STATE OF WISCONSIN
IN SUPREME COURT

RULE PETITION NO. 23-01

IN THE MATTER OF AMENDING WIS. STAT. § 809.12
RELATING TO APPELLATE REVIEW OF MOTIONS
FOR RELIEF PENDING APPEAL

Comments of Appellate Practice Section
State Bar of Wisconsin

The Appellate Practice Section of the State Bar of Wisconsin appreciates this opportunity to comment on Rule Petition No. 23-01. The Petition seeks to amend a rule of appellate practice, Wis. Stat. (Rule) § 809.12 (Motion for relief pending appeal), and thus goes to the core of what the Section exists to address.

While the Section is grateful to Petitioners for raising an issue of interest to appellate practitioners in Wisconsin, ultimately the Section does not support the rule change requested by the Petition. As we understand it, the thrust of the Petition is to "mak[e] it easier for an appellate court to stay a circuit court decision it knows it will likely reverse" (Pet. at 13). We are concerned by some of the (unstated) implications of this objective, and the ongoing judicial debate over this and related issues suggests the time is not right to cut off the discussion by codifying a rule.

The following comments explain why in more detail, but the upshot is that the proposed rule is either unnecessary or inconsistent with existing law; conflicts with Wisconsin's longstanding practice of developing standards of review via the common law; and does not provide appellate courts or practitioners with clarity regarding the issue it attempts to address.

1. Governing principles under current common law

Before turning to the two rationales and five benefits identified by the Petition, we begin with four points that Wisconsin law already makes clear:

First, whether to grant a stay pending appeal is subject to the four-factor test in *State v. Gudenschwager*, 191 Wis. 2d 431, 529 N.W. 225 (1995). Every sitting justice in *Waity v. LeMahieu* agreed that this is the governing test. *See* 2022 WI 6, 400 Wis. 2d 356, 969 N.W.2d 263, at ¶ 49 (citing *Gudenschwager* factors as reiterated in *State v. Scott*, 2018 WI 74, ¶ 46, 382 Wis. 2d 476, 914 N.W.2d 141); *id.* at ¶ 65 (concurrence) ("We adopted the *Gudenschwager* test to guide the determination of whether to grant a stay pending appeal."); *id.* at ¶ 86 (dissent) ("The correct legal standard for deciding whether to grant a stay pending appeal is a four-factor balancing test that has been used by the federal courts for at least 60 years. We expressly adopted it over 25 years ago in *Gudenschwager*.") (internal citation omitted).

Second, a circuit court's determination under this test is discretionary, so is reviewed for erroneous exercise of discretion. *Gudenschwager*, 191 Wis. 2d at 439, 529 N.W.2d 225. Every justice in *Waity v. LeMahieu* agreed on this, too. *See* 2022 WI 6, ¶ 50 ("On appeal, a circuit court's decision to grant or deny a motion to stay is reviewed under the erroneous exercise of discretion standard."); *id.* at ¶ 67 n. 8 (concurrence) ("Our review is under the erroneous exercise of discretion standard."); *id.* at ¶ 85 (dissent) (same, citing *Gudenschwager*).

Third, a circuit court's legal error is *per se* an erroneous exercise of discretion. *See, e.g., King v. King*, 224 Wis. 2d 235, ¶ 34, 590 N.W.2d 480 ("A circuit court erroneously exercises its discretion if it makes an error of law . . ."); *Gallagher v. Grant-Lafayette Elec. Co-op.*, 2001 WI App 276, ¶ 23, 249 Wis. 2d 115, 637 N.W.2d 80 ("Although the decision whether to exclude evidence

involves the exercise of discretion, if the exercise of discretion is based on an incorrect legal standard, it is an erroneous exercise of discretion.") (citing *King*) (internal citation omitted). *See also Waity*, 2022 WI 6, ¶ 67 n.8 (Hagedorn, J., concurring) ("the circuit court in this case applied the wrong standard of law which is, by definition, an erroneous exercise of discretion.")

