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Supreme Court of Wisconsin

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November 16, 2021

To:

Hon. Valerie Bailey-Rihn
Circuit Court Judge
215 S. Hamilton St.
Madison, WI 53703

Carlo Esqueda
Clerk of Circuit Court
Dane County Courthouse
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Madison, WI 53703

*Address list continued on page 3.

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

No. 2021AP1673

Kaul v. Prehn L.C. #2021CV1994

The court having considered the petition to bypass the court of appeals submitted on behalf of petitioner-appellant, State of Wisconsin ex rel. Joshua L. Kaul; the response filed on behalf of the respondent-respondent, Frederick Prehn; and the nonparty memorandum in opposition to the petition filed on behalf of the Wisconsin Legislature;

IT IS ORDERED the petition to bypass is granted, and the appeal is accepted for consideration in this court; and

IT IS FURTHER ORDERED that the motion of the Wisconsin Legislature for leave to file a reply memorandum in support of its motion for intervention is now pending before this court and is granted, and the proposed reply memorandum is accepted for filing; and

IT IS FURTHER ORDERED that the Wisconsin Legislature's motion for intervention is now pending before this court and will be addressed in a forthcoming order; and

IT IS FURTHER ORDERED that within 30 days after the date of this order the appellant must file a brief in this court; that within 20 days of filing the respondent must file a brief; and that within 10 days of filing the appellant must file either a reply brief or a statement that no reply brief will be filed; and

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IT IS FURTHER ORDERED that the parties will be notified of the date and time for oral argument in this appeal in due course.

REBECCA GRASSL BRADLEY, J. (*concurring*). I concur with the court's decision in this case to grant the Attorney General's petition to bypass the court of appeals; the respondent joins the request for this court to expedite appellate review. This case presents purely legal issues of statutory interpretation, which implicate the separation of powers. I write separately to highlight the court's inconsistency in following its purported practice of denying petitions to bypass prior to the filing of briefs in the court of appeals, which it sometimes deems "premature"—except when it doesn't.

At the same time the court grants the bypass petition in this case—notwithstanding the Attorney General's noncompliance with the court's "premature petitions" rule—a majority denies the bypass petition in Jeffrey Becker v. Dane County, asserting that "[t]his court generally denies as premature petitions for bypass prior to the filing of briefs in the court of appeals" and citing a 1986 case for this practice.¹ There is no rule prohibiting the filing of a petition to bypass prior to the parties completing their briefing before the court of appeals. Wisconsin Stat. § (Rule) 809.60(1)(a) provides that "[a] party may file with the supreme court a petition to bypass the court of appeals pursuant to s. 808.05 no later than 14 days following the filing of the respondent's brief under s. 809.19 or response. The petition must include a statement of reasons for bypassing the court of appeals." (Emphasis added.) This rule establishes a deadline by which a petition to bypass must be filed, but nothing in either the rules of appellate procedure or this court's internal operating procedures declares petitions filed any time prior to this deadline premature.

Demonstrating that this court does not follow its ostensible "rule" regarding so-called "premature" petitions, the court unanimously grants this petition to bypass, despite the fact that briefing has not been completed in the court of appeals. Its decision to do so is not an anomaly; just a few months ago, this court granted the Wisconsin Legislature's petition to bypass in Waity v. LeMahieu before the parties filed all of their briefs with the court of appeals.² The court neglected to explain its reasoning for granting the petitions in two cases while denying the petition in another, despite all three petitions having been filed before the completion of briefing in the court of appeals.

Process matters. If the court wishes to enforce a rule against "premature petitions" it should adopt one. Instead, the majority inconsistently applies a mere practice without disclosing any standards by which it will choose whether to apply it. I respectfully concur.

¹ Jeffrey Becker v. Dane Cnty., No. 2021AP1343, unpublished order (Wis. Nov. 16, 2021) (citing Milwaukee Brewers Baseball Club v. Wis. Dep't of Health & Soc. Servs., 130 Wis. 2d 56, 62–63, 387 N.W.2d 245 (1986)). The 1986 case cited by the court contains absolutely no discussion of this purported rule nor does it cite any authority for it; the decision merely says "[t]his court dismissed the bypass petition as premature because briefs on the appeal had not been filed." Milwaukee Brewers Baseball Club, 130 Wis. 2d at 63.

² Waity v. LeMahieu, No. 2021AP802, unpublished order (Wis. July 15, 2021).

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I am authorized to state that ANNETTE KINGSLAND ZIEGLER, C.J., and PATIENCE DRAKE ROGGENSACK, J., join this concurrence.

REBECCA FRANK DALLET, J. (*concurring*). I write separately to clarify the reasons for granting the petition for bypass even though the parties have yet to file their principal briefs with the court of appeals. Typically, we deny such petitions as “premature,” see Milwaukee Brewers Baseball Club v. DHSS, 130 Wis. 2d 56, 62-63, 387 N.W.2d 245 (1986), but the unique circumstances of this case warrant an exception to that practice. Petitioner alleges an ongoing injury that threatens the functioning of an important state agency. Delaying access to this court while the parties file briefs in the court of appeals may unnecessarily prolong that alleged harm. Bypass now is therefore appropriate.

I am authorized to state that JILL J. KAROFKY, J., joins this concurrence.

Sheila T. Reiff
Clerk of Supreme Court

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