

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 6, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2013AP13
STATE OF WISCONSIN**

Cir. Ct. No. 2012CV1323

**IN COURT OF APPEALS
DISTRICT IV**

REBECCA LUKANICH,

PETITIONER-APPELLANT,

V.

BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County:
SHELLEY J. GAYLORD, Judge. *Affirmed.*

Before Blanchard, P.J., Lundsten and Sherman, JJ.

¶1 PER CURIAM. Rebecca Lukanich appeals from a circuit court order affirming a determination by the University of Wisconsin-Madison Nonresident Tuition Appeals Committee (the “Committee”) that Lukanich is not a

resident of Wisconsin for tuition purposes, and thus not exempt from nonresident tuition under WIS. STAT. § 36.27(2).¹ We affirm the order.

¶2 Lukanich was born in Illinois and resided there with her parents until she enrolled at the University of Wisconsin–Eau Claire as an undergraduate from the fall 2007 term through the spring 2010 term. She paid nonresident tuition while a student at UW-Eau Claire. During the summers of 2007, 2008, and 2009, Lukanich lived and worked in Illinois. She graduated from UW-Eau Claire in May 2010.

¶3 Following her graduation from UW-Eau Claire, Lukanich moved to Green Lake, Wisconsin, where she lived from May 2010 until December 2010. During the summer of 2010, she commuted from Green Lake to Illinois for work approximately two days a week.

¶4 Lukanich applied to the UW-Madison Pharmacy Admissions Office for the fall 2010 term. At the time of her application, Lukanich applied as a nonresident. She listed a permanent home address in Grayslake, Illinois, and did not attempt to claim legal Wisconsin residence for tuition purposes. In September 2010, Lukanich began classes at the UW-Madison School of Pharmacy. In December 2010, she moved from Green Lake to a condominium in Middleton.

¶5 After her first year of pharmacy school, Lukanich received a pharmacy internship with CVS/Pharmacy. From May to August 2011, she worked

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

at CVS stores in Illinois. She lived with her parents in Illinois on days when she was working at CVS.

¶6 On September 6, 2011, Lukanich sought to change her status from nonresident to resident by submitting an “Appeal For Exemption From Nonresident Tuition” for the fall 2011 term. The Committee heard her appeal on September 23, including Lukanich’s testimony. On September 26, the Committee determined that she was properly classified as a nonresident for tuition purposes. On October 19, 2011, the Committee issued written Findings of Facts and Conclusions of Law. Lukanich petitioned the Committee for a rehearing and the request was denied on November 15, 2011.²

¶7 Several months later, on February 9, 2012, Lukanich reapplied for a nonresident tuition exception for the spring 2012 term. On March 1, 2012, a hearing was held at which Lukanich testified. The Committee again determined that Lukanich was properly classified as a nonresident.

¶8 Lukanich filed a petition in the Dane County Circuit Court for review of the Committee’s March 1, 2012 decision. The circuit court upheld the Committee’s decision and Lukanich now appeals.

¶9 Lukanich argues “the primary issue to be decided by the court in this case is one of statutory interpretation.” Lukanich insists due weight deference is the appropriate standard for reviewing the Committee’s decision under WIS. STAT. § 227.57(10). Lukanich is incorrect. The parties here do not present competing

² It appears Lukanich did not appeal this determination and we therefore do not further address it.

interpretations of a statute. For that matter, we find no interpretation of a statute by an administrative agency that we might defer to.

¶10 So far as we can tell, it is undisputed that a student who enters Wisconsin and remains in the state principally to receive an education is presumed to continue to reside outside Wisconsin for purposes of tuition. WIS. STAT. § 36.27(2)(e). This presumption is rebuttable, but the burden is on the petitioner to show by clear and convincing evidence the intent to maintain a permanent Wisconsin residence for the preceding twelve months. *Id.* Under § 36.27(2)(e), “[i]n determining bona fide residence at the time of the beginning of any semester or session and for the preceding 12 months *the intent of the person to establish and maintain a permanent home in Wisconsin is determinative.*” (Emphasis added.)

¶11 Although we disagree with Lukanich that this appeal presents a question of statutory interpretation, we acknowledge that there may be a dispute regarding how we should review the Committee’s decision. We need not, however, resolve that dispute because no matter what our standard of review, we would affirm. That is, regardless of whether the decision to deny Lukanich in-state status turns on a finding of fact, a legal issue, or an exercise of discretion, we would affirm the Committee and, therefore, the circuit court. More specifically: (1) if the issue before us is whether the committee’s factual finding that Lukanich did not have the requisite subjective intent, that finding is supported by the record; (2) if the issue presents a legal question as to whether the undisputed facts here meet a statutory standard, we conclude that they do; or (3) if the issue is whether the committee properly exercised discretion in denying Lukanich in-state status for tuition purposes, we conclude that the record supports that exercise of discretion. We reach all of these conclusions based on the analysis that follows.

