IN THE SUPREME COURT OF WISCONSIN

Appeal No. 2021AP802

ANDREW WAITY, JUDY FERWERDA, MICHAEL JONES, and, SARA BRINGMAN,

Plaintiffs-Respondents,

v.

DEVIN LEMAHIEU, in his official capacity, and ROBIN VOS, in his official capacity,

Defendants-Appellants-Petitioners.

On Appeal From The Dane County Circuit Court
The Honorable Stephen E. Ehlke, Presiding
Dane County Case No. 2021-CV-589

PLAINTIFFS-RESPONDENTS' MEMORANDUM IN SUPPORT OF THEIR MOTION TO STRIKE PORTIONS OF DEFENDANTS-APPELLANTS-PETITIONERS' OPENING BRIEF

I. Introduction

The Court accepted this case on a petition for bypass so that it could engage in a *de novo* review of the summary judgment decision of the circuit court, by applying this well-known and fully accepted standard:

> [The Wisconsin Supreme Court] review[s] a circuit court's grant of summary judgment de novo, applying the same methodology as the circuit court, and benefiting from its

> analysis. *Atkins v. Swimwest Family Fitness Center*, 2005 WI 4, ¶ 11, 277 Wis.2d 303, 691 N.W.2d 334. According to Wis. Stat. § 802.08(2), summary judgment will be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

Everson v. Lorenz, 2005 WI 51, ¶9, 280 Wis. 2d 16, 95 N.W.2d 298.

Under that standard, the Court is obligated to consider the same record as did the circuit court, nothing more and nothing less. That means that it should not countenance any party placing facts before the Court that are not in the circuit court record, which is what the Defendants-Appellants-Petitioners (hereinafter "the Legislators") have done.[1] Those facts should be stricken from the Legislators' Opening Brief.[2]

Additionally, even though the only issue pending before the Court is a review of the circuit court's summary judgment decision, in

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[1] The Plaintiffs-Respondents refer to the Defendants-Appellants-Respondents as "the Legislators" rather than the "Legislature" because Speaker Vos and Majority Leader LeMahieu's actions in violation of Wis. Stat. § 13.124 are the subject of the complaint. The "Legislature" did not enter into contracts with outside counsel to represent the Assembly and Senate in potential redistricting litigation. Speaker Vos contracted purportedly on behalf of the Assembly and Majority Leader LeMahieu did so purportedly on behalf of the Senate. The record does not contain any evidence that the Joint Committee on Legislative Organization or any other committee of the legislature authorized the engagement of those outside counsel to represent the "Legislature."

[2] Formally, "Opening Brief of Defendants-Appellants-Petitioners," and hereinafter referred to as the "Legislators' Opening Brief" or "Br."

Section V of their Opening Brief, the Legislators gratuitously request that the Court repeat what is said in its decision on the Legislators' motion for stay pending appeal about how courts should apply the *Gudenschwager*[3] factors to a request for stay when the standard of review of the judgment is *de novo*. Neither the Plaintiffs-Respondents (hereinafter "Waity") nor the Court should expend any more time and resources on a matter that is not before the Court on appeal. Section V of the Legislators' Opening Brief should be stricken.

II. The factual record was made in the circuit court.

The factual record in the circuit court in support of the Legislators' motion for summary judgment consists of three affidavits from one of the Legislators' attorneys of record, Kevin LeRoy, each of which has numerous documents attached (R.21, 49, & 54; the Legislators' Appendix (hereinafter, "App'x") 109-293, 390-401, 423-71), and the affidavit of Megan Foesch describing the way in which she submits bills from the Assembly, Senate and Legislature for payment by the Department of Administration ("DOA"). (R.48; App'x 383-89)

[3] 191 Wis. 2d 431, 434, 529 N.W.2d 225, 226 (1995).

