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June 11, 2019

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

No. 2019AP622 SEIU, Local 1 v. Vos L.C.#2019CV302

Pending before this court is a motion by the defendants-appellants, Robin Vos, Roger Roth, Scott Fitzgerald, and Jim Steineke, all in their official capacities as leaders of the Wisconsin Assembly and Wisconsin Senate[1] (the Legislative Defendants), for temporary relief pending appeal in this matter.

In an order entered March 26, 2019, the Dane County Circuit Court granted in part the motion of the plaintiffs-respondents, Service Employees International Union, Local I, et al. (the plaintiffs), for a temporary injunction and enjoined the enforcement of certain provisions in 2017 Wisconsin Act 369 (Act 369), which the Wisconsin Legislature had passed during an

[1] Robin Vos is the Speaker of the Assembly. Roger Roth is the President of the Senate. Scott Fitzgerald is the Majority Leader of the Senate. Jim Steineke is the Majority Leader of the Assembly.

"extraordinary session"[2] in December 2018 and which had subsequently been signed into law by then Governor Scott Walker. Specifically, the circuit court temporarily enjoined the defendants from enforcing the following provisions of Act 369:

- Section 26, which provides that in order for the Attorney General to compromise or discontinue a civil action brought on behalf of the state or a state officer, department, board, or commission, the Attorney General must obtain the consent of a house of the Legislature that has intervened in the action or, if no house of the Legislature has intervened, from the Legislature's Joint Committee on Finance;

- Section 30, which provides that, with respect to civil actions against the state or a state department, officer, employee, or agent in which the plaintiff seeks injunctive relief or a consent decree, in order for the Attorney General to compromise or settle the action, the Attorney General must obtain the consent of a house of the Legislature that has intervened in the action or, if no house of the Legislature has intervened, from the Legislature's Joint Committee on Finance;

- Section 64, which provides that the Legislature's Joint Committee for the Review of Administrative Rules (JCRAR) may suspend an administrative rule multiple times; and

- Sections 31, 33, 38, 65-71, and 104-105, which (1) define a new category of administrative materials as "guidance documents;"[3] (2) require existing and new guidance documents to go through a notice and comment period, which must be certified by the secretary or head of the respective administrative department or agency;[4] (3) require that each guidance document must identify the applicable

[2] We use the term "extraordinary session" to describe what the Legislature did in December 2018 when it conducted floor debate and votes because that has been the term used by the parties in their filings.

[3] Section 31 of Act 369 defines "guidance document" as "any formal or official document or communication issued by an agency, including a manual, handbook, directive, or informational bulletin, that does any of the following:

1. Explains the agency's implementation of a statute or rule enforced or administered by the agency, including the current or proposed operating procedure of the agency.
2. Provides guidance or advice with respect to how the agency is likely to apply a statute or rule enforced or administered by the agency, if that guidance or advice is likely to apply to a class of persons similarly situated."

[4] Any guidance document that an administrative department or agency wishes to adopt after July 1, 2019 (the first day of the seventh month after the effective date of Act 369), must go

> provision of federal or state law that supports the statement or interpretation of law in the guidance document; (4) require that each guidance document must not contain any standard, requirement, or threshold that is not explicitly required or permitted by a lawfully promulgated statute or rule; and (5) authorize judicial review proceedings to challenge the validity of guidance documents.[5]

In the same order, the circuit court also denied the Legislative Defendants' motion for a stay of the injunction pending the completion of appellate review. The circuit court's discussion of the motion for a stay was contained in a single footnote, which stated as follows (except for the deletion of a parenthetical aside):

> [2]To obtain a stay pending appeal, the legislative defendants must demonstrate the inverse of all the factors that plaintiffs must demonstrate for injunctive relief. *See State v. Scott*, 2018 WI 74, ¶46, 382 Wis. 2d 476, 914 N.W.2d 141 ("a stay pending appeal is appropriate where the moving party: (1) makes a strong showing it is likely to succeed on the merits of the appeal; (2) shows that, unless a stay is granted, it will suffer irreparable injury; (3) shows that no substantial harm will come to other interested parties; and (4) shows that a stay will do no harm to the public interest.").[6]

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through the notice and comment period and must be certified as such before it may be adopted by the department or agency. Act 369, § 38. For all guidance documents that are in existence prior to July 1, 2019, if the guidance document has not gone through the notice and comment period and has not been certified as such prior to July 1, 2019, the guidance document is considered rescinded. Id.

