

**Rules Petition No. 23-01**

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*In the Supreme Court of Wisconsin*

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

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**COMMENT IN SUPPORT OF THE PETITION**

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## INTRODUCTION

A pending rulemaking petition requests this Court to amend Wis. Stat. § (Rule) 809.12 to clarify that an appellate court must independently review a circuit court's legal conclusions when deciding a motion for relief pending appeal. This rule change would mainly apply to motions for a stay pending appeal, specifically the "likelihood of success" factor that a court considers when deciding such motions.

This Court should grant Rules Petition No. 23-01 ("the Petition") for three reasons. First, the proposed rulemaking would merely clarify, not dramatically alter, the law. Second, this clarification is much-needed because it could help protect litigants from irreparable harm, especially in cases where constitutional rights or other important interests are at stake. Third, the Petition is a better vehicle for clarifying the standard of review than a contested case.

## ARGUMENT

### **I. The Petition seeks only a clarification of the law, not a sea change.**

"Courts must consider four factors when reviewing a request to stay an order pending appeal: (1) whether the movant makes a strong showing that it is likely to succeed on the merits of the appeal; (2) whether the movant shows that, unless a stay is granted, it will suffer irreparable injury; (3) whether the movant shows that no substantial harm will come to other interested parties; and (4) whether the movant shows that a stay will do no harm to the public interest." *Waity v. LeMahieu*, 2022 WI 6, ¶ 49, 400 Wis. 2d 356, 969 N.W.2d 263.

Here, the Petition urges this Court to clarify that appellate courts must independently review the first factor of this test. This Court should grant that request.

This Court previously held that “a trial court’s decision to grant or deny a stay pending appeal should be reviewed under an erroneous exercise of discretion standard.” *State v. Gudenschwager*, 191 Wis. 2d 431, 439, 529 N.W.2d 225 (1995) (citing *Lopez v. Heckler*, 713 F.2d 1432, 1436 (9th Cir. 1983); *Beverly v. United States*, 468 F.2d 732 (5th Cir. 1972)). As the Petition’s supporting memorandum explains, however, federal courts independently review the “likelihood of success” factor when deciding whether to issue a stay pending appeal. (Pet. Mem. 8–12.)

*Gudenschwager* should not be interpreted to mean that an appellate court must defer to a circuit court’s legal conclusions. To the contrary, this Court in *Gudenschwager* recognized that a discretionary decision requires application of “a proper standard of law.” *Gudenschwager*, 191 Wis. 2d at 440.

“When the exercise of discretion turns on a question of law,” an appellate court’s “review is de novo.” *Talley v. Mustafa Mustafa*, 2018 WI 47, ¶ 13, 381 Wis. 2d 393, 911 N.W.2d 55. That rule is black-letter law. *See, e.g., Sands v. Whitnall Sch. Dist.*, 2008 WI 89, ¶ 13, 312 Wis. 2d 1, 754 N.W.2d 439; *Mared Indus., Inc. v. Mansfield*, 2005 WI 5, ¶ 9, 277 Wis. 2d 350, 690 N.W.2d 835.

*Gudenschwager* did not disturb that settled rule. This Court should clarify *Gudenschwager*’s holding by amending Wis. Stat. § (Rule) 809.12 as requested in the Petition.

Of course, when independently determining the likelihood of success on appeal, an appellate court should consider the standard of review that will govern the underlying appeal. *See, e.g., Does 1–3 v. Mills*, 39 F.4th 20, 24 (1st Cir. 2022). As this Court recently recognized, “appeals of decisions left primarily to the discretion of circuit courts . . . have a smaller likelihood of success than appeals requiring

de novo [review].” *Waity*, 2022 WI 6, ¶ 53 n.16. This Court thus instructed that “[w]hen reviewing the likelihood of success on appeal, circuit courts must consider the standard of review.” *Id.* ¶ 53; *accord Scullion v. Wisconsin Power & Light Co.*, 2000 WI App 120, ¶ 19, 237 Wis. 2d 498, 614 N.W.2d 565.

The Petition does not seek to upend that rule or otherwise change the standard of review that governs any given merits appeal. It seeks only to clarify that an appellate court “shall independently review the trial court’s legal determinations” when reviewing a motion for relief pending appeal. (Pet. 2.) That clarification is consistent with the black-letter law cited above.

## **II. Clarifying the standard of review could help protect litigants from irreparable harm.**

The applicable standard of review for the “likelihood of success” factor is important. The factors that consider likelihood of success and injury to the movant “are the most critical.” *Nken v. Holder*, 556 U.S. 418, 434 (2009). “When evaluating [the stay-pending-appeal] factors for an alleged constitutional violation, ‘the likelihood of success on the merits often will be the determinative factor.’” *Thompson v. Dewine*, 959 F.3d 804, 807 (6th Cir. 2020) (per curiam) (order) (citation omitted).

Because one purpose of a stay pending appeal is to avoid “irreparable injury,” *see Waity*, 2022 WI 6, ¶ 49, appellate courts should independently review a circuit court’s legal conclusions when determining whether to issue a stay pending appeal. Such de novo review would help appellate courts do justice and ensure that litigants do not suffer irreparable harm during an appeal. Under a *deferential* standard of review, a circuit court’s legal conclusion on the underlying merits would often tip the scale in favor of affirming its stay ruling—

especially in cases alleging a constitutional violation. The Petition seeks to avoid that untenable result.

### **III. The Petition is the best vehicle for clarifying the standard of review.**

The Petition raises an issue squarely within this Court's rulemaking authority. This Court may promulgate rules to "regulate pleading, practice, and procedure in judicial proceedings in all courts." Wis. Stat. § 751.12(1). Because a standard of review is procedural in nature, *see Downey, Inc. v. Bradley Ctr. Corp.*, 188 Wis. 2d 435, 440, 524 N.W.2d 915 (Ct. App. 1994), a rulemaking petition is a proper mechanism for clarifying the standard of review.

The Petition has several advantages over waiting for this issue to arise in a lawsuit.

First, time is often of the essence when an appellate court addresses a motion for a stay pending appeal, especially given that a movant often alleges an irreparable harm absent a stay. Appellate courts and lawyers thus should not spend precious time analyzing the standard of review when dealing with a motion for a stay. Indeed, rulemaking petitions are designed to "promot[e] the speedy determination of litigation upon its merits." Wis. Stat. § 751.12(1). The Petition will achieve that goal.

Second, there is no guarantee that this issue will come before this Court anytime soon. For various reasons—including time constraints, lack of client funds, or strategic considerations—lawyers might decide not to challenge *Gudenschwager's* language when debating a stay pending appeal.

Third, because the court of appeals may not "overrule, modify or withdraw language from a previous supreme court case," *Cook v. Cook*, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997), the court of appeals

may feel powerless to clarify *Gudenschwager*'s holding. After all, this Court in *Gudenschwager* rejected the notion "that a *de novo* standard of review is appropriate" in the stay-pending-appeal context. *Gudenschwager*, 191 Wis. 2d at 440. Because of the *Cook* rule, this Court is in the best position to clarify that appellate courts must apply *de novo* review to a circuit court's legal conclusions in this context. Unless this Court grants the Petition, the court of appeals might decide stay motions for years and years without much-needed clarity on the standard of review.

### CONCLUSION

This Court should grant Rules Petition No. 23-01.

Dated this 2nd day of March 2023.

Respectfully submitted,



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