OFFICE OF THE CLERK

Supreme Court of Wisconsin

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WI 53701-1688

TELEPHONE (608) 266-1880
FACSIMILE (608) 267-0640
Web Site: www.wicourts.gov

July 15, 2021

To:

Hon. Stephen E. Ehlke
Circuit Court Judge
Branch 15
215 S. Hamilton St., Rm. 7107
Madison, WI 53703

Carlo Esqueda
Clerk of Circuit Court
Dane County Courthouse
215 S. Hamilton St., Rm. 1000
Madison, WI 53703

Lester A. Pines
Aaron Dumas
Tamara Packard
Beauregard William Patterson
Pines Bach LLP
122 W. Washington Avenue
Suite 900
Madison, WI 53703

Misha Tseytlin
Kevin M. LeRoy
Troutman Pepper Hamilton Sanders LLP
227 W. Monroe Street, Suite 3900
Chicago, IL 60606

Jeffrey A. Mandell
Douglas M. Poland
Stafford Rosenbaum LLP
P.O. Box 1784
Madison, WI 53701-1784

Mel Barnes
Law Forward, Inc.
P.O. Box 326
Madison, WI 53703

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

No. 2021AP802 Waity v. LeMahieu L.C. #2021CV589

In a separate order issued on this same date, the court granted the petition of the defendants-appellants-petitioners, Senator Devin LeMahieu and Representative Robin Vos,[1] in their official capacities (collectively, the defendants), for bypass. In this order we address the

[1] Senator LeMahieu became the Wisconsin Senate Majority Leader on January 4, 2021. Representative Vos has been the Speaker of the Wisconsin Assembly since 2013.

defendants' motion for temporary relief pending appeal (namely, a stay of the circuit court's declaratory judgment and permanent injunction) in this matter.

This case, which was initiated on March 10, 2021, by four individual taxpayers in the Dane County circuit court,[2] involves a challenge to the validity of two contracts for legal services regarding the process of redistricting that will occur as a result of the 2020 census. The contracts for legal services, which we will call the engagement agreements in this order, state that the specified law firms will provide legal services to and "represent" the Wisconsin Senate and Wisconsin Assembly in connection with the decennial redistricting process and likely ensuing litigation that must take place as a result of the 2020 United States census. The engagement agreements were executed by the defendants on behalf of the legislative houses in which they serve.[3] One of the engagement agreements was with the law firm of Consovoy McCarthy PLLC, in association with Adam Mortara (collectively Consovoy).[4] The revised Consovoy engagement agreement indicates that Consovoy will represent the Assembly and Senate "in possible litigation related to decennial redistricting," but it also indicates that Consovoy will provide "pre-litigation consulting" beginning in January of 2021. The other engagement agreement was with the law firm of Bell Giftos St. John LLC (BGSJ).[5] That agreement provides that BGSJ will "provide legal advice to, represent, and appear for and defend the Wisconsin State Senate and the Wisconsin State Assembly on any and all matters relating to redistricting during the decennial period beginning on January 1, 2021."

The parties appear to agree that there currently is no litigation pending regarding redistricting following the 2020 census. Indeed, the Legislature has not enacted or attempted to

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[2] The plaintiffs-respondents are Andrew Waity, Judy Ferwerda, Michael Jones, and Sara Bringman. They will be referenced in this order collectively as "the plaintiffs."

[3] The plaintiffs do not dispute that the Senate Majority Leader and the Speaker of the Assembly executed the engagement agreements on behalf of their respective houses of the Legislature. Their claim is that the Majority Leader and Speaker lacked authority to enter into those engagement agreements on behalf of their respective legislative houses, as will be discussed in more detail below.

[4] The plaintiffs refer in their filings below and in this court to the initial version of the Consovoy engagement agreement, which they allege was executed on December 23, 2020. The record shows, however, that a "Revised Engagement Agreement" was fully executed on March 3, 2021, which appears to supersede the December 23, 2020 version of the Consovoy engagement agreement and to be the version of the agreement that was in effect at the time of the plaintiffs' complaint and the circuit court's orders at issue in this appeal and in the defendants' stay motion.

