Rules Petition No. 22-____

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

MEMORANDUM IN SUPPORT OF THE PETITION

INTRODUCTION

A motion for relief pending appeal asks a court to equitably stay a circuit court's ruling pending appellate review. As this Court knows well, a circuit court considering whether to stay its judgment pending appeal typically must consider four factors: (1) the movant's likelihood of obtaining a reversal on appeal, (2) the irreparable harm to the movant, (3) the harm to other interested parties, and (4) the harm to the public interest. Once a decision is made, a circuit court's decision on a motion for relief pending appeal may be reviewed by an appellate court for an erroneous exercise of discretion. Recently, Wisconsin courts have reviewed all four factors of the stay analysis—including the movant's likelihood of success on appeal—for an erroneous exercise of discretion.

The petitioners propose an amendment to Wis. Stat. § (Rule) 809.12 to clarify that an appellate court's deferential review applies only to the circuit court's assessment of the harms surrounding the motion for a stay.

Regarding the movant's likelihood of success on appeal, the proposed amendment would clarify that de novo review applies.

Two rationales support this amendment. First, as with any other question of law, the circuit court is in no better a position that the appellate court to say what the law is or how an appellate court would likely rule. Deference is, of course, properly owed to the circuit court's findings of fact and its balancing of the harms. Those fact-bound inquiries are best entrusted to the circuit court and its deeper understanding of the circumstances surrounding a given case. But the same cannot be said of the circuit court's assessment of the likelihood that an appellate court will reverse its judgment. Quite naturally, the appellate court itself it best positioned to gauge how likely it is to reverse the circuit court. Thus, an appellate court reviewing a decision on a motion for a stay pending appeal should be free to exercise its independent judgment when analyzing the movant's likelihood of success on appeal.

Second, the petitioners' proposed amendment will bring Wisconsin's appellate practice in line with the prevailing practice in federal courts. This is significant because the language of Wis. Stat. § (Rule) 809.12 was drawn from the corresponding Federal Rule of Appellate Procedure. Yet, unlike Wisconsin's "one size fits all the factors" standard of review, federal appellate courts decline to defer to a lower court's assessment of the movant's likelihood of success on appeal. Adopting this proposed amendment will conform Wisconsin's application of Rule 809.12 to the longstanding practice under the federal rule that was its model.

For these reasons, the petitioners respectfully request that the Court grant their Petition to amend Wis. Stat. § (Rule) 809.12 regarding the standard of review for a decision on a motion for a relief pending appeal.

I. HISTORICAL OVERVIEW OF WIS. STAT. § (RULE) 809.12

In its current form, Wis. Stat. § (Rule) 809.12 regulates motions for relief pending appeal with three directives. First, it directs movants to first seek a stay from the circuit court. Second, it creates a limited exception allowing movants to seek relief from an appellate court if it would be impractical to seek relief from the circuit court. And third, the rule authorizes appellate review of an adverse decision on a motion for a stay pending appeal. In full, the current rule provides:

> 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.

Rule 809.12.[1]

The Wisconsin Supreme Court adopted Wis. Stat. § (Rule) 809.12 in 1978. 83 Wis. 2d xiii (1978). Wisconsin appellate courts initially applied de novo review to all aspects of a circuit court's decision to grant or deny relief

[1] Wisconsin Stat. § 808.07(2) provides additional authority for both trial and appellate courts to "[s]tay execution or enforcement of a judgment or order" while an appeal is pending.

pending appeal. In its 1993 *Faust v. Faust* decision, the court of appeals held: "Although the grant or denial of a stay is a discretionary act of the trial court, we are not relegated to simply reviewing the action taken by the trial court. A motion under Rule 809.12, Stats., for relief pending appeal is considered *de novo* by the court of appeals." 178 Wis. 2d 599, 601–02, 501 N.W.2d 810 (Ct. App. 1993) (citation omitted).

Two years after *Faust*, however, the Wisconsin Supreme Court took a different view, adopting an erroneous exercise of discretion standard. In *State v. Gudenschwager*, the court explained:

> As an initial matter, we must address the standard of review to be applied when an appellate court reviews a trial court's decision to grant or deny a stay pending appeal. In *In re Marriage of Faust v. Faust*, the court of appeals stated, without citation, that motions for relief pending appeal brought under Rule 809.12 are considered *de novo* by appellate courts.
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> Rule 809.12 is based on Fed. R. App. P. 8(a). It is well established that federal cases may provide persuasive guidance to the proper application of state law copied from federal law. Our review of applicable federal law leads us to conclude that a trial court's decision to grant or deny a stay pending appeal should be reviewed under an erroneous exercise of discretion standard. *See e.g., Lopez v. Heckler*, 713 F.2d 1432, 1436 (9th Cir. 1983); *Beverly v. United States*, 468 F.2d 732 (5th Cir. 1972). Consequently, we overrule *Faust*'s holding that a *de novo* standard of review is appropriate.