[5] The circuit court found that the plaintiffs had not met their burden for obtaining a temporary injunction and therefore refused to enjoin the enforcement of a number of provisions in both Act 369 and 2017 Wisconsin Act 370 (Act 370). Those sections, which have remained in effect, include provisions relating to (1) the ability of the houses of the Legislature to intervene in civil actions (Act 369 §§ 3, 5, 28, 29, 97, 98, and 99), (2) the designation of enterprise zones (Act 369 § 87), and (3) requests to the federal government for waivers on pilot programs and demonstration projects and for reallocation of public and local assistance funds (Act 370 §§ 10-11). In addition, the plaintiffs withdrew their motion for a temporary injunction with respect to several other provisions of Act 369: section 35 (prohibiting administrative agencies from seeking deference for their interpretations of law in lawsuits), section 16 (relating to changes in security at the state capitol), and section 72 (requiring notice of the outcome of a challenge to the validity of an administrative rule be given to the Legislative Reference Bureau). These statutory provisions also have remained in effect.

[6] These factors were adopted by this court in State v. Gudenschwager, 191 Wis. 2d 431, 440, 529 N.W.2d 225 (1995) (citing Leggett v. Leggett, 134 Wis. 2d 384, 385, 396 N.W.2d 787

> The court has concluded that plaintiffs are likely to succeed on the merits on some of their claims. And during oral arguments, the legislative defendants could not identify any harm that would result if the court were to decline to issue a stay in this case. Accordingly, to the extent this court balances the interests of the parties for and against the stay, the balance overwhelmingly tips in favor of not granting one. Therefore, the court denies the legislative defendants' motion to stay this ruling pending appeal . . . ."

The Legislative Defendants subsequently appealed as of right from the circuit court's order granting the temporary injunction. See Wis. Stat. § 813.025(3). By order dated April 19, 2019, this court assumed jurisdiction over the appeal on its own motion, pursuant to Wis. Const. Art. VII, § 3(3), Wis. Stat. § 808.05(3), and Wis. Stat. § (Rule) 809.61.

While the appeal was pending in the court of appeals, the Legislative Defendants filed a motion for temporary relief (a stay) pending appeal, along with a memorandum in support of the motion. See Wis. Stat. § 808.07(2). In the motion, the Legislative Defendants seek a stay of the entirety of the circuit court's injunction while their appeal is pending.

When this court assumed jurisdiction over this appeal, it acquired jurisdiction over all motions that were pending in the appeal, including the Legislative Defendants' motion for temporary relief pending appeal. The court's April 19, 2019 order, therefore, advised the parties that it would decide that motion based on the documents that had been filed in the court of appeals. On April 30, 2019, however, this court issued an order in League of Women Voters of Wisconsin v. Evers, Case No. 2019AP559, an appeal relating to the constitutionality of the three acts passed during the December 2018 "extraordinary session." In the April 30, 2019 order, this court granted the Wisconsin Legislature's motion for temporary relief pending appeal. Accordingly, by order dated May 7, 2019, this court allowed the parties to file supplemental memoranda concerning the motion for temporary relief pending appeal in this matter, including the effect, if any, of this court's April 30, 2019 order in Case No. 2019AP559 on the motion.

Wisconsin Statute § (Rule) 808.07(2) authorizes both a circuit court and an appellate court to grant a number of forms of temporary relief while an appeal is pending, including (1) staying execution or enforcement of a judgment or order; (2) suspending, modifying, restoring, or granting an injunction; or (3) issuing any other order appropriate to preserve the "existing state of affairs or the effectiveness of the judgment subsequently to be entered."

Where a litigant asks an appellate court to grant it temporary relief pending appeal and the litigant has sought such relief unsuccessfully in the circuit court, the motion addressed to the appellate court is not considered in a vacuum. The appellate court's review is conducted by

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(Ct. App. 1986)). Indeed the Scott decision cited Gudenschwager as authority for those factors. We therefore will refer to these factors in this order as the "Gudenschwager factors."

reviewing initially the circuit court's decision to grant or deny such relief under an erroneous exercise of discretion standard. Gudenschwager, 191 Wis. 2d at 440. "An appellate court will sustain a discretionary act if it finds that the trial court (1) examined the relevant facts, (2) applied a proper standard of law, and (3) using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." Id. at 440 (citing Loy v. Bunderson, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982)).