[5] The BGSJ engagement agreement, which is in the form of a letter, is dated January 6, 2021.

enact any redistricting legislation because the United States Census Bureau has not yet released the census data that is required to draw the redistricting maps. According to the Census Bureau's web site, it plans to release the data that states will need to begin redistricting in mid-August and will release the final redistricting data toolkit in late September.[6]

Briefly stated, the plaintiffs' complaint alleged that the sole authority for the defendants to enter into contracts for obtaining legal services other than from the Wisconsin Department of Justice (DOJ) is Wis. Stat. § 13.124 (2019-20),[7] that section 13.124 permits the Majority Leader and Speaker to retain "outside" counsel (i.e., attorneys not directly employed by the state) only with respect to a pending "action," and that there is no pending action related to redistricting. Thus, the plaintiffs requested that the circuit court declare that the Consovoy and BGSJ engagement agreements were void and issue an injunction prohibiting the defendants from authorizing any further payments under those agreements and from entering into any other contracts for "outside" counsel unless an action had been commenced in which the senate and/or assembly was a party or in which their interests were affected.

The defendants filed a motion to dismiss the plaintiffs' complaint, arguing, inter alia, that the engagement agreements were authorized by the Wisconsin Constitution[8] and/or Wisconsin

[6] See https://www.census.gov/programs-surveys/decennial-census/decade/2020/2020-census-main.html (last visited July 12, 2021).

[7] All subsequent references to the Wisconsin Statutes are to the 2019-20 version unless otherwise indicated. Section 13.124(1)(b), which was enacted in 2018 as part of 2017 Wisconsin Act 369, provides as follows: "The speaker of the assembly, in his or her sole discretion, may obtain legal counsel other than from the department of justice, with the cost of representation paid from the appropriation under s. 20.765(1)(a), in any action in which the assembly is a party or in which the interests of the assembly are affected, as determined by the speaker. The speaker shall approve all financial costs and terms of representation." There are similar provisions granting authority to the majority leader to obtain "outside" legal counsel for the senate, Wis. Stat. § 13.124(2)(b), and granting authority to the co-chairpersons of the joint committee on legislative organization to obtain "outside" legal counsel on behalf of the legislature as a whole, Wis. Stat. § 13.124(3)(b).

[8] The defendants relied on Art. IV, § 1 of the Wisconsin Constitution, which vests the Senate and Assembly with the "legislative power" of the state. They contended that the Constitution's express grant of this legislative power also included the grant of implied powers necessary to carry out this governmental function, one of which would be the power to retain legal counsel.

Statutes §§ 16.74,[9] 20.765,[10] and 13.124 (interpreted in conjunction with Wis. Stat. § 990.001(3)[11]).

The circuit court, with the parties' agreement, converted the defendants' motion to dismiss into a motion for summary judgment. On April 29, 2021, the circuit court issued a written "Decision and Order," which denied the defendants' motion, granted summary judgment to the plaintiffs, declared the Consovoy and BGSJ engagement agreements void ab initio, and enjoined the defendants from authorizing any further payments under those agreements. The circuit court considered and rejected each of the sources of authority for the engagement agreements offered by the defendants.

In its Decision and Order, the circuit court analyzed each of the potential bases for the Legislature's hiring of the redistricting attorneys in the engagement agreements. Because we are in a preliminary stage of this appeal and wish to limit our comments to avoid prejudging the merits of this case, we will focus on just one potential source of authority, Wis. Stat. § 16.74, that was rejected by the circuit court both in its summary judgment decision and its denial of the defendants' motion for a stay pending appeal. If the circuit court erred in considering whether the defendants have a likelihood of success on appeal on that issue, then there is no reason to discuss at this juncture the likelihood of appellate success for the other arguments offered by the defendants.

In its summary judgment decision the circuit court discussed, inter alia, whether the engagement agreements were authorized under Wis. Stat. § 16.74, which states that "[a]ll supplies, materials, equipment, permanent personal property and contractual services within the legislative branch shall be purchased by the joint committee on legislative organization" or by the appropriate service agency. Here, the defendants argued that the statute's use of the term "contractual services" meant that the Legislature had authority to purchase services, which would include legal services. The circuit court, however, said that it was relying on a rule of statutory

[9] Section 16.74(1) provides, in relevant part, that "[a]ll supplies, materials, equipment, permanent personal property and contractual services required within the legislative branch shall be purchased by the joint committee on legislative organization or by the house or legislative service agency utilizing the supplies, materials, equipment, permanent personal property or services." The section contains a similar sentence that applies to the purchase of the same categories by the judicial branch.