Fourth, appellate courts review legal questions *de novo*, without deference to the decision under review. This principle is so elementary as to require no citation.

Synthesizing these four points, Wisconsin common law already provides that in reviewing a circuit court's decision on a motion for stay pending appeal, the appellate court considers legal errors *de novo* as part and parcel of applying the erroneous exercise of discretion standard. The threshold question is what the rule change requested by the Petition adds to any of this.

2. Stated rationales for the Petition

To answer that question, we turn to the two rationales stated by the Petition. One is to affirm the principle that appellate courts owe lower courts no deference in reviewing questions of law (Pet. at 2). The other is that the proposed amendment will bring Wisconsin's practice in line with the prevailing practice in federal courts (*id.*). Respectfully, we view the first rationale as insufficient to justify a rule change and the second as at least partially incorrect.

As already discussed, no rule change is needed to clarify the general point that legal questions are reviewed *de novo*, or the more specific point that *Gudenschwager* determinations are reviewed for erroneous exercise of discretion, or even the most specific point that legal questions embedded in this analysis are still reviewed *de novo*. Again, *Waity v. LeMahieu* and prior cases already make all of this clear.

So while the first rationale for the proposed rule change is perhaps uncontroversial, it produces a rule that is, in effect, doubly redundant of the common law: it states that a discretionary determination will be reviewed as such, except to the extent the error of discretion was of one particular type—legal error—which will, again, be reviewed as such. Why this particular (and unusually specific) application of these most basic principles warrants its own rule is unclear.

As for the second rationale, we note that the Petition focuses on federal *case law* that has developed a common law approach under a federal *rule* that, like Wisconsin's, is silent on the point the Petition would make express.

Like the current version of Wis. Stat. (Rule) § 809.12, Fed. R. App. P. 8 (a) does not contain any express standard of review. For that matter, it does not place *any* conditions on federal appellate courts' review of a motion for relief pending appeal. This leads to two key observations. First, granting the Petition would in fact introduce a difference between the Wisconsin and federal rules where none currently exists—not bring the two rules closer together, as the Petition suggests. Second, if the federal courts have been able to develop their own approach to reviewing such motions without any standard expressed in the rule, Wisconsin's courts are equally capable of doing so—or, more accurately, continuing to do so—via common law development under Wis. Stat. (Rule) § 809.12.

And Wisconsin's courts (including this one) *have* been doing just that, as the decisions and orders cited in the Petition and subsequent responses make clear. Common law development—not rule-based standards of review—is how both Wisconsin courts *and* federal courts have been addressing this issue for decades.[1]

---

[1] To the extent Petitioners believe the common law does not provide sufficient clarity around *which* aspects of appellate

And that is true as to standards of review generally, not just this particular issue. Indeed, there is no provision in Chapter 809 that sets forth any standard of review for any type of motion or issue; words such as "erroneous exercise of discretion," "*de novo*," and "independent review" do not even appear in any statutory provision in Chapter 809. We are not convinced that this particular type of motion is significant enough to merit the first and (at least for now) only appellate standard of review prescribed by statute.

Finally, in connection with the Petition's second rationale, we note that even the federal case law is not uniform on this issue. Among the examples cited in the Petition, *Hinrichs v. Bosma*, 440 F.3d 393, 396 (7th Cir. 2006), actually states a three-part standard: factual findings are reviewed for clear error, legal conclusions are reviewed *de novo*, and the district court's balancing of the factors is reviewed under the abuse of discretion standard. *Cf.* Pet. at 8. And the Tenth Circuit's approach to reviewing preliminary injunction decisions is the same. *Cf.* Pet. at 9, quoting *Zoller Laboratories, LLC v. NBTY, Inc.*, 111 Fed. App'x 978, 981–82 (10th Cir. 2004). In other words, even the federal courts are continuing to workshop this standard at common law. To freeze the discussion at a particular point in time would be odd and, we think, unwarranted.

