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Supreme Court of Wisconsin

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September 21, 2021

To:

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Circuit Court Judge
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You are hereby notified that the Court has entered the following order:

No. 2021AP1321-LV	<u>County of Dane v. PSC of Wisconsin</u> (L.C. #2019CV3418)
2021AP1325	<u>County of Dane v. PSC of Wisconsin</u> (L.C. #2019CV3418)
2021AP1495-W	<u>Huebsch v. Frost</u>

The court having considered the petition for review; the petition for supervisory writ; the motion for administrative stay; the memorandum in support of the motion for stay pending appeal and petition for supervisory writ or exercise of superintending authority; and the five-volume appendix of the other party-appellant-petitioner, Michael Huebsch; and responses filed by respondent, Jacob B. Frost; petitioners-respondents, County of Dane, et al.; respondent-respondent, Public Service Commission of Wisconsin; and intervenors-respondents, Chris Klopp, American Transmission Company, and Midcontinent Independent System Operator, Inc.; and having also considered a non-party brief filed by Clean Wisconsin;

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IT IS ORDERED that the petition for supervisory writ is denied; and

IT IS FURTHER ORDERED that for the purposes of this appeal, Case Nos. 2021AP1321-LV and 2021AP1325 are consolidated; and

IT IS FURTHER ORDERED that the petition for review is granted and that pursuant to Wis. Stat. § (Rule) 809.62(6), the other party-appellant-petitioner may not raise or argue issues not set forth in the petition for review unless otherwise ordered by the court; and

IT IS FURTHER ORDERED that pursuant to Wis. Stat. §§ (Rules) 809.62(6) and 809.63, within 30 days after the date of this order the other party-appellant-petitioner must file a brief in this court; that within 20 days of filing the petitioners-respondents, County of Dane, County of Iowa, Town of Wyoming, and Village of Montfort; respondent-respondent-respondent, Public Service Commission of Wisconsin; intervenor-petitioner-respondent, Driftless Area Land Conservancy; and intervenors-respondents, Wisconsin Wildlife Federation, Chris Klopp, LeRoy Belken, Gloria Belken, S.O.U.L. Wisconsin, Clean Energy Organizations, Dairyland Power Cooperative, ITC Midwest LLC, American Transmission Company, LLC, Midcontinent Independent System Operator Inc., ATC, LLC and WEC Energy Group, Inc. must file either a brief or a statement that no brief will be filed; and that if a brief is filed by any of these parties, within 10 days of filing of the last response brief the other party-appellant-petitioner must file either a reply brief or a statement that no reply brief will be filed; and

IT IS FURTHER ORDERED that in any brief filed in this court the parties shall not incorporate by reference any portion of their petition for review or response; instead, any material in these documents upon which there is reliance should be restated in the brief filed in this court; and

IT IS FURTHER ORDERED that the first brief filed in this court must contain, as part of the appendix, copies of the orders of the court of appeals in this case; and

IT IS FURTHER ORDERED that the allowance of costs, if any, in connection with the granting of the petition will abide the decision of this court on review; and

IT IS FURTHER ORDERED that the motion seeking a stay of enforcement of the August 24, 2021 subpoena and any other discovery or trial-related demands directed to Michael Huebsch is granted.

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REBECCA GRASSL BRADLEY, J. (*concurring*). Typically, supreme court justices refrain from revealing their disagreement with the court's decision to grant review.¹ Abandoning this sound judicial practice and the impartiality it preserves, Justice Jill Karofsky, joined by Justices Ann Walsh Bradley and Rebecca Frank Dallet, dissents from the court's decision to grant this petition for review because she characterizes the case as a "procedural anomaly." Perhaps, but that does not mean the court should deny review.

Justice Karofsky says she is "aware of no precedent allowing witnesses to seek such expansive review." Although petitions for review are typically filed by parties to a dispute, we have granted review of petitions filed by nonparties, including witnesses. See, e.g., Imposition of Sanctions in Alt v. Cline, 224 Wis. 2d 72, 78–79, 589 N.W.2d 21 (1999) (nonparty witness appealed circuit court's grant of plaintiff's motion to compel discovery requiring him to answer a certain question posed to him at deposition). We recently granted review in a case scheduled for oral argument this term in which a nonparty sought interlocutory appellate review of a decision of the circuit court denying him standing as a victim to oppose a defendant's Shiffra/Green² motion to compel production and in camera review of the victim's mental health records. State v. Johnson, 2020 WI App 73, 394 Wis. 2d 807, 951 N.W.2d 616. Regardless of the procedural posture, this court may grant review "when special and important reasons are presented" including when "[a] decision by the supreme court will help develop, clarify or harmonize the law" and "[t]he question presented is a novel one, the resolution of which will have statewide impact[.]" Wis. Stat. § (Rule) 809.62(1r)(c)2. (2019–20).

Interlocutory appeal is not a "procedural abnormalit[y];" it is expressly permissible under the Wisconsin Statutes before the court of appeals if it will:

- (a) Materially advance the termination of the litigation or clarify further proceedings in the litigation;
- (b) Protect the petitioner from substantial or irreparable injury; or
- (c) Clarify an issue of general importance in the administration of justice.