[10] Section 20.765(1)(a) and (b) provides, in relevant part, that "[t]here is appropriated to the legislature . . . [a] sum sufficient to carry out the functions of the assembly" . . . and [a] sum sufficient to carry out the functions of the senate . . . ."

[11] Section 990.001(3), which is found in the statutory chapter regarding the construction of statutes, provides as follows: "The present tense of a verb includes the future when applicable. The future perfect tense includes past and future tenses."

construction requiring statutes to be read in context to construe "contractual services" to refer only to items that precede that term in the statute. In other words, the circuit court read this statute to mean that the legislature could not purchase any stand-alone "contractual services," but only those contractual services that are directly connected to the purchase of "supplies, materials, equipment, [and] permanent personal property," such as installation services for a piece of equipment.

Further, the circuit court said that, even if one construed "contractual services" in Wis. Stat. § 16.74 more broadly, the statute requires that such services must be "required within the legislative branch." Since, in the circuit court's view, the Legislature lacks authority to have any involvement in litigation (unless the litigation directly involves the Legislature's valid institutional interest), this statute could not authorize the Legislature to purchase legal services related to anticipated litigation, which the circuit court concluded was the only way to characterize the legal services to be provided currently to the Legislature under the engagement agreements.

The defendants filed a motion in the circuit court for a stay of its summary judgment order and permanent injunction pending their appeal. After receiving the plaintiffs' response to the stay motion, the circuit court issued an oral decision on May 10, 2021, which was incorporated into a short written order denying the motion entered that same day.

In its oral ruling, the circuit court listed the factors for obtaining a stay pending appeal. A stay pending appeal is appropriate where the movant:

> (1) makes a strong showing that it is likely to succeed on the merits of the movant's appeal;
> (2) demonstrates that, in the absence of a stay pending appeal, it will suffer irreparable injury;
> (3) shows that no substantial harm will come to other interested parties; and
> (4) demonstrates that the public interest will not be harmed.

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 (Ct. App. 1986)).

The circuit court began by discussing the factor of likelihood of success on appeal. After again rejecting the defendants' arguments that the Wisconsin Constitution gave the Legislature the authority to enter into the engagement agreements and stating that it was unlikely that its decision on the issue would be reversed on appeal, the circuit court turned to the statutory bases on which the defendants relied for their likelihood of success on appeal. The sum total of the circuit court's analysis on all of the statutory issues is contained in the following single paragraph from its oral ruling:

> In terms of the statutory arguments on the various statutes, much of the argument is a re-presentation or a slightly differently stated way of arguing what was

> originally before me, and **I would merely be repeating what I have already set forth in my written decision**. Suffice it to say for today's purposes that nothing that is in the defendants' submission causes me to believe they are likely to succeed on appeal on those issues either. (Emphasis added).

The court then turned to the question of irreparable harm. It believed that the Legislature would suffer no harm from its decision and injunction because it viewed the legal services provided by the two law firms as being related only to potential future litigation, which was not yet in existence. If such litigation were filed in the future, Consovoy and BGSJ could be hired and could easily begin to represent the Legislature at that time (if it had any proper role to play in the litigation). The circuit court also said that the Legislature's only role in redistricting was to enact legislation. Because the court believed that the Legislature had state agencies that could assist it in the legislation-enacting process (e.g., the Legislative Reference Bureau, the Legislative Technology Services Bureau, the Legislative Council, and the DOJ), which it said were "plenty of resources available to the Legislature to engage in their redistricting role," it concluded that the Legislature would not be harmed by being deprived of the services of Consovoy and BGSJ at this time. Further, to the extent that the defendants argued that the circuit court's decision to void the engagement agreements ab initio created the potential harm of exposing to public record requests all of the otherwise privileged communications between the legislative leaders and the two law firms, the circuit court found no irreparable harm, stating that the Legislature could choose not to disclose such records, which would then result in another court deciding the privilege issue in a second lawsuit.