3. Stated benefits of the proposed rule change

Next, we turn to the five benefits identified by the Petition. In our view, these are not so much benefits of the proposed rule change as they are (a) already achieved by the common law, (b) based on dubious assumptions, (c) more concerned with downplaying the risks of the proposed rule, or (d) redundant of rationales already discussed above.

---

courts' *Gudenschwager* review implicate "conclusions of law," we address that concern in Section 4.

The first stated benefit is that the proposed change "preserves differential [sic] review of the circuit court's balancing of the harms." Pet. at 11. The reference to "preservation" confirms that the common law status quo already provides for deferential review, so it is not an incremental benefit of changing the rule.

The second stated benefit is that the amendment "diminishes the likelihood that a party will be harmed by a circuit court's incorrect judgment during the pendency of the appeal." Pet. at 11. This requires some unpacking. If the amendment diminishes the effect of a judgment, then that must mean the amendment would, on balance, make it easier for reviewing courts to grant early motions to stay those judgments. And that is the same as the fifth stated benefit: that the proposed rule "facilitates effective temporary relief" "by making it easier for an appellate court to stay a circuit court decision it knows it will likely reverse." Pet. at 13.

Both of these stated benefits assume two things: (1) that current law somehow makes it too difficult for appellate courts to stay circuit court decisions, and (2) that at the outset of an appeal, which is almost always when a stay is requested, the reviewing court has already made up its mind on the merits of the appeal.

The Petition does not support the first assumption. The current standard leaves ample room for an appellate court to grant a stay even if the circuit court did not, and recent decisions (like *Waity*) and related orders[2] make

---

[2] *See, e.g., League of Women Voters v. Evers*, No. 2019-AP-559, unpublished order (Wis. Ct. App. Mar. 27, 2019) (granting Legislature's motion to stay circuit court injunction pending appeal after circuit court had denied stay); *Serv. Emps. Int'l Union (SEIU) Local 1 v. Vos*, No. 2019-AP-622, unpublished order (Wis. June 11, 2019) (same); *Waity v. LeMahieu*, No. 2021-AP-802, unpublished order (Wis. July 15, 2020) (same); *Tiegen v. Wisconsin Elections Commission*, No. 2022-AP-92 (Wis. Ct. App. Jan. 24, 2022) (granting temporary stay); *Tiegen v. Wisconsin*

clear that neither this Court nor the court of appeals will hesitate to use that authority when warranted.

The second assumption is concerning to the Appellate Practice Section. While there is certainly room to review legal error *in the circuit court's stay decision* at the outset of the appeal, the typical urgency of a stay request is not well suited to a thorough review of the merits *of the appeal*. We discuss this point further in Section 4.

The third stated benefit is that the proposed change "is sufficiently tailored to avoid unnecessarily disrupting settled law." Pet. at 12. This is not so much a benefit as it is a statement that the harm from changing the rule will be minimal. Of course, whatever disruption *would* be occasioned by the rule change could be avoided by leaving the rule as it is.

Finally, the fourth stated benefit is that the proposed change "will bring Wisconsin appellate practice into line with the federal authority that influenced Wis. Stat. § (Rule) 809.12's adoption." Pet. at 12. This appears to be a restatement of the second *rationale* for the rule, not an additional benefit. And as discussed above, the proposed amendment would in fact deviate from the federal rule, which (like Wisconsin currently) does not state a standard of review, but leaves that for the courts to develop at common law.

In summary, to the extent the proposed amendment merely purports to codify *existing* law, we see no incremental benefit to doing so. If instead the proposed amendment would *change* the law, in our view the potential adverse implications for the appellate process outweigh any perceived benefit in "making it easier for an appellate court to stay a circuit court decision."

Elections Commission, No. 2022-AP-92 (Wis. Feb. 11, 2022) (declining to extend temporary stay following bypass).