In opposition to the motion for summary judgment, the Plaintiffs each submitted an affidavit attesting to their status as citizens of Wisconsin and Wisconsin taxpayers. (R.38-41) Waity also presented an affidavit of Attorney Lester A. Pines attaching a letter received from the legal counsel of the DOA attesting to the fact that no invoices for work performed under the challenged contracts had been submitted to the DOA Secretary for audit as required by Wis. Stat. § 16.74(4) (R.37), and two affidavits from Attorney Beauregard W. Patterson attesting to his internet searches showing that at the time the contracts at issue were executed no litigation about Wisconsin redistricting was pending. (R.7, 42)[4] The Legislators did not request that the circuit court judicially notice any facts.

There are no other facts in the record except those pled in the Plaintiffs' Complaint ("the complaint"), which was not required to be answered because the Legislators' motion to dismiss was by consent of the parties converted to a motion for summary judgement.

[4] *Amicus curiae* Wisconsin Democracy Campaign submitted to the circuit court an affidavit by Minority Leader Gordon Hintz explaining that in previous engagements of outside counsel by Vos, neither he nor any member of the minority in the legislature was allowed to communicate with such counsel. (R.44)

Attempting to avoid their failure to put admissible evidence before the circuit court in support of their motion for summary judgment when that opportunity existed, the Legislators now assert new facts on this appeal. Each time that the Legislators use one of their newly created "facts," they deceptively cite pages of this Court's decision on the motion for stay; App'x 503, App'x 504, App'x 504-505, App'x 505-506, or App'x 506-507, as if those are citations to facts that are in the record. They are not facts in the record.

III. The Legislators repeatedly and egregiously argued based on facts that are not in the record.

A. The Legislators' assertion of fact that Wis. Stat. § 13.124 is a "streamlined," "expedited" alternative to a supposedly customary outside-counsel hiring procedure is not found anywhere in the record.

Nothing in any of the affidavits in the record or pled in the complaint presented any evidence that Wis. Stat. § 13.124, which was enacted in December 2018, was adopted as a "streamlined" or "expedited" procedure for hiring outside counsel. Nor is there any legislative history in the record which supports that factual claim. Despite that, the Legislators repeatedly asserted those "facts" in the following sections of the Opening Brief as follows:

- "In 2018, the Legislature adopted Wis. Stat. § 13.124 to create an additional, 'streamlined alternative to the usual procedure,'

App'x.504, allowing legislative leaders of both Houses to obtain legal counsel on an expedited basis for any 'actions,' without purporting to displace its prior constitutional and statutory authority to hire outside counsel using the JCLO or house-committee balloting processes." Br. at p. 5; PDF filed document page number, (hereinafter "Doc.") p. 10

- "Section 13.124 authorizes the Legislature to engage in this streamlined process not only after an action has been filed, but when the Legislature concludes that it will be a 'party' to, or will have its 'interests' implicated by, an imminent lawsuit." Br. at 12; Doc. p. 17

- "Enacted only in 2018, Section 13.124 now provides the Legislature with a 'streamlined alternative to the usual procedure,' App'x.504–05, to engage legal services when such expedition is needed without going through JCLO...." Br. at 20; Doc. p. 25

- "But Section 13.124 provides the Legislature with a streamlined process to quickly engage outside counsel when necessary, avoiding the customary joint committee processes by allowing legislative leadership to enter such agreements themselves." Br. at 34, n. 4; Doc. p. 39

- "Section 13.124 thus enables the Houses, through their leadership, to avoid the delays that can sometimes occur from the Legislature's more-standard practice of submitting proposed authorizations for the hiring of outside counsel to the JCLO ballot procedure or individual House organization committees, see supra pp. 5–6, by allowing a 'streamlined alternative to the usual procedure,'" Br. at 35; Doc. p. 40

All of those sentences in the Legislators' Opening Brief should be stricken because they are not supported by the factual record.

B. There are no facts in the record that the contracts at issue were entered into to provide "expert," "sophisticated" legal advice in the "highly specialized and complex area" of redistricting law.