Finally, the circuit court addressed the potential harm to the plaintiffs and to the public if it would grant a stay. The circuit court viewed the potential harm to both groups as the same because the plaintiffs brought this action as taxpayers. The court said that both groups would suffer harm because taxpayer money would continue to be spent on contracts that the circuit court had concluded were not authorized.

The defendants filed an appeal and a motion for stay pending appeal initially in the court of appeals. The court of appeals denied the stay motion, which we need not discuss here, as explained below. The defendants subsequently filed a petition for bypass to this court, which we grant today in a separate order, and a motion asking this court to grant them a stay pending completion of our review of the appeal.

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 appellate court reviews the circuit court's decision to grant or deny such relief under an erroneous exercise of discretion standard. Gudenschwager, 191 Wis. 2d at 439. Our decision in Gudenschwager makes clear that where a motion for relief pending appeal is directed to this court after the movant has unsuccessfully sought such relief in both the circuit court and the court of appeals, this court reviews the circuit court's exercise of discretion, not the court of appeals' exercise of discretion. 191 Wis. 2d at 444 ("Consequently, we find that [the circuit court's] decision to release Gudenschwager pending appeal amounted to an erroneous exercise of discretion.").

"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." Gudenschwager, 191 Wis. 2d at 440 (citing Loy v. Bunderson, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982)). Our review of the circuit court's order in this case denying the defendants' request for a stay of the declaratory judgment and injunction leads us to conclude that the circuit court erroneously exercised its discretion. Although the circuit court referenced the four factors set forth in Gudenschwager, it made errors of law in failing to apply the proper legal analysis under those factors.

Initially, the circuit court made errors of law regarding the first factor and its relation to the other factors. Although it acknowledged that the stay factors are interrelated, the circuit court spoke only of the defendants being required to make a "strong showing" of a likelihood to succeed on appeal. The Gudenschwager decision and subsequent rulings from this court, however, have explained that the likelihood of success on appeal is not a stand-alone prerequisite, but one of four factors that are to be considered as part of a whole. The "strong showing" of a likelihood of success on appeal does not require a particular chance or odds of success; it is not even a showing of being more likely than not of succeeding on appeal. Rather, the "strong showing" is inversely proportional to the amount of irreparable injury that the moving party (and the public) will suffer in the absence of temporary relief pending appeal. Gudenschwager, 191 Wis. 2d at 441. The movant is always required to show at least "more than the mere possibility" of success on the merits of the appeal, but the level of probability of success will vary depending on the facts of the case and the amount of irreparable harm present.[12] The circuit court, however, treated this factor as a stand-alone prerequisite of a "strong showing" that the defendants had failed to meet. It never discussed whether the defendants had demonstrated "more than the mere possibility" of success on the merits.

Further, as was the case with another circuit court's denial of a similar motion for stay pending appeal in League of Women Voters v. Evers, the circuit court in this case completely failed to understand that the analysis of likelihood of success on appeal in the context of a stay motion is substantively different from the analysis of likelihood of success on the merits it had previously performed in deciding to grant a permanent injunction to the plaintiffs. League of Women Voters v. Evers, No. 2019AP559, unpublished order at 7, (Wis. April 30, 2019) ("LWV order"). As shown by the quotation of the single paragraph above regarding the likelihood of the defendants' statutory arguments being successful on appeal, the circuit court said that it would not even discuss them in its stay decision because it would "merely be repeating what I have already set forth in my written decision." In other words, the circuit court found that there would not be any likelihood of success on appeal because it had already decided that the statutes did not

[12] Conversely, a higher probability of success on the merits can warrant a stay pending appeal even where the nature or amount of irreparable harm is relatively lower. Gudenschwager, 191 Wis. 2d at 441 ("In other words, more of one factor excuses less of another.").

authorize the Legislature's hiring of outside lawyers at this time and the defendants had not shown the court anything new to convince it that it had potentially made a mistake in its prior legal analysis. That is why its next sentence said that "nothing that is in the defendants' submission causes me to believe they are likely to succeed on appeal on those issues either." That is not the correct legal analysis. The question when considering a stay pending appeal is not whether the movant has come up with some new legal source or theory in its motion for a stay, but whether the movant has shown "more than the mere possibility" of convincing a different court (namely, an appellate court), which, when coupled with irreparable harm, requires that the effect of the circuit court's judgment or order be temporarily stayed while the appellate court is reviewing the case.

