

Rule Petition No. 23-01

In the Supreme Court of Wisconsin

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

**SUPPLEMENTAL MEMORANDUM
IN SUPPORT OF THE PETITION**

Via a May 26, 2023 letter from Supreme Court Commissioner Timothy M. Barber, the Court asked three questions regarding Rule Petition No. 23-01. This memorandum addresses each of the questions. Additionally, the memorandum proposes a slightly modified version of the proposed amendment to Wis. Stat. § (Rule) 809.12., which Petitioners believe addresses some of the concerns underlying the Court's questions.

I. ANSWERS TO THE COURT'S QUESTIONS

The Court posed three questions regarding the proposed amendment to Wis. Stat. § (Rule) 809.12. Each question is answered in order.

A. Which of the stay pending appeal factors involve a "legal determination"?

As set forth in *State v. Gudenschwager*, 191 Wis. 2d 431, 440, 529 N.W.2d 225 (1995), a party seeking a stay pending appeal must demonstrate: (1) "a strong showing that it is likely to succeed on the merits of the appeal"; (2) "unless a stay is granted, it will suffer irreparable injury"; (3) "no substantial harm will

come to other interested parties”; and (4) “a stay will do no harm to the public interest.” Please identify which of these factors the petitioners believe involve a “legal determination” by the circuit court as opposed to a factual determination.

Answer: Only the first factor—the likelihood of success on appeal— involves a legal determination (*i.e.*, a conclusion of law). The remaining factors involve fact-intensive inquiries properly entrusted to the circuit court’s discretion.

That said, the Court’s question demonstrates that the proposed amendment could be drafted more clearly to identify which factor an appellate court is to review independently. Accordingly, Section II of this memorandum proposes a modification to the proposed amendment clarifying that *de novo* review applies only “when reviewing the movant’s likelihood of success on appeal.”¹

B. Is “legal determinations” synonymous with “conclusions of law”?

Also, please clarify whether the petitioners intend the phrase “legal determination” to be synonymous with “conclusion of law.”

Answer: Yes, the Petition was drafted with the understanding that the terms “legal determinations” and “conclusions of law” are synonymous. And as a practical matter, they are. However, in light of the Court’s question, petitioners believe substituting the term “conclusions of law” would offer greater clarity and consistency with the rest of Chapter 809. The Wisconsin

¹ This would apply equally both under *Gudenschwager* and under the modified framework set forth in *Scullion v. Wisconsin Power & Light Co.*, governing stays pending appeal in the context of a money judgment. See 2000 WI App 120, ¶¶18–23, 237 Wis. 2d 498, 614 N.W.2d 565. While similar, *Scullion* sets forth a slightly different set of factors a court must consider in the context of a stay pending appeal involving a money judgment. This Petition leaves the *Gudenschwager/Scullion* distinction in place.

Rules of Appellate Procedure employ the term “conclusions of law” in several places, but nowhere do the rules use the phrase “legal determinations.” *See, e.g.,* Wis. Stat. §§ 809.105(4), 809.105(11)(a)3., 809.19(2), 809.19(8g)(b), 809.62(2)(f)2. Therefore, Section II of this memorandum proposes replacing the term “legal determinations” with “conclusions of law.”

C. Why is this rule petition necessary after this Court’s decision in *Waity v. LeMahieu*?

Why is it necessary to specify that appellate courts shall “independently review the trial court’s legal determinations” when *Waity v. LeMahieu*, 2022 WI 6, ¶¶50, 52–53, 400 Wis. 2d 356, 969 N.W.2d 263, demonstrates that an appellate court does not defer to a circuit court’s legally erroneous application of the likelihood of success on the merits factor?

Answer: With respect, Petitioners believe the Court’s question overstates *Waity*’s holding in two respects.

First, regardless of what *Waity* demonstrates, the words chosen by the Court indicate that it applied an erroneous exercise of discretion standard to the likelihood of success on appeal factor. The Court said it reviewed the circuit court’s decision not to grant a stay pending appeal “under the erroneous exercise of discretion standard.” *Id.*, ¶50. It made no suggestion that de novo review applied to the Court’s review of the movant’s likelihood of success on appeal. That said, even if the Court in *Waity* did hold that the erroneous exercise of discretion standard applies to the likelihood of success on appeal factor, then this Petition simply serves to clarify that point for the benefit of the bench and bar.

Second, in Petitioners’ view, this Petition addresses a situation not addressed in *Waity*. In *Waity*, the Court addressed whether “the circuit court

erroneously exercised its discretion by applying an incorrect legal standard.” *Id.*, ¶50. But what about when the circuit court articulates the correct legal standard, but then applies it incorrectly? *Waity* does not say that an appellate court may independently review the circuit court’s incorrect application of the correct legal standard. This Petition would clarify that an appellate court shall independently review the likelihood that the appellate court will reverse the circuit court’s application of the relevant legal standard. 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 simply because the circuit court articulated the correct legal standard on the record.

This Petition clarifies that an appellate court is rarely, if ever, obligated to defer to a circuit court’s erroneous conclusion of law. *Waity* says an appellate court owes no deference to a circuit court that uses the wrong legal standard. The Petition adopts the unremarkable corollary that an appellate court owes no deference to a circuit court’s incorrect application of the correct legal standard. Regardless of *Waity*’s scope, this Petition will clarify this aspect of appellate practice in Wisconsin.

II. MODIFIED PROPOSED LANGUAGE

In light of the Court’s questions, Petitioners believe the proposed amendment could be revised for additional clarity. To that end, Petitioners offer the following modified language for the Court’s consideration:

809.12. Motion for relief pending appeal

(1) A person seeking relief under s. 808.07 shall file a motion in the trial court unless it is impractical to seek relief in the trial court. A motion in the court must show why it was impractical to seek relief in the trial court or, if a motion had been filed in the

trial court, the reasons given by the trial court for its action. A person aggrieved by an order of the trial court granting the relief requested may file a motion for relief from the order with the court. A judge of the court may issue an ex parte order granting temporary relief pending a ruling by the court on a motion filed pursuant to this rule. A motion filed in the court under this section must be filed in accordance with s. 809.14.

(2) If a person aggrieved by the trial court's decision to grant or deny a motion filed pursuant to this rule seeks appellate review of the trial court's determination, the court shall review the trial court's decision for an erroneous exercise of discretion, but it shall independently review the trial court's ***conclusions of law when reviewing the movant's likelihood of success on appeal.***

(Revised language bolded and italicized.)

This revision eliminates two potential sources of ambiguity identified by the Court's questions. First, it replaces the term "legal determinations" with "conclusions of law." This addresses the Court's concern about whether "legal determinations" is synonymous with "conclusions of law." Second, the modified proposal clarifies that the de novo standard of review applies only when reviewing the likelihood of success on appeal factor, and not to any of the other factors. This addresses the Court's concern about which factors will be affected by the amendment.

CONCLUSION

Petitioners respectfully ask that the Court grant this Petition and amend Wis. Stat. § (Rule) 809.12, either in the form proposed in the Petition, or as stated in this Supplemental Memorandum.

Dated: June 19, 2023

Respectfully submitted,

Electronically signed by Caleb R. Gerbitz

Caleb R. Gerbitz

(STATE BAR # 1122558)

James M. Sosnoski

(STATE BAR # 1118862)

111 East Kilbourn Avenue

19th Floor

Milwaukee, WI 53202

(414) 273-1300 (telephone)

(414) 273-5840 (fax)

crg@mtfn.com

sjm@mtfn.com