Having reviewed the circuit court's decision on the Legislative Defendant's motion for a stay pending appeal, we conclude that the circuit court erroneously exercised its discretion because it made errors of law. It set forth the proper factors relevant to such motions, but it failed to follow the proper rules for applying them.

The circuit court's legal errors appear to arise, in part, from its erroneous belief that the factors for deciding whether to grant a stay pending appeal are simply the inverse of the factors for granting a temporary injunction. Those analyses, while similar, have important differences with respect both to the likelihood of success and consideration of irreparable injuries, which we will explain below.

In order to obtain a temporary injunction, a moving party, usually the plaintiff, must first demonstrate that it has a reasonable likelihood of success on the merits of its claim. In other words, it must demonstrate that it is reasonably likely to obtain the relief it seeks at the conclusion of the case. See Werner v. A.L. Grootemaat & Sons, Inc., 80 Wis. 2d 513, 520, 259 N.W.2d 310 (1977) ("A temporary injunction is not to be issued unless the movant has shown a reasonable probability of ultimate success on the merits."). On the other hand, where a party against whom a temporary injunction has been entered seeks a stay of that injunction pending appeal (in either the circuit court or an appellate court), the appellant must make a "strong showing" that it is likely to succeed on its appeal of the temporary injunction. We have explained, however, that this "strong showing" is met when the circuit court has enjoined a statute based on its conclusion that the statute is unconstitutional. See Gudenschwager, 191 Wis. 2d at 441. The plaintiff's likelihood of success on the ultimate merits of his/her claim is not necessarily the inverse of the appellant's likelihood of success on appeal of a temporary injunction. In other words, the likelihood of success calculus in these two analyses is not a zero sum game. If a plaintiff has a likelihood of success on the merits of its claims, that fact does not necessarily mean that the defendant against whom a temporary injunction has been entered lacks a likelihood of success on an appeal of the temporary injunction. If the opposite were true, then no stay of a temporary injunction pending appeal would ever be entered because a circuit court must always find a reasonable likelihood of ultimate success on the merits by the party seeking an injunction in order to issue the temporary injunction in the first place.

The circuit court in this case, however, erred as a matter of law because it relied on this improper conflation of the two analyses. When it was supposed to be analyzing the Legislative Defendants' likelihood of success on an appeal of its injunction, it did not conduct that analysis but again pointed to the fact that it had already found that the plaintiffs had a likelihood of

success on the merits of some of their claims. This was the wrong analysis for deciding the motion for a stay and caused it to issue a legally flawed decision, as discussed below.

Moreover, the circuit court also fell victim to the same legal error that occurred in League of Women Voters of Wisconsin. It failed to take into account that its decision to issue a temporary injunction was based on legal determinations regarding novel questions involving the separation of powers doctrine that will be subject to de novo review on appeal. It failed to consider that its conclusions regarding the scope of the separation of powers doctrine will be the first word, not the last word, on those legal questions. It simply reasoned that since it had determined those legal questions in favor of the plaintiffs initially, the Legislative Defendants had to have no likelihood of success on appeal.

Second, the circuit court failed to properly consider irreparable injuries. Instead, it once more pointed to its consideration of harms in deciding the plaintiffs' motion for a temporary injunction. The analysis of harms for a temporary injunction, however, is not the same as that which must occur when deciding a motion for a stay of a temporary injunction, nor is one simply the inverse of the other. Again, if those analyses were simply inverses of each other, then no stay of a temporary injunction would ever be issued. In order to grant a temporary injunction, a circuit court must conclude that the irreparable injuries that result from not granting the temporary injunction tip in favor of the party seeking the injunction. That conclusion must be reached before any stay is ever sought or analyzed. If a circuit court merely conducted the same analysis of harms in deciding the stay, of course it would reach the same conclusion.

There is, however, a critical distinction between the two analyses, one which the circuit court in this case ignored. When deciding a motion for a temporary injunction, a circuit court analyzes whether the party moving for an injunction has shown that it will suffer irreparable harm in the absence of a temporary injunction and that it lacks an adequate remedy at law. Werner, 80 Wis. 2d at 520. The circuit court also compares that showing of irreparable harm with the competing irreparable harm that the party or parties who oppose the injunction and the public will suffer if a temporary injunction is issued. See Pure Milk Products Co-op v. National Farmers Organization, 90 Wis. 2d 781, 800, 280 N.W.2d 691 (1979) (in context of reviewing grant of permanent injunction, "competing interests must be reconciled and the plaintiff must satisfy the trial court that on balance equity favors issuing the injunction"); see also Werner, 80 Wis. 2d at 520 (consideration of irreparable harm and lack of adequate legal remedy is required for both temporary and permanent injunctions).