Moreover, the circuit court committed an error of law by failing to take into account that when the appellate court would be reviewing the circuit court's ruling and the defendants' arguments on appeal, it would be applying a de novo standard of review on a series of legal issues of first impression.[13] As we stated in the LWV order, "[t]he circuit court did not acknowledge that its determination was the first word, not the last word, on the interpretation of the relevant constitutional provisions and statutes." LWV order at 7. The fact that the circuit court believed that its constitutional and statutory interpretations were correct does not eliminate the potential that three judges on the court of appeals or seven justices on this court, all of whom will be considering the legal interpretation questions for the first time without any need to defer to the circuit court's conclusion, will adopt an opposite interpretation of the relevant constitutional provisions and statutes. That likelihood, for legal questions of first impression

[13] The first factor in the stay analysis is whether the movant has shown a "likelihood of success on the merits of the appeal." Inherent in any appellant's likelihood of success on appeal will be the impact of the appellate standard of review. Members of this court have recognized that the appellate standard of review can greatly affect the outcome of an appeal, and indeed can often be "outcome determinative." See, e.g., League of Women Voters Educ. Network v. Walker, 2014 WI 97, ¶60, 357 Wis. 2d 360, 851 N.W.2d 302 (Crooks, J., concurring) ("As has been recognized in other cases, it is often true that the standard of review and the applicable analysis dictate the outcome." (footnote omitted)); Phelps v. Physicians Ins. Co. of Wisconsin, Inc., 2009 WI 74, ¶68, 319 Wis. 2d 1, 768 N.W.2d 615 (Ann Walsh Bradley, J., dissenting) ("Appellate standards of review define the roles of appellate courts and are often outcome determinative."). An example bears this out. A party challenging on appeal a circuit court's discretionary choice of sentencing length or its discretionary decision on whether to exclude evidence under Rule 904.03 will have a much smaller likelihood of success on appeal than a party challenging on appeal a circuit court's interpretation of a statute in the first instance. Indeed, a party challenging a circuit court's interpretation of a statute that has been addressed in prior appellate rulings will likely have a smaller chance of success on appeal than a party challenging an interpretation of a statute that has not ever been interpreted. With respect to a statutory interpretation challenge to a previously unaddressed statute, it is not unusual at all for an appellate court to disagree with the circuit court's interpretation. This is not surprising, given the appellate court's greater time and attention to statutory research and analysis.

under a de novo standard of review, is what the circuit court failed to analyze. All the circuit court did was to "repeat" the analysis it had done previously when deciding to grant summary judgment in favor of the plaintiffs and to enter a permanent injunction. If that is all that is involved in analyzing the likelihood of success on appeal in deciding a stay motion, very few stays pending appeal would ever be entered because almost no circuit court judge would admit on the record that he/she could have reached a wrong interpretation of the law.

Our review of the defendants' motion and arguments regarding the interpretation of Wis. Stat. § 16.74 leads us to conclude that they have set forth arguments that have "more than the mere 'possibility' of success on the merits" when we will conduct our own de novo review of the issue. The operative language in that statute is that the legislative branch may purchase "[a]ll supplies, materials, equipment, permanent personal property and contractual services" that are "required within the legislative branch." The circuit court viewed the term "contractual services" not as a term of equal dignity with the other terms in that list, but as an add-on item to the other categories of tangible goods in the list that can be purchased. An interpretation that is at least equally plausible is that "contractual services" is an independent item in the list of items that the legislative branch may purchase. Indeed, the circuit court's interpretation would essentially insert the word "accompanying" in front of "contractual services" in order to tie that term to each of the preceding terms. The statutes, however, define "contractual services" as a stand-alone item that all three branches of state government may purchase. Wis. Stat. § 16.70(3) (defining "contractual services" as "all services"). Moreover, it appears that the state government has recognized that the purchase of "contractual services" can include the purchase of professional services, which would include legal services.

