukee***, 268 Wis. at 358. The court held that the ballot question did substantially comply with this requirement. The ballot question provided:

> Shall Ordinance No. 732 of the city of Milwaukee, passed in accordance with section 66.02 of the Wisconsin statutes … to consolidate the town of Lake with the city of Milwaukee in the county of Milwaukee … on the terms and conditions set forth therein be ratified?

Id. The court reasoned:

> The primary consideration in a situation of this nature is the ascertainment of the voter's intent. It is clear that the voter was called upon to ratify the terms and conditions of the consolidation ordinance adopted by his respective government. *Reference to the full ordinances was set forth in the referendum question.*

Id. at 358-59 (emphasis added). The court also concluded that, based on the publication and distribution of the entire ordinance, "no voter could have been misled by the procedure employed in the submission of these questions." ***Id.*** at 359.

Notably, the ballot question in ***City of Milwaukee*** identifies the ordinance by number and states the purpose of the ordinance—to consolidate the town with the City of Milwaukee—but refers the voter to the ordinance for "the terms and conditions," rather than spelling them out. Arguably this ballot question provides no more detail than that provided by the ballot question in this case.

Turning now to MMAC's cases, we start with ***Ekern***. That case involved a challenge to a ballot question on whether to amend the state constitution. Among other issues, the ***Ekern*** court addressed whether the constitution permitted the legislature to delegate by statute to the Secretary of State the duty to prepare the ballot question for the referendum on the proposed constitutional amendment. Article XII, section 1 of the Wisconsin Constitution provides that, when the majority of the legislature agrees to a proposed amendment, "it shall … submit such proposed amendment … to the people in such manner and at such time as the legislature shall prescribe." In concluding that the statute was consistent with, not in violation of, the legislature's constitutional duty, the court made the statement on which MMAC relies: "In other words, even if the form is prescribed by the Legislature, it must reasonably, intelligently, and fairly comprise or have reference to every essential of the amendment."[7] ***Ekern***, 187 Wis. at 201.

[7] A fuller context for this quote is:

> Had the framers of the Constitution intended that the Legislature prescribe the form, it might easily have done so…. [I]t is highly probable that the framers had in mind the vital distinction between matters of substance and matters of mere form. Had the Legislature in the instant case prescribed the form of submission in a manner which would have failed to present the real question, or had they, by error or mistake, presented an entirely different question, no claim could be made that the proposed amendment

(continued)

Reading ***Ekern*** alone, it is not clear that this statement relates to the adequacy of the ballot question, which the court does not specifically discuss at this point in its opinion. However, in ***Thomson***, also a constitutional amendment case, the court reads this statement from ***Ekern*** as addressing the requirement of a "concise statement." ***Thomson***, 264 Wis. at 659. Despite this, the ***Thomson*** court expressly did not decide whether the ballot question there comprised "every essential of the [proposed] amendment." ***Id.*** Instead, the court concluded that the ballot question was inaccurate because it represented the proposed amendment to require apportionment of senate districts along certain lines when the proposed amendment did not mandate that. ***Id.*** at 660.[8]

Thus, while the ***Thomson*** court, in the context of constitutional amendments, restates the "every essential of the amendment" language,[9] it does

> would have been validly enacted. *In other words, even if the form is prescribed by the Legislature, it must reasonably, intelligently, and fairly comprise or have reference to every essential of the amendment.* This demonstrates quite clearly the fact that the form of submission is after all a mere form, and that the principal and essential criterion consists in a submission of a question or a form which has for its object and purpose an intelligent and comprehensive submission to the people, so that the latter may be fully informed on the subject upon which they are required to exercise a franchise.

Ekern, 187 Wis. at 201-02 (emphasis added).

[8] Before addressing the adequacy of the ballot question, the court in ***Thomson***, 264 Wis. at 656, had already invalidated the submission of the proposed constitutional amendment, concluding that there needed to be separate submissions to the voters on two points so they could be voted on separately, as required by article XII, section 1 of the Wisconsin Constitution. This section provides, in part, that "if more than one amendment be submitted, they shall be submitted in such manner that the people may vote for or against such amendments separately."