4. Is likelihood of success "*purely* legal" after all?

The tension between an initial stay request and an ultimate merits review goes to the heart of the common law stay analysis, and to the first *Gudenschwager* factor in particular. Because that factor implicates "conclusions of law" *and* discretionary judgment differently in different cases, and because the proposed rule change (even as amended) does not clarify *which* aspects of the first factor analysis are "conclusions of law" warranting *de novo* review versus greater deference to the circuit court, we conclude by examining that issue in greater detail and offering some thoughts on a potential path forward.

As the supplemental memorandum in support of the Petition notes, the Petition has already prompted the Court to ask: "Which of the stay pending appeal factors involve a 'legal determination'?" Supp. Memo. at 1. Petitioners answer that only the first factor—likelihood of success on appeal—does. *Id.* at 2.

Even if that's true, there's a critical difference between saying that the first factor *involves* a legal determination and saying that the first factor is *purely* a "legal conclusion" to be reviewed *de novo*, as the supplemental memorandum may be read to suggest. While it is theoretically possible that a particular appeal would involve only a single legal determination (say, a facial challenge to the constitutionality of a statute), making merits review (and thus review of likelihood of success on the merits) more "purely legal" than in most appeals, there will be many other appeals that involve an interplay of factual findings, legal rulings, and discretionary decisions, each subject to their own standard of review on appeal, making the "likelihood of success" prediction far more complex. At least in those cases, if not all appeals, the parties are likely to disagree over which aspects of the first factor analysis are "conclusions of law" after all.

To be sure, some errors of law will be obvious, particularly when they creep in at the outset of the stay analysis. At the most basic level, if a circuit court fails to identify and apply the *Gudenschwager* test in the first instance, that would be first-order legal error even before reaching any particular factor of the stay analysis, much less the underlying merits. The rule amendment as originally proposed would presumably include this threshold issue among the "legal determinations" subject to "independent[] review," but the amended proposal would not, being expressly limited to *Gudenschwager*'s first factor.

Then, even under the first factor itself, a circuit court can commit legal error at multiple levels. In one clear example, the circuit court can misapprehend what the first factor asks it to do. At this level, the relevant question is not whether the circuit court believes its merits decision is correct, but whether a reviewing court is likely to reverse that decision. If the circuit court stops the analysis without considering *that* question, it has not properly applied *Gudenschwager*'s first factor.

This was the legal error in *Waity v. LeMahieu*: the circuit court "erroneously exercised its discretion *by applying an incorrect legal standard.*" 2022 WI 6, ¶ 50 (emphasis added). Rather than asking what an appellate court might do, the circuit court referred back to its own reasoning on the merits, reaffirmed those conclusions, and stated that any separate consideration in connection with a stay would "merely be repeating what [it] already set forth" on the merits. *Id.* at ¶ 51 (alteration in original). This Court explained the flaw in that approach at some length, emphasizing that in considering a stay, the circuit court must step outside its own assessment of the merits to consider objectively what a reviewing court might do, taking into account the standard of review that will govern its merits decision on appeal. *Id.* at ¶¶ 52–53.

The *Waity* dissenters disagreed as to what role the standard of review that will govern the merits on appeal should play in the first factor analysis. *Id.* at ¶¶ 90–92. Here, the comments submitted by Attorneys Pierson and Lenz appear to engage primarily with that debate. But as we see it, neither form of the proposed rule addresses this issue one way or the other. Under either form, just as currently, a reviewing court applying *Waity* might conclude that a circuit court's failure to adequately account for the standard of review governing the merits was a legal error justifying reversal. But as stated, neither the Petition nor the proposed rule targets that second-order type of legal error.

In fact, Petitioners' supplemental comments confirm this is *not* the type of error they're worried about. They say their Petition "addresses a situation *not* addressed in *Waity*." Supp. Memo. at 3 (emphasis added). *Waity* was a "legal standard" error. "But what about when the circuit court articulates the correct legal standard, but then applies it incorrectly?" *Id.* at 4. The Petition is intended to address *that* situation: "It clarifies that the court of appeals does not defer to the circuit court's analysis of the movant's likelihood of success on appeal" – period.