On the other hand, in the context of a subsequent motion to stay an injunction, the court must weigh the irreparable harm that the movant for a stay would face in the absence of a stay during the appeal in the event that the movant is ultimately successful in having the injunction vacated on appeal versus the irreparable harm that the party who prevailed at the circuit court would suffer without the injunction during the appeal in the event the party who prevailed at the circuit court was successful in having the temporary injunction affirmed at the end of the appeal. Gudenschwager, 191 Wis. 2d at 441-44. In other words, the analysis for a stay motion adds to the mix the ability of the respective harms to be undone or unwound by the appellate court at the

end of the appeal. Therefore, consideration of the likelihood that each side's harms can be mitigated or remedied upon conclusion of the appeal if the result on appeal is in favor of that side is a necessary consideration.

It is the presence of this added element that requires circuit courts to conduct two separate harms analyses—one analysis of the factors for determining whether to grant a temporary injunction in the first instance and, if a temporary injunction is entered and a stay is sought, a second analysis of the factors for determining whether to stay that injunction while it is being reviewed on appeal. The circuit court in this instance, however, never conducted this second analysis and never considered the ability or likelihood that either side's harms could be remedied or mitigated in the event that side prevailed on appeal. It simply relied on the analysis it had used for deciding to grant the temporary injunction. That was an error of law that rendered its ultimate decision an erroneous exercise of discretion.

Having determined that the circuit court's decision was legally erroneous, we turn to the proper application of the Gudenschwager analysis.

When we address the first factor of the likelihood of success on appeal where a statute has been enjoined, our prior decisions require us to take into account the presumption of constitutionality that attaches to regularly enacted statutes.[7] Unlike the situation in League of Women Voters of Wisconsin, the plaintiffs in this case do not allege that either Act 369 or Act 370 was invalidly enacted into law. Therefore, the presumption of constitutionality clearly should be applied in this case. Further, as both the Governor and the Attorney General concede, the presumption of constitutionality, by itself, is sufficient to satisfy the first Gudenschwager factor of a "strong showing" of a likelihood of success on appeal in the context of a motion for temporary relief pending appeal. See Gudenschwager, 191 Wis. 2d at 441 ("Since regularly enacted statutes are presumed to be constitutional, see Chicago & N.W.R. Co. v. LaFollette, 27 Wis. 2d 505, 520-21, 135 N.W.2d 269 (1965), we conclude that, for purposes of deciding whether or not to grant a stay pending appeal, the State has made a strong showing that it is likely to succeed on the merits of its appeal of Judge Wolfe's finding that chapter 980 is unconstitutional."). Consequently, as we did in Gudenschwager, we conclude that the first factor weighs in favor of granting a stay of an injunction against the enforcement of a statute. Id.

Turning to consideration of irreparable harms, we acknowledge that in most cases there will be some harm to both sides, especially when the stay motion is directed toward an injunction against the enforcement of a statute that is presumed to be constitutional. That does not mean, however, that the totality of the harms on each side of the issue will be of equal severity and magnitude, nor that they will be equal in terms of the ability and likelihood that the harms can be remedied or mitigated by the ultimate decision on appeal.

[7] The circuit court failed to consider the presumption of constitutionality in its footnote denying the Legislative Defendants' motion for a stay pending appeal. This was yet another error of law that rendered its decision an erroneous exercise of discretion.

As we stated in our April 30, 2019 order in League of Women Voters of Wisconsin, the Legislature (here represented by the Legislative Defendants) and the public suffer a substantial and irreparable harm of the first magnitude when a statute enacted by the people's elected representatives is declared unenforceable and enjoined before any appellate review can occur. Moreover, there are specific irreparable harms that stem from the nature of the acts that would be enjoined under the circuit court's order. Sections 26 and 30 of Act 369 grant to the Legislature the right to consent or not to consent before the Attorney General (1) settles or discontinues a civil action in which the state (or a subdivision or representative thereof) is a plaintiff (plaintiff-side action) or (2) compromises or settles a civil action against the state (or a subdivision or representative thereof) in which an injunction or consent decree is sought (defendant-side action). If the temporary injunction is not stayed while this appeal is pending, the Legislature will be prevented from exercising those rights of review and consent. For example, it will be unable to review instances where the Attorney General confesses the invalidity (constitutional or otherwise) of a statute passed by the Legislature. Moreover, this harm likely will not be able to be remedied or mitigated if the Legislative Defendants prevail in this appeal. A settlement of a plaintiff-side case or the entry of a final injunction or consent decree in a defendant-side case will almost certainly result in the entry of a final judgment or order in that litigation. It will be extremely difficult, if not impossible, to undo those final judgments or orders, especially where the civil action was pending in a federal court.[8]