[9] Currently the legislature is required to include the statement of the referendum question in the legislation approving a proposed constitutional amendment, WIS. STAT. § 13.175, and that statement must be a "concise statement of each question in accordance with the act or resolution directing submission …." WIS. STAT. § 5.64(2)(am).

not provide guidance on how to apply that standard. Injecting greater uncertainty is the fact that, although ***City of Milwaukee*** was decided after ***Thomson***, the ***City of Milwaukee*** decision does not refer to the "every essential" language in deciding that the ballot question on the consolidation ordinance was sufficient.

According to MMAC, any ambiguity created by the line of cases discussed above was resolved by ***Peoples State Bank***, 272 Wis. 614. It appears to us, however, that ***Peoples State Bank*** neither squarely addresses the specificity issue raised here nor plainly undercuts ***City of Milwaukee***, ***Elliott***, or ***Morris***.

Peoples State Bank did not involve a challenge to the sufficiency of the ballot question. Instead, it was argued that the vote on the ballot question was invalid because, although the ballot question was accurate, the notice of election erroneously described the effect of the proposed amendment.[10] ***Peoples State Bank***, 272 Wis. at 620-22. The court concluded the error in the notice of election did not invalidate the ballot question, which, the court said, "was what the electors

[10] At the times relevant to ***State ex rel. Thomson v. Peoples State Bank***, 272 Wis. 614, 76 N.W.2d 370 (1956), and ***Thomson***, 264 Wis. 644, the statute applicable to constitutional amendments, WIS. STAT. § 6.10 (1953), required the Secretary of State to prepare an explanation of the change made by a proposed constitutional amendment and attach it to the proposed amendment; this was then part of the notice required to be published at specific times before the next general election. *See also* WIS. STAT. § 6.11 (1953). In both cases, the Secretary of State prepared explanations of the changes—and this is what contained the error in ***Peoples State Bank***—and they were published along with the proposed amendments, even though the elections were in April, not November. ***Peoples State Bank***, 272 Wis. at 622; ***Thomson***, 264 Wis. at 658. The ***Thomson*** court viewed this action by the Secretary of State as "barren of any effect" because it was not directed by the legislature to be done for April elections, and therefore was not "part of the legislature's submission of the proposed amendment to the people." ***Thomson***, 264 Wis. at 658. ***Peoples State Bank*** cited this portion of ***Thomson*** approvingly, but it is not clear how this figured in the analysis of the ***Peoples State Bank*** court. ***Peoples State Bank***, 272 Wis. at 622-23. For that matter, it is not clear in ***Thomson*** how the statutorily "unauthorized" notice by the Secretary of State, which included the full text of the proposed amendment, affected the court's conclusion that the inaccurate ballot question invalidated the election.

came directly in contact with … presumably read … and it is natural to assume that the question of the ballot was controlling." ***Id.*** at 622. The court acknowledged it could not tell how many electors read the erroneous explanation, but stated it was "inconceivable that as many as 45,000 electors [approximately the number of "yes" votes that would have had to vote "no" to change the outcome] would read it or that they were misled in their voting." ***Id.*** at 621.

We understand MMAC to be reading ***Peoples State Bank*** as establishing the principle that courts should not look to the contents of a notice to ascertain whether the voters understood what they were voting on because it is unlikely that significant numbers of voters read notices. Rather, according to MMAC, ***Peoples State Bank*** supports the view that the only reliable source of what the voters know is the ballot question and therefore it must contain all the essential information. We question whether it is proper to read ***Peoples State Bank*** so broadly. ***Peoples State Bank*** does not address the meaning of the statutory term—"concise statement"—at issue here and does not necessarily suggest that a statutory notice requirement is irrelevant in deciding how to interpret the term "concise statement."