¹ Stutson v. United States, 116 S. Ct. 611, 617 (1996) (Scalia, J., dissenting) ("It is not customary, but quite rare, to record dissents from grants of certiorari[.]").

² State v. Green, 2002 WI 68, 253 Wis. 2d 356, 646 N.W.2d 298; State v. Shiffra, 175 Wis. 2d 356, 646 N.W.2d 298 (Ct. App. 1993).

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Wis. Stat. § (Rule) 808.03(2). Contrary to Justice Karofsky's statement, nothing in the text of the permissive appeals statute deems the practice either "undesirable" or "disfavored." The court of appeals has recognized:

This court may, in its discretion, grant interlocutory review in those limited instances when we conclude that the necessity of immediate review outweighs our general policy against the piecemeal disposal of litigation. The petitioner must demonstrate that the issue raised meets one of the criteria of § 808.03(2), STATS., and that there is a substantial likelihood that this court will reverse the trial court's nonfinal order.

Cascade Mountain, Inc. v. Capitol Indem. Corp., 212 Wis. 2d 265, 268 n.2, 569 N.W.2d 45 (Ct. App. 1997) (citing State v. Webb, 160 Wis. 2d 622, 467 N.W.2d 108 (1991)).

Of course, this court unquestionably retains the discretion to grant such review as well. Far from being a "new avenue for interlocutory appellate review" as Justice Karofsky claims, just last year we granted interlocutory review of a circuit court order granting a discovery motion. State v. Jendusa, 2021 WI 24, 396 Wis. 2d 34, 955 N.W.2d 777. The Wisconsin Constitution broadly confers jurisdiction on this court to do so:

- (1) The supreme court shall have superintending and administrative authority over all courts.
- (2) The supreme court has appellate jurisdiction over all courts and may hear original actions and proceedings. The supreme court may issue all writs necessary in aid of its jurisdiction.
- (3) The supreme court may review judgments and orders of the court of appeals, may remove cases from the court of appeals and may accept cases on certification by the court of appeals.

Wis. Const. art. VII, § 3.

This case is highly unusual, and worthy of this court's attention. It concerns a unanimous decision by the Public Service Commission (PSC) to approve a new high-voltage transmission line.³ This line, we are told, has an estimated cost of \$474 to \$560 million.⁴ Additionally, the PSC itself persuasively argues the resolution of the issues raised in the petition for review are likely to

³ Petition for Review at 7.

⁴ Id. at 8.

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have significant implications throughout state government. In its briefing in response to the petition, the PSC wrote "to express its agreement with Huebsch that appellate guidance would clarify, develop, and harmonize the law on several important issues that have been raised below[.] . . . [T]he circuit court could benefit from appellate guidance sooner rather than later."⁵ The petition unquestionably meets our established criteria for granting review. See Wis. Stat. § (Rule) 809.62(1r). This case will, for example, resolve novel legal questions that will have a statewide impact. § 809.62(1r)(c)2. The substantive significance of the issues presented renders them worthy of our prompt attention as this state's law-developing court.⁶ I concur with the court's decision to grant review in this case.

JILL J. KAROFKY, J. (*concurring in part and dissenting in part*). Granting this interlocutory petition for review is a procedural anomaly in at least two regards. First, it comes via a non-party witness who is challenging not just his subpoena but also earlier discovery rulings to which he was not a party. I am aware of no precedent allowing witnesses to seek such expansive review. Second, the underlying case is still in the pretrial stage. The petition therefore comes to us in an interlocutory posture. Both statute and case law hold that piecemeal appellate practice like this is undesirable and disfavored. See, e.g., Wis. Stat. § 808.03 (2019-20); State v. Jenich, 94 Wis. 2d 74, 80, 288 N.W.2d 114, on reconsideration, 94 Wis. 2d 74, 292 N.W.2d 348 (1980); Culbert v. Young, 140 Wis. 2d 821, 825–26, 412 N.W.2d 551 (Ct. App. 1987).

Given the procedural abnormalities, I would not establish this new avenue for interlocutory appellate review. I respectfully dissent from the grant of this interlocutory petition for review and the stay of the subpoena for the petitioner's trial testimony.

I am authorized to state that Justices ANN WALSH BRADLEY and REBECCA FRANK DALLET join this concurrence/dissent.

Sheila T. Reiff
Clerk of Supreme Court

⁵ Public Service Commission's Br. at 2.

⁶ Cook v. Cook, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997) (quoting State ex rel. La Crosse Tribune v. Circuit Court for La Crosse Cnty., 115 Wis. 2d 220, 229–30, 340 N.W.2d 460 (1983)) (noting this court has been "designated by the constitution and the legislature as a law declaring court"); see also State ex rel. Wis. Senate v. Thompson, 144 Wis. 2d 429, 436, 424 N.W.2d 385 (1988) (citations omitted) ("[I]t is this court's function to develop and clarify the law."); State v. Hermann, 2015 WI 84, ¶154, 364 Wis. 2d 336, 867 N.W.2d 772 (Ziegler, J., concurring) ("Unlike a circuit court or the court of appeals, the supreme court serves a law development purpose[.]")

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