As this language and Petitioners' comments elsewhere make clear, the thrust of the Petition is really about a third type of "legal error": the legal error a reviewing court may perceive *not* in the circuit court's stay decision, but in the underlying merits decision itself. On this point, they say, "the appellate court itself is best positioned to gauge how likely it is to reverse the circuit court." Pet. at 2. They continue:

> If an appellate court is *fairly confident that it will ultimately reverse* the circuit court, temporarily staying the circuit court's judgment until a final decision is rendered seems like a sensible and prudent approach.

> *Why should the reviewing court cabin itself* to reviewing whether the circuit court reached a sensible prediction as to how the reviewing court will eventually rule? It makes far more sense for the reviewing court to *directly assess for itself how likely it is to reverse* the circuit court's judgment.

Pet. at 6 (emphasis added).

If Petitioners' position is that *Gudenschwager*'s first factor calls for an appellate court to perform *de novo* legal review *on the merits* at the earliest stage of the case, with no deference to the circuit court's view of likelihood of success on the merits—regardless of the issues presented for review, when all that is before the court may be a notice of appeal (or petition for review) and a motion for a stay—we think that Wisconsin common law has not yet developed to the point of clarity on that issue. At a minimum, Petitioners have not identified Wisconsin case law supporting that position. And there are legal and practical obstacles to that position that are not resolved by the Petition or the text of the proposed rule.

First, that interpretation is arguably in tension with *Waity*, which recently reaffirmed that all four factors of the *Gudenschwager* test are reviewed for erroneous exercise of discretion, so long as the circuit court applied the first factor from the standpoint of a reviewing court and not based on its own view of the merits. *Waity*, ¶¶ 50 -53. It is also arguably in tension with *Gudenschwager* itself, which emphasized that the ultimate question is whether the trial court "reached a conclusion that a reasonable judge could reach" (*Gudenschwager*, 191 Wis. 2d 431, 440)—not the decision the reviewing judge(s) *would* or *will* reach. And it is difficult to square with the general principle that for discretionary decisions like this one, the court's "role on review is to 'search the record for reasons to sustain'" it. *State v. Dobbs*, 2020 WI 64, ¶ 48, 392 Wis. 2d 505, 945 N.W.2d 609.

Second, mandating *de novo* review of likelihood of success on the merits (and thus of the merits themselves) at the motion to stay stage presents practical concerns:

- At that point, the record on appeal typically will not have been compiled, and the appellate court does not have access to the circuit court's electronic docket. Thus, often, the only documents from the circuit court proceedings available to the appellate court are those that a party happens to include in the appendix accompanying a motion for a stay or a petition for review.

- The appellate court will often be rushed to reach a decision on a stay motion based on events beyond the court's control. This abbreviated timeline for an appellate stay decision stands in contrast with the circuit court, which has often been living with the case for months (or longer) and has had a more fulsome opportunity to digest the issues (both factual and legal) that are involved in the case.

- Due to abbreviated timelines, the appellate court often will lack a meaningful opportunity to benefit from merits briefing, argument, or the chance to ask questions of the parties, beyond any snapshot of the merits included in the stay motion and/or the petition for review and any response.

Under those conditions, to base a stay decision on a snap *de novo* judgment about the underlying merits risks improperly prejudging those merits.

Of course, the nature of the first factor itself—"likelihood of success *on the merits*"—necessarily entails *some* consideration of the underlying merits at this stage of the appeal. But the degree to which that analysis will involve "conclusions of law" with respect to the merits will vary from case to case, and in many if not most cases will be fairly debatable.

