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DISTRICT IV

February 3, 2012

To:

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

2012AP32-AC

Friends of Scott Walker v. Michael Brennan (L.C. # 2011CV4195)

Before Lundsten, P.J., Vergeront and Higginbotham, JJ.

In an opinion released today, we reversed the circuit court order denying the appellants' motion to intervene and remanded to the circuit court with directions to vacate the oral ruling of January 5, 2012 and the written order of January 20, 2012, and to permit the recall committees to intervene. Earlier in this appeal, the appellants moved for relief pending appeal in the form of an order staying the circuit court's later rulings made on the merits. That motion remains pending.

Because, as explained below, the formal vacating of the circuit court rulings will probably be delayed for at least another month, the question of whether to grant relief pending appeal remains a live one. We now order further argument on the stay issue.

The January 5, 2012, oral decision and the January 20, 2012, written order that we order vacated make certain declarations about the duties of the Government Accountability Board with respect to recall petitions. Those rulings will not be vacated by the circuit court until after remittitur, which is the transmittal of our decision and the return of the record from this court to the circuit court. *See* WIS. STAT. § 808.08(1) (2009-10)¹ (when record and remittitur are received in the trial court, if the trial judge is ordered to take specific action, the judge shall do so as soon as possible). If no petition for review is filed, remittitur occurs thirty-one days after our decision, “or as soon thereafter as practicable.” WIS. STAT. RULE 809.26(1). If a petition for review is filed, remittitur is delayed until the supreme court reaches a final decision. RULE 809.26(2).

The appellants filed their motion in this court to stay the circuit court’s rulings on January 11, 2012. As discussed further below, one of the factors in granting relief pending appeal is the appellant’s likelihood of success on the merits. Because of the expedited briefing schedule, we anticipated that we would issue a ruling on the merits shortly after completion of the briefing on January 26, 2012. Therefore, we held the motion in abeyance pending our fuller review of the merits.

¹ All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

Although we have issued our opinion on the merits of the appeal, that does not end our authority to grant relief under WIS. STAT. § 808.07(2)(a). That statute allows us to grant relief “[d]uring the pendency of an appeal.” Appeals remain pending until remittitur, which is, as we described, the conclusion of the appellate process.

Movants seeking relief pending appeal must: (1) make a strong showing that they are likely to succeed on the merits of the appeal, (2) show that they will suffer irreparable injury unless a stay is granted, (3) show that no substantial harm will come to other interested parties, and (4) show that a stay will do no harm to the public interest. *State v. Gudenschwager*, 191 Wis. 2d 431, 440, 529 N.W.2d 225 (1995). “These factors are not prerequisites but rather are interrelated considerations that must be balanced together.” *Id.*

Applying those factors in this case, with the release of our opinion it is evident that the movants have satisfied the first element. As to the remaining elements dealing with injury to the appellants, the respondents, and the public interest, the most recent arguments before us were submitted by the parties in mid-January. In the appellants’ reply brief, dated January 26, 2012, they assert that the board has chosen not to appeal the January 20, 2012, order by the circuit court, and has “changed its long-established review process so that it can deploy an as-yet undefined and untested new process.” The appellants further assert that, as a result of the January 20 order, the board has sought an “open-ended extension” under WIS. STAT. § 9.10(3)(b) so that it can use this new process.

Based on these statements, it appears to us that further developments have occurred on the question of whether the appellants, the respondents, or the public interest will be injured if the January 20 order is allowed to remain in effect until remittitur. The above information suggests that

the board may intend to implement new procedures and criteria, regardless of whether the January 20 is vacated or stayed. It is not clear what the practical effect would now be on the procedures the board is following if we were to stay the circuit court's January 20 order. It is also not clear whether the January 20 order is currently causing injury to the appellants. Nor is it clear whether the appellants are being harmed by the procedures the board is currently following.

To address these questions, and also to address whether a stay would harm the respondents or the public interest, we order further argument. The appellants and the Friends of Walker respondents shall file letter briefs addressing these points. The letter briefs will replace the earlier motion and response, and so must incorporate all of the prior arguments that still remain valid in the current situation, as well as add new arguments that are specific to recent developments. However, the parties need not include arguments about the likelihood of success on the merits.

Although the board has not participated in the briefing of this appeal, it remains a respondent, and therefore may file a response to the appellants' letter brief.

IT IS ORDERED that by February 9, 2012, the appellants shall file a letter brief updating their motion for relief pending appeal, as described further above.

IT IS FURTHER ORDERED that by February 14, 2012, the Friends of Walker respondents shall, and the Government Accountability Board may, file a letter brief in response to the appellants' letter brief.

A. John Voelker
Acting Clerk of Court of Appeals