Further, the subchapter in which both Wis. Stat. §§ 16.70 and 16.74 are found is entitled "Purchasing." It appears to provide authority for the Department of Administration (DOA) to purchase items, including "contractual services," for the executive branch. Wis. Stat. § 16.71(1) ("Except as otherwise required under this section and s. 16.78 or as authorized in s. 16.74, the department [i.e., DOA] shall purchase and may delegate to special designated agents the authority to purchase all necessary materials, supplies, equipment, all other permanent personal property and miscellaneous capital, and contractual services and all other expense of a consumable nature for all agencies."). The list of items that the DOA may purchase under Wis. Stat. § 16.71(1), which includes "contractual services," is essentially the same list of items that the legislative and judicial branches may purchase under § 16.74. Indeed, § 16.71(1) acknowledges that DOA's authority to purchase does not apply where § 16.74 applies—namely, for purchases by the legislative and executive branches. Thus, if the DOA may purchase legal "contractual services" for the executive branch under § 16.71, then so may the legislative and judicial branches do so under § 16.74.

It is also a plausible interpretation that Wis. Stat. § 13.124 was not enacted in 2018 to eliminate the Legislature's authority to purchase "contractual services" under Wis. Stat. § 16.74. The passage of § 13.124, which authorizes the Majority Leader and Speaker to retain legal counsel on behalf of their houses of the Legislature, could have been intended to provide a streamlined alternative to the usual procedure of having members of the committees on

legislative organization approve such legal engagement agreements by the return of written ballots, which appears to have been the Legislature's historical practice for authorizing such service contracts. Indeed, it would appear to be an unusual development for a branch of government to adopt a new law, rule, or regulation that limited that branch's authority to take actions that it had previously been authorized to take.

We make these comments not to decide the proper legal interpretation of Wis. Stat. § 16.74 at this time. We merely conclude now, in the context of the defendants' motion for a stay pending appeal, that the defendants have offered an argument regarding § 16.74 that has considerably "more than the mere 'possibility' of success on the merits."[14]

We now turn to the circuit court's consideration of the potential irreparable harms that might be suffered by the parties and/or the public. Here the circuit court again made a mistake of law when it applied the wrong analysis. The circuit court engaged in the same harms analysis that it used when it granted the permanent injunction to the plaintiffs. As we explained when reviewing the denial of a stay pending appeal in Service Employees International Union, Local 1 v. Vos, No. 2019AP622, unpublished order (Wis. June 11, 2019), there is a difference between the harms analysis in deciding whether to grant an injunction in the first instance and the harms analysis in deciding whether to stay that injunction pending appeal:

> 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

[14] As noted above, given our conclusion that the defendants have shown a sufficient likelihood of success on the merits of the issue of interpreting Wis. Stat. § 16.74, there is no need for us to analyze the defendants' likelihood of success on their other likely appellate arguments.

> 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.

Id., unpublished order at 6-7.

Here, the circuit court never considered whether the harms could be undone or unwound by an appellate court at the end of the appeal.

When we consider the potential harms that accompany the decision to grant or deny the defendant's motion for a stay pending appeal in this case, we conclude that the balance tips in favor of granting the stay. The circuit court essentially rejected that any harm would befall the Legislature if its declaratory judgment and injunction were allowed to remain in effect pending the completion of the appeal. It acknowledged, as would seem proper, that the Legislature would have the ability to retain outside counsel to assist it in drafting redistricting legislation that will comply with the necessary statutes and case law rules. Its declaratory judgment and injunction, however, will prevent the Legislature from having outside counsel to assist in that constitutionally mandated task because the circuit court concluded that the Legislature may not obtain outside legal services until a redistricting lawsuit is filed, which would likely be after the Legislature has had at least some time to craft and pass redistricting legislation. That inability to have counsel of one's choice does qualify as a real harm. Further, the circuit court believed that the inability to hire outside counsel would not impair the Legislature's ability to enact redistricting legislation because the Legislature has available to it the services of the DOJ and various legislative services agencies, such as the Legislative Reference Bureau, the Legislative Council, and the Legislative Technology Services Bureau, some of which also employ attorneys. While we do not denigrate the worth of the DOJ and those service agencies, the circuit court's assertion rests on the faulty premise that lawyers are fungible. They are not, especially in the context of the highly specialized and complex area of redistricting law.[15] If the circuit court's