Moreover, this is not a speculative injury. The Attorney General has admitted that once the circuit courts in League of Women Voters of Wisconsin and this case enjoined the enforcement of sections 26 and 30 of Act 369, the Department of Justice (DOJ) proceeded to settle several cases since it no longer needed to obtain legislative consent. Aff. of Charlotte Gibson ¶21. Some, if not all, of these cases appear to have been pending in federal court since they were identified as "multi-state" consumer cases. If the Legislative Defendants ultimately prevail on appeal, this court will not be able to direct the federal courts to vacate or reopen the judgments in those cases. The right of the Legislature to review and consent to those settlements will be gone forever.[9]

[8] The majority of the civil cases in which the Wisconsin Department of Justice is involved occur in federal court. Aff. of Charlotte Gibson ¶5.

[9] In its footnote, the circuit court stated that during oral argument on the motion for temporary injunction, the Legislative Defendants "could not identify any harm that would result if the court were to decline to issue a stay in this case." As shown in the text above, that is not fully accurate if the circuit court really meant that the Legislative Defendants had identified no harm at all. The Legislative Defendants did identify the harms that would result from the Legislature's inability to enforce the enjoined sections of Act 369. If the circuit court meant that the Legislative Defendants had been unable to identify particular case settlements or particular administrative regulations or particular guidance documents to which the Legislature would object in the absence of a temporary injunction, that is not surprising since neither the Legislative Defendants nor their counsel had access to the relevant information about what case settlements or administrative regulations would occur during the pendency of this appeal. Further, the case

The same types of irreparable injury will occur with respect to the Legislature's ability to suspend administrative rules and to ensure that administrative guidance documents comport with the statutes that govern the promulgating agency. Because these provisions relate to state agencies, however, we acknowledge that there is a somewhat greater possibility that a final decision on appeal could remedy or mitigate the harm that stems from the injunction.

However, the plaintiffs, the Governor, and the Attorney General identify the general harm that may occur if statutory provisions that are ultimately found to be unconstitutional are enforced while the appeal is pending. The Attorney General also alleges that sections 26 and 30 of Act 369 make it more difficult and time-consuming for the DOJ to settle cases. He particularly focuses on the impact of the legislative consent requirement on settlement negotiations, noting that in some instances opposing parties make settlement offers contingent upon DOJ acceptance within a certain time period and that the Legislature and the DOJ had not agreed upon a procedure for obtaining legislative consent before the injunctions were entered. Indeed, he contends that some settlement opportunities may be missed because the DOJ may not be able to obtain legislative consent within the time set by the opposing party.

Even accepting, arguendo, that some settlement opportunities during the pendency of this appeal may be missed because the DOJ may not be able to obtain legislative consent within the time frame specified in a settlement offer, that does not necessarily mean that the state has lost the ability to obtain a similar settlement or final litigated result. An opposing party that wishes to settle may be willing to extend the time period for settlement or to renew its settlement offer (or to make a similar new offer) later in the case that will provide the same or similar benefits to the state. To say that the state will lose out forever on the benefits it could obtain in a particular settlement offer that could not be accepted within the time period specified in the offer is speculative.

Finally, we consider the potential harm to the public. As the Attorney General notes, staying the injunction may delay the settlement or resolution of some plaintiff-side consumer cases where settlement funds are distributed to individual members of the public. It must be remembered, however, that this delay, if it occurs, would be temporary because the stay of the injunction under consideration would apply only while this appeal is pending. On the other hand, however, as noted above, the public as a whole suffers irreparable injury of the first magnitude where a statute enacted by its elected representatives is declared unenforceable and enjoined before any appellate review can occur.