Likewise, there are no facts set forth in the affidavits or the complaint supporting the factual assertions made by the Legislators in their Opening Brief that the contracts with outside counsel at issue were entered into because the lawyers engaged were "experts" "sophisticated" in the "highly specialized and complex area" of redistricting law. The record is also devoid of evidence of any reasoning or rationale for why the specific outside counsel were hired.

Those factual statements have absolutely no support in the record. In fact, the record contains nothing whatsoever about the qualifications and experience of either of the law firms engaged or the specific attorneys in those firms who would provide direct representation. Nor are there any facts in the record that support the factual assertions that redistricting litigation is "complex," "highly specialized," "requires 'expert' counsel" or "sophisticated legal advice."

Yet, those unsupported assertions of fact are also found repeatedly in the Legislators' Opening Brief:

- "The Legislature—consistent with decades of bipartisan practice—retained expert outside counsel to assist with the

complicated, once-in-a-decade task of decennial redistricting." Br. at 2; Doc. p. 7

- "...[t]he Legislature has determined—consistent with decades of uniform, bipartisan practice—that obtaining sophisticated legal advice regarding the once-in-a-decade decennial redistrict process is necessary for it to carry out its constitutional duties." Br. at 11; Doc. p. 16

- "...Defendants lawfully and correctly determined that, in this 'highly specialized and complex area of [ ] law,' the Legislature 'require[s]' outside counsel advice to complete its constitutional functions effectively, App'x.505–06." Br. at 15; Doc. p. 20

- "...after making the entirely sensible and correct determination that obtaining expert legal counsel is needed...App'x.506–07." Br. at 19; Doc. p. 24

- "The Constitution Authorizes The Legislature To Enter Into Contracts To Obtain Expert Legal Advice On Redistricting." Br. at 23; Doc. p. 28

- "The Legislature concluded, as it has for decades, supra pp. 4–5, that the 'most eligible and appropriate' means to complete redistricting, *Minneapolis*, 116 N.W. at 910 (citation omitted), include seeking the guidance of sophisticated outside counsel to offer map-drawing and prelitigation advice." Br. at 27; Doc. p. 32

- "The need for such outside counsel is especially clear for complex areas of the law like the decennial redistricting at issue here." Br. at 27-28; Doc. pp. 32-33

- "The Legislature obtaining redistricting experts to help in the map drawing process, including for map drawing and pre-litigation advice, does not burden any other branch." Br. at 29; Doc. p. 34

- "...given the importance of counsel to the operations in the 'highly specialized and complex area of redistricting law,' the

> Legislature's hiring of skilled counsel to draft, evaluate, and prepare to defend 'the once-every-decade issue of redistricting,' App'x.505–06, is unmistakably a 'function[ ] of' the Legislature, Wis. Stat. § 20.765(1)(a)–(b); accord Wis. Const. art. IV, §§ 1, 3; *Koschkee*, 2018 WI 82, ¶ 13." Br. at 32; Doc. p. 37

- "...as the Legislature has determined—consistent with decades of uniform, bipartisan practice—that obtaining sophisticated legal advice regarding the once-in-a-decade decennial redistrict process is necessary for it to carry out its constitutional duties." Br. at 11; Doc. p. 16

Because those statements are based on assertions of fact regarding "expert" or "sophisticated" legal advice, and/or the "highly specialized" and/or the "complex area of redistricting," and/or determinations of why the lawyers were selected for retention, and there are no facts in the record to support those characterizations about the lawyers, the law firms, the rationale for hiring them, and the nature of redistricting litigation, they must be stricken from the Legislators' Opening Brief.

C. The Legislators' statements that the outside counsel were engaged for the purposes of drafting redistricting legislation and drawing redistricting maps are directly opposite to the express language of the contracts.