[15] If a person needs to have a doctor surgically repair a cleft inside of his or her eye, the person will not hire a family practice doctor or even a regular ophthalmologist to perform that surgery. Indeed, given the highly specialized nature of such a surgery, even the top ophthalmological surgeon available under the person's insurance plan may not have the skill and experience to perform such a surgery. It may be necessary to search in other states for an eye surgeon who has done such specialized surgeries. Similarly, not every lawyer, even ones who have some familiarity with redistricting, will be able to provide the knowledge and advice necessary to assist the Legislature in navigating the complex legal maze of redistricting.

injunction remains in effect while this appeal is pending, the Legislature will not be permitted to have the assistance of lawyers who focus on the once-every-decade issue of redistricting during the short window of time in which the Legislature will have the first opportunity (pursuant to the state constitution) to draw the required new districts. If this court ultimately concludes that the Legislature properly entered into the Consovoy and BGSJ engagement agreements, it will not be able at the end of its review to remedy that lack of legal assistance for the specific (and likely expired) window of time open to the Legislature to act on redistricting. The harm to the representatives of the people in limiting their ability to do this difficult and complex task assigned to them in the Wisconsin Constitution will be significant and unremedied.

On the other hand, the plaintiffs and the circuit court assert that if a stay is entered, taxpayer funds will be spent on legal contracts that may ultimately be ruled to be unauthorized. We do not disregard that the unauthorized expenditure of public funds would be a harm to the taxpayers of this state. We are not as sure at this point, however, that the harm from the expenditure of such funds, if we ultimately rule in favor of the plaintiffs, will be irreparable, given the possibility of requiring the law firms to disgorge public funds on contracts that would be declared void.

In any event, we conclude that the potential for depriving the Legislature of the counsel of its choice during the period when it most needs them to assist it in crafting redistricting legislation that will comply with the necessary statutory and case law requirements and the inability to remedy that deprivation at the end of this appeal outweighs the possibility that a not insignificant amount of taxpayer funds could be spent on unauthorized service contracts without a means to recoup those funds. The harm to the public from depriving its elected representatives of specialized lawyers necessary to perform the important task the public has assigned to those representatives similarly outweighs the harm to the public of having some taxpayer funds be spent on legal services contracts that are ultimately declared void.

In summary, we conclude that the circuit court made errors of law in analyzing both the defendants' likelihood of success on the merits of their appeal and in analyzing the potential for harm and the ability of this court to undo or mitigate that harm at the end of the case. When we apply the proper standards to these factors, we conclude that the factors ultimately weigh in favor of granting a temporary stay of the circuit court's declaratory judgment and permanent injunction. Accordingly,

IT IS ORDERED that the motion of the defendants-appellants-petitioners for temporary relief pending appeal is granted, and the circuit court's April 29, 2021 Decision and Order is stayed in full pending the completion of this court's review in this case.

REBECCA FRANK DALLET, J. *(dissenting).* The majority misinterprets both the framework for determining whether a stay should issue and our previous applications of that framework. Because Senator Devin LeMahieu and Representative Robin Vos (the "Legislators") have failed to demonstrate that the circuit court either applied the incorrect legal standard or reached a conclusion not reasonably supported by the facts, I respectfully dissent.

With the decennial redistricting process looming, the incoming Wisconsin Senate Majority Leader and the Speaker of the Wisconsin Assembly hired outside private attorneys, at a cost of roughly $30,000 per month, to consult on the rules and regulations related to redistricting and to prepare for potential litigation over the redistricting maps.[16] To date, there is no such litigation. Several taxpayers (the "Taxpayers"), challenged the Legislators' statutory authority to enter into those contracts, alleging the Legislators were unlawfully spending taxpayers' money. The circuit court agreed with the Taxpayers, granting their summary judgment motion. The circuit court also declined to stay its decision pending appeal. The Legislators appealed the stay denial, choosing the District III Court of Appeals to hear that appeal.[17] District III's motion judge affirmed the circuit court's decision denying a stay, as did a three-judge panel. Having been denied a stay three times, the Legislators now ask this court to grant it.