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law does not require that level of specificity. For example, in Gudenschwager, this court concluded that the state would be irreparably harmed because Gudenschwager's release would create a risk of him committing new sexual offenses. The court did not require the state to identify what specific crimes Gudenschwager would commit against which individuals on what specific dates. 191 Wis. 2d at 442 ("The harm identified by the State is that there is a substantial likelihood that Gudenschwager will commit further acts of sexual violence if he were to be released under the conditions set by Judge Wolfe.").

Having considered the nature and magnitude of the irreparable harms and the likelihood that those harms cannot be remedied or mitigated at the conclusion of the appeal, we conclude that a stay of the temporary injunction should be granted in this case, with one exception.

The exception to the stay relates to guidance documents that were in existence as of March 26, 2019, when the circuit court order enjoining section 38 of Act 369 was entered. Under section 38 of Act 369, if an existing guidance document has not been certified as having gone through the new notice and public comment procedure, the guidance document will be considered rescinded as of July 1, 2019. Those guidance documents, which assist members of the public in dealing with their state government, will no longer be available. The agencies subject to this requirement, however, have been under the impression that they would not have to meet the July 1, 2019 deadline because the guidance document provisions in Act 369 have been subject to a circuit court temporary injunction for more than two months (since March 26, 2019). If this court were now to stay that part of the circuit court's injunction, the agencies would have insufficient time to complete the notice and comment procedure for all of their existing guidance documents. The inability of the agencies at this point to complete that process would create harm to the general public because the existing guidance documents on which members of the public rely to interact with state government agencies will no longer be available as of July 1, 2019. That harm to the public affects our decision with respect to guidance documents that were in existence when the circuit court enjoined section 38 of Act 369. We therefore determine that, given the effect of the circuit court's temporary injunction on the notice and comment process for those guidance documents and the impact that the rescission of those documents would have on the public, the better course is to allow the temporary injunction to remain in effect solely with respect to the provision in section 38 of Act 369 that requires the rescission of guidance documents in existence on March 26, 2019 that are not certified as having gone through the notice and public comment process by July 1, 2019. See Wis. Stat. § 227.112(7)(a). Our decision does not affect section 38 in regard to guidance documents that were created after the circuit court injunction was entered.

IT IS ORDERED that the motion of defendants-appellants Robin Vos, Roger Roth, Scott Fitzgerald, and Jim Steineke for temporary relief pending appeal is granted in part as follows. The temporary injunction issued by the Dane County Circuit Court on March 26, 2019, is stayed pending the final resolution of the appeal in this matter, with the sole exception that the temporary injunction is not stayed and therefore remains in effect with respect to the provision in section 38 of Act 369 that requires the rescission of guidance documents that were in existence as of March 26, 2019. See Wis. Stat. § 227.112(7)(a).[10]

[10] When an appellate court determines that a circuit court erroneously exercised its discretion in failing to grant a stay pending appeal at the same time that the temporary injunction was issued, it should craft its relief to return the parties to the positions they were in immediately prior to the entry of the circuit court's injunction to the extent practicable. The court notes that the Attorney General has acknowledged that the Department of Justice settled or discontinued some cases without obtaining legislative consent while the injunctions in League of Women

¶1 REBECCA FRANK DALLET, J. *(Concurring in part, dissenting in part).* I agree with the majority order that the temporary injunction remains in effect with respect to the provision in section 38 of 2017 Wisconsin Act 369 (Act 369) that requires the rescission of guidance documents. I also agree that the temporary injunction be stayed with respect to section 64 of Act 369, which provides that the Legislature's Joint Committee for the Review of Administrative Rules may suspend an administrative rule multiple times. I disagree, however, with the decision to stay the temporary injunction to the extent it enjoins enforcement of sections 26 and 30 of Act 369.[11] For that reason, I respectfully dissent.

¶2 The majority order alters the applicable standard of review, erroneous exercise of discretion, with respect to the first Gudenschwager factor, likelihood of success. See State v. Gudenschwager, 191 Wis. 2d 431, 440, 529 N.W.2d 225 (1995). The majority order appears to alter substantive law when it asserts that because the decision to issue a temporary injunction "was based on legal determinations regarding novel questions," it would be subject to de novo review on appeal. Under current law however, a de novo review is part and parcel of the erroneous exercise of discretion standard. See LeMere v. LeMere, 2003 WI 67, ¶14, 262 Wis. 2d 426, 663 N.W.2d 789 (setting forth that this court decides de novo "'any questions of law which may arise during our review of an exercise of discretion'") (quoted source omitted). However, I will not dwell on the first Gudenschwager factor as the Attorney General and the Governor concede that this factor weighs in favor of the Legislative Defendants. Accepting this concession, I focus instead on the other three Gudenschwager factors as applied to sections 26 and 30.[12] As emphasized by this court in Gudenschwager, 191 Wis. 2d at 440, "[t]hese factors are not prerequisites but rather are interrelated considerations that must be balanced together."