Neither of the two contracts at issue, one with Consovoy McCarthy in association with Adam Mortara (R.1:15-20, R.49:5-9; App'x 94-99, 394-98) and the other with Bell Giftos St. John (R.1-21-23; App'x 100-02), engage counsel with the task of drafting redistricting

legislation, nor with the task of drawing redistricting maps. There are no facts in the record that support such statements.

The scope for the Consovoy contract is specifically for possible redistricting litigation and does not include "pre-litigation advice:"

> This Engagement Agreement sets forth the terms under which Consovoy McCarthy PLLC ("CM") in association with Adam Mortara ("Mortara") (collectively, "CM&M") will represent the Wisconsin State Assembly and Wisconsin State Senate (the "Legislature" or "you") in possible litigation related to decennial redistricting (the "Litigation"). CM&M's engagement hereunder is limited to representing the Legislature in the Litigation through trial and, if requested, on appeal.
>
> The parties currently do not know whether or in what venue the Litigation will occur.
>
> Scope of Representation
>
> The Legislature is also retaining Bell Giftos St. John LLC ("BGSJ") to represent it in the Litigation. CM&M is being retained to work alongside BGSJ. Mortara will provide overall strategic litigation direction, take key fact and expert discovery, and serve as lead trial counsel at trial, while BGSJ and CM will provide additional day-to-day litigation resources.
>
> Mortara hereby commits that the Litigation will take precedence over other clients as to trial scheduling matters, and that in the event of an irresolvable trial date conflict between you and another client, he will be lead trial counsel in this matter.

(R.1:15; App'x 394)

The scope of services in the Bell Giftos St. John contract also does not include "legislative drafting" and specifically states that "it does not include, however, the drawing of redistricting maps:"

> Scope of Representation. Bell Giftos St. John LLC agrees to provide legal advice to, represent, and appear for and defend the Wisconsin State Senate and Wisconsin State Assembly on any and all matters relating to redistricting during the decennial period beginning on January 1, 2021. Services within the scope include all services in furtherance of this attorney-client relationship relating to redistricting. Such services include, for example, providing legal advice to the client (through its members or staff as designated by Senator LeMahieu and Representative Vos) regarding constitutional and statutory requirements and principles relating to redistricting. It also includes appearing for clients in judicial or proceedings relating to redistricting, should such an action be brought, or administrative actions relating to redistricting, such as the rule petition currently pending before the Wisconsin Supreme Court. It also includes providing legal advice about the validity of any draft redistricting legislation if enacted. It does not include, however, the drawing of redistricting maps.

(R.1:21-22; App'x 100-01)

Despite the clarity of the facts in the record about the scope of the Consovoy and Bell Giftos St. John contracts, the Legislators made these unsupported and inaccurate factual claims in their Opening Brief:

- "Most recently, the Legislature entered into two contracts, one with Consovoy McCarthy PLLC (joined by Adam Mortara) ("Consovoy"), and another with Bell Giftos St. John LLC ("BGSJ"), for legislative drafting...." Br. at 6; Doc. p. 11

- "The Legislature concluded, as it has for decades, supra pp. 4–5, that the 'most eligible and appropriate' means to complete redistricting, *Minneapolis*, 116 N.W. at 910 (citation omitted), include seeking the guidance of sophisticated outside counsel to offer map-drawing..." Br. at 27; Doc. p. 32

- "The Legislature obtaining redistricting experts to help in the map drawing process, including for map drawing and pre-litigation advice, does not burden any other branch." Br. at 29; Doc. p. 34

Because those factual assertions are unsupported and contradicted by the evidence in the record, they must be stricken from the Legislators' Opening Brief.

IV. Section V of the Legislators' Opening Brief should be stricken in its entirety because the standards for judicial review of a circuit court's denial of a motion to stay a judgment are not currently before this Court.[5]

A. The issue of whether the circuit court improperly applied the *Gudenschwager* factors to a motion to stay a judgment subject to *de novo* review was never presented to the circuit court.