191 Wis. 2d 431, 439–40, 529 N.W. 225 (1995) (citations omitted).

Since *Gudenschwager*, Wisconsin appellate courts have generally applied erroneous exercise of discretion review to all aspects of a circuit court's decision on a stay pending appeal. But before turning to those decisions, it is worth noting that the Ninth Circuit's *Lopez v. Heckler*

decision cited in *Gudenschwager* actually articulates a more nuanced standard of review than the Court let on. It distinguished between the trial court's equitable and legal analysis, explaining that the court's decision "will only be reversed if the lower court abused its discretion ***or*** *based its decision upon erroneous legal premises*." *Lopez,* 713 F.2d at 1436 (quoting another source) (emphasis added). The *Lopez* court then applied this standard of review, deferentially reviewing the trial court's analysis of the relevant harms, but independently reviewing the movant's probability of succeeding on the merits of her appeal. *Id.* at 1436–40.

Gudenschwager may have articulated a "one size fits all the factors" standard for appellate review of a decision on a motion for relief pending appeal, but the authority it cited advanced a more nuanced view—one which applies de novo review when analyzing the movant's likelihood of success on appeal.

II. RECENT CHALLENGES PRESENTED BY THE STANDARD OF REVIEW

Several cases over the past few years have brought into focus the tension created by *Gudenschwager*'s blanket deferential standard of review. These cases highlight the difficulty of analyzing whether the circuit court's analysis of the likelihood an appellate court would reverse constitutes and erroneous exercise of discretion.

The most significant decision from this court on this issue in recent years was in *Waity v. LeMahieu*, 2022 WI 6, 400 Wis. 2d 356, 969 N.W.2d 263. There, the court articulated the deferential standard of review adopted in *Gudenschwager* and applied it to all four factors of the stay-pending-appeal analysis. *Id.*, ¶¶ 48–61. On the likelihood of success on

appeal factor, the court held that "the circuit court erroneously exercised its discretion by applying an incorrect legal standard." *Id.*, ¶ 50. The implication appeared to be that if the circuit had applied the correct legal standard, the court would have applied deferential review to its application of that legal standard to the facts of the case.

The *Waity* dissent agreed that deferential review applied to the likelihood of success on appeal factor, but it contended that the majority was not sufficiently deferential to the circuit court's legal analysis. *Id.*, ¶ 85 (Dallet, J., dissenting). In the dissent's view, "So long as the circuit court demonstrated a rational process and reached a decision that a reasonable judge could make, an appellate court must affirm, even if it would have reached a different conclusion." *Id.* (cleaned up).

But why? 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.

A few other recent decisions from Wisconsin courts highlight the tension inherent in applying deferential review to the likelihood of success on the merits analysis. For example, in *Teigen v. Wis. Elections Comm'n*, No. 2022AP91, the court reviewed multiple motions to stay regarding the permissibility of drop boxes in the February 2022 and April 2022 elections. When analyzing those motions, precedent suggests that the court's role was

to assess whether the Waukesha County Circuit Court reached a permissible guess as to how the Wisconsin Supreme Court would ultimately rule. In the petitioners' view, the better question would have been whether the supreme court itself thought it would likely reverse.

A similar tension appeared in *County of Dane v. Public Service Commission of Wisconsin*, 2022 WI 61, 403 Wis. 2d 306, 976 N.W.2d 790. There, the circuit court declined to quash discovery subpoenas against a former PSC commissioner based on a possible due process violation. *Id.*, ¶ 16. But, while the issue was stayed and on appeal, the subpoenas were withdrawn, and the court of appeals vacated its stay of discovery on the former commissioner. *Id.* ¶ 17. When it appeared the former commissioner would be subject to additional subpoenas, this Court granted review and stayed further discovery against the former commissioner until it could consider the merits of the case. *Id.* ¶ 18. Once again, precedent suggests that this Court's role was cabined to whether the Dane County Circuit Court reached a permissible guess as to how the Court would ultimately rule. In the petitioners' view, the better question would have been whether this Court itself thought it would likely reverse.