MMAC aptly identifies the difficulty of determining what voters knew about a proposed ordinance before voting on it. However, it is not readily apparent that ***Peoples State Bank*** lends support to this position. The court in ***Peoples State Bank*** *did* consider the erroneous published explanation and concluded it did not mislead the voters, given the correct ballot question. It would appear there is a sound basis for treating correct statutorily required notices as evidence that the voters were informed—perhaps in effect applying a presumption that the legislature has required those notices in order to adequately inform voters. *See* ***Ekern***, 187 Wis. at 205 (the publication of the notice required by statute is "in

reality a part of the submission" because it is "designed to bring home to the knowledge of the voters the submission of the proposed amendment at the election, together with the amendment itself, and the change which the amendment will work upon the existing Constitution"). If it is proper or necessary for courts to consider evidence besides the ballot question and the statutorily required notices in ascertaining the voters' intent, it would be helpful to have guidance on when that is either permissible or required, what type of evidence is relevant, and a more precise statement of the standard the court is to apply.

If the supreme court agrees with MMAC that the standard in ***Ekern/Thomson*** is the correct interpretation of WIS. STAT. § 9.20(6), then it will be helpful for electors, municipalities, and the courts to have guidance in how that standard is to be applied. The discussion at oral argument before this court suggests that, with an ordinance of any complexity, such as this one, it is not easy to articulate how one goes about determining what the "essentials" are. A straightforward standard that is easy to apply would appear to further the purpose of the direct legislation statute by minimizing invalidation of election results.

Depending on how the term "a concise statement of [the ordinance's] nature" is construed, it may be necessary to resolve the parties' dispute over the evidence that courts can consider in determining the voters' intent. 9to5 argues that, after an election has taken place, courts are to validate a challenged election if it reflects the intent of the voters, regardless of irregularities, and may look to the level of debate and publicity before the election to determine if the voters were misled by the irregularities. The court in ***State ex rel. Oaks v. Brown***, 211 Wis. 571, 578-79, 249 N.W. 50 (1933), construed WIS. STAT. § 5.01(6) (1931), now § 5.01(1), to require this approach in a case where there was noncompliance with some of the notice provisions of WIS. STAT. § 10.43 (1931), a

predecessor to § 9.20, and related statutes.[11] *See also* ***City of Milwaukee***, 268 Wis. at 359 (stating that, if necessary to determine the voters' intent, the court may look to evidence outside the ballot and consider the published notices of the proposed ordinance as well as distribution to residences). According to 9to5, there is undisputed evidence in this record showing that electors in Milwaukee were well informed and aware of the contents of the ordinance and were not misled by any lack of detail in the ballot question.

MMAC contends that the task of determining what voters in this election knew about the ordinance before voting is impracticable. Consistent with its reading of ***Peoples State Bank***, MMAC asserts that a court should look only at the ballot question and determine from that, using an objectively reasonable standard, whether the voters knew "every essential" of the ordinance.

As noted earlier, MMAC raises other challenges to the ordinance besides the inadequacy of the ballot question: the ordinance (1) exceeded the City's police powers; (2) is preempted by state and federal labor laws; and (3) is unconstitutional because it impairs contracts, regulates activity outside the City, and is unconstitutionally vague. We anticipate that these issues, as well as the question of severability that arises if only particular provisions are invalid, can be resolved based on existing law.

[11] WISCONSIN STAT. § 5.01(1) provides: "CONSTRUCTION OF CHS. 5 TO 12. Except as otherwise provided, chs. 5 to 12 shall be construed to give effect to the will of the electors, if that can be ascertained from the proceedings, notwithstanding informality or failure to fully comply with some of their provisions."

If the ballot question is determined to be adequate and MMAC does not prevail on its other challenges to the ordinance, another provision of WIS. STAT. § 9.20 will need to be addressed. Section 9.20(8) provides:

> City ordinances or resolutions adopted under this section shall not be subject to the veto power of the mayor and city or village ordinances or resolutions adopted under this section shall not be repealed or amended within 2 years of adoption except by a vote of the electors. The common council or village board may submit a proposition to repeal or amend the ordinance or resolution at any election.

9to5 contends that, in the event the injunction is vacated, the only reasonable construction of this provision is that the two years does not begin to run until that time. MMAC contends that the language plainly provides that the two years begins to run from the adoption of the ordinance on November 4, 2008, regardless of the injunction that has been in effect. This is an issue of first impression, and its resolution will likely involve further definition of the purpose of the direct legislation statute. It is an appropriate issue for certification along with the primary issue we certify.