¶3 In its written decision, the circuit court observed that during oral argument the Legislative Defendants "could not identify any harm that would result if the court were to decline to issue a stay in this case." In their brief to the circuit court, the Legislative Defendants pointed only generally to chaos resulting from not knowing which cases, if any, the Attorney General would defend. I agree with the Governor that counsel for the Legislative Defendants, the movant, "made virtually no effort to persuade the court that the final three Gudenschwager factors, having to do with irreparable and other harm, were in their favor." In contrast, Service

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Voters of Wisconsin and this case were in effect. The court will not attempt to undo those settlements or discontinuances because it does not appear that it would be practicable to do so.

[11] Sections 26 and 30 took away the Attorney General's power to settle or discontinue a civil action where the State is a plaintiff and the power to compromise or settle a civil action against the State in which an injunction or consent decree is sought. This power was given to a house of the Legislature, or the Legislature's Joint Committee on Finance.

[12] Pursuant to the other three factors, the moving party must: "(2) show[] that, unless a stay is granted, it will suffer irreparable injury; (3) show[s] 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).

Employees International Union, Local I, et al. (the plaintiffs), the Governor, and the Attorney General provided numerous affidavits detailing specific harm resulting from the challenged statutory provisions. The circuit court applied the proper standard and determined that the Legislative Defendants made no showing on three of the four Gudenschwager factors. There is no basis for this court to declare that no reasonable judge could reach the conclusion of the circuit court. See State v. Jeske, 197 Wis. 2d 905, 913, 541 N.W.2d 225 (Ct. App. 1995) (concluding that a circuit court's decision should be upheld "unless it can be said that no reasonable judge, acting on the same facts and underlying law, could reach the same conclusion.") This court's inquiry should end there.

¶4 Even when this court considers the briefs that were submitted to this court subsequent to the circuit court's decision, the Legislative Defendants still do not demonstrate proof of harm if the injunction is not stayed that outweighs the harm to the plaintiffs, the Governor, and the Attorney General if the stay is granted. The majority order focuses on abstract harm to the Legislative Defendants and the public when a law enacted by the Legislature and signed by the Governor is enjoined. This abstract harm to the Legislative Defendants is offset by the alleged abstract harm to the Governor and Attorney General of having their executive powers usurped.

¶5 The Attorney General, however, provides specific examples of concrete harm to its office and the public that would result from the litigation procedure controls in sections 26 and 30 going into effect, including harm that occurred before entry of the injunction. A critical part of the Attorney General's responsibility in litigation is a determination of the terms on which to compromise, settle, or dismiss a case. The Attorney General alleges that the litigation control provisions in sections 26 and 30 prevent it from maintaining necessary confidentiality in settlement negotiations and to timely meet deadlines for settlement offers since no process of legislative approval has been established. The Attorney General details specific examples of harm resulting from missed settlement deadlines and breached confidentiality.[13] The Attorney General further describes how taxpayers would be harmed by continuing to defend the State of Wisconsin in suits that the Department of Justice believes, in its professional judgment, should be terminated.

¶6 The majority order inflates the corresponding abstract harm the Legislative Defendants would suffer from an inability to exercise their newly conferred power to review and consent to settlement negotiations. Any abstract harm conferred upon the Legislative Defendants from the temporary injunction enjoining the enforcement of the litigation control provisions is outweighed by concrete, irreparable harm to the Attorney General and the citizens of the State of Wisconsin, and therefore the temporary injunction should remain in effect as to sections 26 and 30 of Act 369.

[13] The majority order simply speculates that opposing parties "may be willing to extend the time period for settlement or to renew its settlement offer . . . later in the case." However, individuals entitled to compensation may never attain another settlement and, at a minimum, will have any recovery delayed in the process without the ability to obtain interest.

¶7 For the reasons stated above, I respectfully concur in part and dissent in part.

¶8 I am authorized to state that Justices SHIRLEY S. ABRAHAMSON and ANN WALSH BRADLEY join this concurrence/dissent.

Sheila T. Reiff
Clerk of Supreme Court

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