The general rule is that issues not presented to the circuit court will not be considered for the first time on appeal. This court has frequently stated that even the claim of a constitutional right will be deemed waived unless timely raised in the circuit court. The party raising the issue on

[5] The issue of whether the circuit court erroneously exercised its discretion in failing to stay its summary-judgment order pending appeal is irrelevant to the relief requested by the Legislators in their Opening Brief. They specifically state in their request for relief that "[t]his Court should reverse the Circuit Court's Order granting summary judgment to Plaintiffs and order that judgment be entered in the Legislature's favor." Br. at 46.

> appeal has the burden of establishing, by reference to the record, that the issue was raised before the circuit court.

State v. Caban, 210 Wis. 2d 597, 604, 563 N.W.2d 501, 505 (1997).

On April 30, 2021, the Legislators moved for a stay of the circuit court's grant of a permanent injunction and declaratory judgment in favor of Waity. (R.52; App'x 404-07) On May 10, 2021, the circuit court denied the motion for stay. In response, the Legislators filed a Motion for Stay in the court of appeals.

They could have presented to the circuit court the claim that it erroneously applied the *Gudenschwager* factors by filing a motion to reconsider the decision on the motion for stay. The Legislators did not do so. Because the issue of whether the circuit court erred in its application of the *Gudenschwager* factors was never presented to the circuit court, that issue is not part of this appeal.

B. This Court's reasoning as to how to apply the *Gudenschwager* factors in this case is moot.

The question of how to apply the *Gudenschwager* standards to the circuit court's judgment is moot. On June 23, 2021 and again on June 29, 2021 the court of appeals denied the Legislators' motion for stay.

Subsequently, the Legislators filed with this Court a petition for bypass and motion for stay pending appeal on June 30, 2021.[6]

On July 15, 2021, this Court reviewed the circuit court's denial of stay, determined that the circuit court had erroneously exercised its discretion by improperly applying and interpreting the *Gudenschwager* factors, and ordered that the circuit court's judgment be stayed pending appeal. Having done that, this Court disposed of the issue. It is moot.

C. The Legislators' desire for a published decision on the *Gudenschwager* standards does not properly put that issue before this Court.

Whether the Court's stay order merits publication has already been decided. Supreme Court Rule § 80.003(b) states that orders of this Court may be published when "[t]he order contains significant discussion or explanation of the state constitution, or any law, statute, or court rule." That gives this Court the discretion to publish an order or refrain from doing so. Having refrained, there is no reason why the Court should revisit the issue.[7]

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[6] The filings referenced in this paragraph are found in the Court's docket entries but do not have docket numbers for reference.

[7] If the Legislators want a binding recitation of the factors the courts of this state must consider when a stay is sought pending appeal of a judgment that will be reviewed *de novo*, they can introduce legislation to enact them. They do not need a published decision for further guidance.

The matter of the request for a stay and the standards applied to that request concluded. There is no reason for the Court to address it during its consideration of the merits of this appeal. Section V should be stricken from the Legislators' Opening Brief.

IV. Conclusion

Waity's motion to strike all references to facts that are not in the record from the Legislators' Opening Brief, as described in this memorandum, and to strike Section V of that brief in its entirety, should be granted.

Respectfully submitted this 2nd day of September 2021.

PINES BACH LLP

Lester A. Pines, SBN 1016543
Tamara B. Packard, SBN 1023111
Aaron G. Dumas, SBN 1087951
Leslie A. Freehill, SBN 1095620
Beauregard W. Patterson, SBN 1102842
122 W. Washington Ave., Ste. 900
Madison, WI 53703
Telephone: (608-251-0101)
Facsimile: (608-251-2883)
lpines@pinesbach.com
tpackard@pinesbach.com
adumas@pinesbach.com
lfreehill@pinesbach.com
bpatterson@pinesbach.com

Attorneys for Plaintiffs-Respondents