The motions for relief in *Waity*, *Teigen*, and *County of Dane* all left the court in an odd spot. In each, the court attempted to deferentially review the lower court's analysis of movant's likelihood of obtaining a reversal before this Court, even as dissenting justices challenged that the court's review was insufficiently deferential. This petition seeks to resolve that tension by clarifying that appellate courts may consider how they themselves

will likely rule on the ultimate merits of an appeal. It need not assess whether the circuit court made a sufficiently rational guess.

III. FEDERAL COURTS INDEPENDENTLY REVIEW TO THE LIKELIHOOD OF SUCCESS ON APPEAL FACTOR

Earlier, we noted that the Ninth Circuit's *Lopez v. Heckler* decision cited in *Gudenschwager* endorsed the two-part standard of review advanced in this Petition. As it turns out, the Ninth Circuit is far from alone among federal courts applying de novo review to a trial court's analysis of a movant's likelihood of success on appeal, as the following cases demonstrate:

- *Matter of Forty-Eight Insulations, Inc.*, 115 F.3d 1294, 1301 (7th Cir. 1997) ("As is the case with other forms of equitable relief, a court's decision to deny a Rule 8005 stay is highly discretionary. However, we review the legal conclusion that a stay movant has met the required threshold showing of likelihood of success *de novo*." (citation omitted)).
- *Hinrichs v. Bosma*, 440 F.3d 393, 396 (7th Cir. 2006) ("In reviewing a motion for a stay pending appeal, we review the district court's findings of fact for clear error, its balancing of the factors under the abuse of discretion standard and its legal conclusions de novo.").
- *Does 1–3 v. Mills*, 39 F.4th 20, 24 (1st Cir. 2022) ("Our consideration of the plaintiffs' motion seeking a stay pending appeal is de novo." [The entire focus of the First Circuit's analysis was on the likelihood of success on appeal factor.]).
- *In re Revel AC, Inc.*, 802 F.3d 558, 567 (3d Cir. 2015) ("We generally review appeals from a denial of a stay for abuse of discretion, giving proper regard to the District Court's 'feel' of the case. However, we review *de novo* the District Court's decision on the likelihood of success, for it involves a purely legal determination." (cleaned up)).
- *S.S. Body Armor I., Inc. v. Carter Ledyard & Milburn LLP*, 927 F.3d 763, 772–73 (3d Cir. 2019) ("We typically review appeals from the

denial of a stay for abuse of discretion, giving proper regard to the district court's feel of the case. But, since the first factor involves a purely legal determination, we review a district court's decision on the likelihood of success *de novo*." (citations omitted)).

In a similar vein, federal courts have articulated the same standard of review for preliminary injunctions, which generally turn on the same four factors as a motion for a stay pending appeal. *See Scullion v. Wis. Power & Light Co.*, 2000 WI App 120, ¶ 18 n.14, 237 Wis. 2d 498, 614 N.W.2d 565 (noting that the four factors for a stay pending appeal "are borrowed" from the preliminary injunction analysis). In this context, federal courts also apply de novo review to the likelihood of success on the merits factor.

- *Gateway Eastern Railway Co. v. Terminal R.R. Ass'n of St. Louis*, 35 F.3d 1134, 1137 (7th Cir. 1994) ("This Court gives substantial deference to a district court's decision to grant a preliminary injunction insofar as that decision involves the discretionary acts of weighing evidence or balancing equitable factors. However, the more purely legal conclusions made by a district court in granting a preliminary injunction are subject to *de novo* review." (quotation marks and citation omitted)).
- *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 763 (6th Cir. 2019) ("We review the district court's determination of likelihood of success on the merits de novo. The 'ultimate determination as to whether the four preliminary injunction factors weigh in favor of granting or denying preliminary injunctive relief is reviewed for abuse of discretion. This standard of review is 'highly deferential' to the district court's decision.'" (quoting another source)).
- *Zoller Laboratories, LLC. v. NBTY, Inc.*, 111 Fed. App'x 978, 981–82 (10th Cir. 2004) ("We review the district court's decision to deny a preliminary injunction for abuse of discretion. In doing so, we examine the district court's factual findings for clear error and its legal determinations de novo." (quoting another source)).