¶12 Lukanich concedes that she entered Wisconsin for the principal purpose of obtaining an education.³ Thus, we begin with the statutory presumption that works against Lukanich—that she is a nonresident—and the fact that she has the burden of proof to demonstrate by clear and convincing evidence the intent to establish and maintain a permanent home in Wisconsin for the twelve months preceding the spring 2012 semester.⁴

¶13 The legislature set forth numerous factors within WIS. STAT. § 36.27(2)(e), that may demonstrate or disprove a student’s intent in this regard:

In addition to representations by the student, intent may be demonstrated or disproved by factors including, but not limited to, timely filing of a Wisconsin income tax return of a type that only full-year Wisconsin residents may file, voter registration in Wisconsin, motor vehicle registration in Wisconsin, possession of a Wisconsin operator’s license, place of employment, self-support, involvement in community activities in Wisconsin, physical presence in Wisconsin for at least 12 months preceding the beginning of the semester or session for which the student registers
....

³ Lukanich argues the Committee “incorrectly asserts that Lukanich has been a student the entire time she has lived in Wisconsin.” Lukanich insists she did not attend classes during the summer of 2010 or the summer of 2011. Lukanich’s argument, in this respect, is based on a mischaracterization of the Commission’s findings and conclusions. The Commission found Lukanich was enrolled at UW-Eau Claire from the fall 2007 term through the spring 2010 term, and received her bachelor’s degree in May 2010. The Committee further found Lukanich “matriculated as a full-time student at this University on September 2, 2010, and you have been enrolled and pursuing an education for each successive term since that time.” The Committee concluded “you entered and remained in the State of Wisconsin *principally to obtain an education* and therefore a presumption of nonresidence has arisen.” (Emphasis added.) See WIS. STAT. § 36.27(2)(e).

⁴ As the Committee recognized, in this case bona fide residence “would have to be established by clear and convincing evidence for the twelve-month period commencing on or about January 23, 2011.”

Although not exhaustive, the statutory factors clearly support the Committee's determination. Inherent in the Committee's function is the duty to weigh the various types of evidence that are frequently relied upon in these often difficult cases, determine the credibility of witnesses, and draw inferences from the facts. That is to say, the determination depends on the facts of the particular case.

¶14 If we deal here with a fact question or a matter of discretion, we note that the Committee is in the best position to determine a person's intentions in light of their declarations and other conduct and circumstances. The evidence will often be equivocal.

¶15 If viewed as a discretionary call, our review is limited to determining whether the Committee properly exercised its discretion, even if we would have reached a contrary result. WISCONSIN STAT. § 227.57(8) specifically provides "the court shall not substitute its judgment for that of the agency on an issue of discretion."

¶16 Here, it is apparent the Committee was thoroughly familiar with all of the proper factors that were to be considered. It is also evident the Committee properly examined the facts and reached a well-reasoned decision that Lukanich failed to sustain her burden of proof by clear and convincing evidence.

¶17 When Lukanich first moved to Wisconsin, she did so principally to receive an education. When she stayed in Wisconsin to attend the UW-Madison School of Pharmacy, she again did so principally to receive an education. Lukanich admitted that at the time of her application to pharmacy school, she applied as a nonresident because she was not sure that she permanently intended to live in Wisconsin. The Committee could reasonably interpret that statement as

strengthening an inference that Lukanich did not have the intent to remain in Wisconsin when she applied.

¶18 The Committee acknowledged that Lukanich submitted evidence supporting the view that she intended to remain in Wisconsin. Among other things, she filed Wisconsin income taxes since 2010, had been registered to vote in Wisconsin, owned a motor vehicle registered in Wisconsin since 2011, and obtained a Wisconsin driver's license in 2010. Lukanich also testified before the Committee that she intended to remain in Wisconsin for the rest of her life.

¶19 However, Lukanich also maintained substantial ties with Illinois. Lukanich had obtained an internship at CVS stores, and worked in Illinois CVS stores from May to August 2011. Her trips back and forth to Illinois had been frequent, and she stayed at her parents' house while working in Illinois. At the time of the March 2012 hearing, she continued to work for CVS, sometimes in Illinois. The Committee also noted, and Lukanich conceded, that other than the passage of time, there was no substantial change in Lukanich's circumstances during the twelve months preceding the spring 2012 semester.

¶20 Accordingly, whether treated as fact-finding, the application of a legal standard, or an exercise of discretion, we conclude that the record supports the Committee determination that Lukanich has “not presented sufficient evidence of bona fide residence in this State for the year next preceding the [s]pring 2012 [t]erm to rebut the presumption” of nonresidency.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