At the circuit court level, it is difficult to conceive of a case where the likelihood of success on appeal can be assessed *only* in terms of legal conclusions. Even where the judgment itself presents only a pure question of law, the circuit court's analysis is still likely to entail other considerations, such as whether the question was easy or difficult to resolve, mundane or novel, in line with the mainstream of judicial decisions or an outlier. Then, too, there is the question of which court will review the decision next: the court of appeals, in its error-correcting role, or this Court, with its power to overrule prior precedent and change Wisconsin law? Of course, those complexities only increase to the extent the ruling also turns on factual findings or discretionary determinations, each subject to their own standards of review. In short, while the first factor analysis will often (perhaps always) *involve* conclusions of law, it will also often (if not always) involve more.

So to say that, *as a rule*, a circuit court's analysis of that factor will be reviewed *de novo* seems to us to paint with too broad a brush. In fairness to Petitioners, it is not totally clear whether they stand by so broad a position. *Compare* Pet. at 2 ("Regarding the movant's likelihood of success on appeal, the proposed amendment would clarify that *de novo* review applies.") *and* Supp. Memo. at 2 (proposing a modification to the proposed amendment "clarifying that *de novo* review applies only when reviewing the movant's likelihood of success on appeal") (which sounds like the same thing) *with id.* at 5 (amended rule) (court "shall independently review *the trial court's conclusions of law* when reviewing the movant's likelihood of success on appeal") (emphasis added).

This last framing seems potentially narrower, applying only to embedded "conclusions of law" and not the entire first factor analysis. But this introduces new ambiguities. First, it isn't clear whether "the trial court's conclusions of law" encompass the trial court's stay analysis, the underlying merits, or both. Second, and

more fundamentally, the rule does not resolve *which* of the many aspects of "likelihood of success" are really "conclusions of law" and which aren't.

In the end, it is this lack of clarity that leads us to conclude that the proposed rule, in either form, will likely work more appellate mischief than it avoids. As originally proposed, it treats the first factor analysis as always and only a legal conclusion, which we think is not sufficiently nuanced. As amended, it begs the critical question, because it does not provide appellate courts or litigants with any clarity regarding *which* aspects of the first factor analysis are legal conclusions requiring *de novo* review. As long as that question remains fairly debatable, the issue will be better developed through the ongoing judicial discussion that is the common law.

* * *

If the Petition proposed a rule change that merely codified existing common law governing appellate review of stay decisions under *Gudenschwager*, that may be redundant and (in light of Chapter 809's current silence on standards of review) idiosyncratic, but would be otherwise unobjectionable. But the Petition appears to go beyond that, codifying *de novo* review not just of whether the circuit court identified the correct legal standard (*Gudenschwager*) or applied it objectively (as *Waity* requires), but also of whether the circuit court's prediction *on the merits* is legally correct. Because that rule is either overly broad or insufficiently clear, and because either way we are not convinced that codifying standards of review is prudent, the Appellate Practice Section regrets that it is unable to support the Petition.

The undersigned is authorized to state that the Board of Governors of the State Bar of Wisconsin has approved submission of these comments on behalf of the Appellate Practice Section.

Respectfully submitted this
25th day of September, 2023.

Electronically signed by James E. Goldschmidt

Matthew S. Pinix
State Bar No. 1064368
Pinix Law, LLC
1200 E. Capital Drive, Suite 360
Milwaukee, WI 53211

Chairperson, Appellate Practice Section

James E. Goldschmidt
State Bar No. 1090060
Quarles & Brady LLP
411 E. Wisconsin Avenue, Suite 2400
Milwaukee, WI 53202

Past Chairperson (2021-22), Appellate Practice Section

Joseph S. Diedrich
State Bar No. 1097562
Husch Blackwell LLP
33 E. Main Street, Suite 300
Madison, WI 53703

Chairperson-Elect, Appellate Practice Section

Douglas M. Raines
State Bar No. 1059539
Husch Blackwell LLP
511 N. Broadway, Suite 1100
Milwaukee, WI 53202

Director, Appellate Practice Section