- *Water Keeper Alliance v. U.S. Dept. of Defense*, 271 F.3d 21, 30–31 (1st Cir. 2001) ("We consequently review the district court's legal findings under the 'likelihood of success' prong de novo. In contrast, we review the district court's judgment calls, applying appropriate standards, under the remaining three prongs for abuse of discretion.").
- *Teva Pharmaceuticals, USA, Inc. v. U.S. Food & Drug Admin.*, 182 F.3d 1003, 1007 (D.C. Cir. 1999) ("Our review of the denial of injunctive relief is for abuse of discretion, but we review *de novo* the district court's conclusions of law, namely that Teva was unlikely to prevail in its challenge to the FDA's refusal to treat the California dismiss as a triggering 'court decision.'").
- *Associated General Contractors of America v. Metropolitan Water District of Southern California*, 159 F.3d 1178, 1180–81 (9th Cir. 1998) ("Moreover, we review its determination that the preliminary injunction should be denied because AGC had no likelihood of success on the merits de novo. At the same time, our review of denials of injunctive relief is limited, and we will reverse only if the district court 'abused its discretion or based its decision on an erroneous legal standard or on a clearly erroneous findings of fact.'" (quoting other sources)).

In both the stay pending appeal context and the preliminary injunction context—again, the same factors apply to both—federal courts consistently apply de novo review when analyzing the movant's likelihood of success, even as they apply discretionary review to the other factors in the analysis.

IV. AMENDING WIS. STAT. § (RULE) 809.12 WILL CLARIFY THE STANDARD OF REVIEW

The petitioners' propose the following amendment to Wis. Stat. § (Rule) 809.12 to clarify the standard of review for an appeal of a motion for relief pending appeal:

> **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 legal determinations.

This language is the product of the petitioners' attempt to fashion a solution that clarifies the standard of review in this context without unintentionally affecting other aspects of the law. This proposed amendment has several benefits, as articulated in the next five paragraphs.

1. The proposed amendment preserves differential review of the circuit court's balancing of the harms. A circuit court's assessment and balancing of the harms presents a fact-bound inquiry that is best entrusted to the circuit court's judgment. This petition preserves the circuit court's discretion to assess the harms of a particular case and weigh them against each other.

2. By clarifying the standard of review for the likelihood of success on appeal factor, the amendment diminishes the likelihood that a party will be harmed by a circuit court's incorrect judgment during the pendency of the appeal. The purpose of a stay pending appeal (and all equitable relief for that matter) is to provide just relief that is tailored to the

needs of the parties. When a circuit court has incorrectly decided a legal issue to a party's ongoing detriment, that party is harmed every day the circuit court's judgment remains in effect. Yet deferring to a circuit court's analysis of the movant's likelihood of success on appeal makes it more likely that an incorrect decision will remain in effect longer, further harming the aggrieved party. Clarifying that an appellate court should independently review the circuit court's legal analysis will make it more likely that a party that will ultimately succeed on appeal is granted the temporary relief necessary to preserve it from undeserved harm.

3. The proposed language is sufficiently tailored to avoid unnecessarily disrupting settled law. The scope of this petition is exceedingly narrow, and intentionally so. The petitioners do not wish to inadvertently disrupt areas of the law unrelated to this particular standard of review. For example, the general language in this petition preserves the slightly different stay-pending-appeal analyses applicable to cases seeking equitable relief verses a money judgment. *Compare Gudenschwager*, 191 Wis. 2d at 440, *with Scullion v. Wis. Power & Light Co.*, 2000 WI App 120, ¶¶ 18–25, 237 Wis. 2d 498, 614 N.W.2d 565. Similarly, it does not alter the rule's sound directive that parties typically must first seek a stay from the circuit court before going to the court of appeals.

4. The proposed amendment will bring Wisconsin appellate practice into line with the federal authority that influenced Wis. Stat. § (Rule) 809.12's adoption. As documented in preceding section, federal appellate courts assess a party's likelihood of success on appeal afresh, even as they defer to the trial court's evaluation of the relevant harms. And

Gudenschwager itself expressed a desire to conform Wisconsin's standard of review to federal practice on this point, citing the comparable language in both the federal and state rules. *Id.* at 439. This petition finally accomplishes that goal.

5. The proposed rule facilitates effective temporary relief, giving appellate courts time to carefully consider the merits of each case at the merits stage. The availability of effective temporary relief in the judicial toolkit gives courts needed flexibility in cases where time is of the essence. As important as it is to avoid undeserved harm while an appeal is pending, it is also crucial that appellate courts can devote sufficient time to difficult or complex cases. This petition advances that interest by making it easier for an appellate court to stay a circuit court decision it knows it will likely reverse while also taking the time necessary to fully analyze and decide the appeal.

CONCLUSION

For the foregoing reasons, the petitioners respectfully ask that the Court grant their Petition and amend Wis. Stat. § (Rule) 809.12 as stated in the Petition.

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Respectfully submitted,

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