We review for an erroneous exercise of discretion the circuit court's denial of the Legislators' stay request. See State v. Gudenschwager, 191 Wis. 2d 431, 439-40, 529 N.W.2d 225 (1995). Under that deferential standard, we may reverse the circuit court's ruling only if the circuit court applied the wrong legal standard or reached a conclusion not reasonably supported by the facts. See id. at 440; State v. Jendusa, 2021 WI 24, ¶16, 396 Wis. 2d 34, 955 N.W.2d 777. Even if the circuit court erred in some way, we must still "search the record for reasons to sustain" its decision. E.g., State v. Dobbs, 2020 WI 64, ¶48, 392 Wis. 2d 505, 945 N.W.2d 609.

The appropriate legal standard for a stay pending appeal requires the court to determine whether the moving party has established four "interrelated" conditions, each of which is balanced against the others: (1) a "strong showing" that the movant is likely to succeed on the merits of the appeal; (2) irreparable injury absent the stay; (3) the other interested parties will suffer no substantial harm; and (4) the stay will not harm the public interest. Gudenschwager, 191 Wis. 2d at 440. The likelihood of success on the merits that must be demonstrated is inversely proportional to the degree of irreparable injury the movant will suffer

[16] For one of the private firms, the scope of representation "is limited to representing the Legislature through trial and, if requested, on appeal." As for the second firm, the scope of representation included "providing legal advice to the client (through its members or staff as designated by Senator LeMahieu and Representative Vos) regarding constitutional and statutory requirements and principles related to redistricting"; "appearing for clients in judicial or proceedings [sic] relating to redistricting, should such an action be brought, or administrative actions relating to redistricting"; and "providing legal advice about the validity of any draft redistricting legislation."

[17] The Legislators specially selected the District III Court of Appeals under Wis. Stat. § 752.21(2). The Legislators also appealed the circuit court's grant of summary judgment to the Taxpayers.

absent the stay. Id. at 441. In other words, a particularly grave harm may overcome a low likelihood of success on the merits. The movant carries the burden to demonstrate that, on balance, the factors favor a stay pending appeal. Id.

The circuit court followed that standard and applied it consistent with our precedent. To circumvent the deference we thus owe to the circuit court's decision, see id. at 439, the majority manufactures legal errors rooted in its own misinterpretations of that precedent. The majority's errors begin with its characterization of the first stay factor. It claims that if the legal issue is novel and an appellate court will review the circuit court's decision de novo, then, necessarily, the movant has made a strong showing that it will likely succeed on the merits. That interpretation is flawed for two reasons.

First, the majority improperly extends the court's unpublished orders in League of Women Voters (LWV) v. Evers, No. 2019AP559, unpublished order (Wis. April 30, 2019), and Service Employees International Union, Local 1 (SEIU) v. Vos, No. 2019AP622, unpublished order (Wis. June 11, 2019), beyond the narrow context in which they arose. The rationale of those stay orders is inapposite because those orders reversed circuit court judges' temporary injunction decisions that were made before the parties had fully argued the merits. By contrast, the circuit court here made a decision on summary judgment with the benefit of full briefing and argument on the merits. The majority ignores this distinction in faulting the circuit court for resting on its summary judgment analysis in assessing the Legislators' likelihood of success on appeal. But it would be nonsensical for the circuit court to have granted the Taxpayers' motion for summary judgment only to turn around and immediately conclude that the Legislators had a "strong" likelihood of success on appeal. The majority fails to explain how the circuit court was supposed to simultaneously rule that the Taxpayers were correct on the law and that there was more than a mere possibility that the Legislators would convince an appellate court of the opposite.

Second, and relatedly, the majority wrongly asserts that the circuit court erroneously exercised its discretion because it failed to consider that its decision would be reviewed de novo. This interpretation renders the first factor meaningless. Per the majority's reasoning, every party who loses on summary judgment has made a "strong showing" that it would win on appeal solely because it lost on the merits in the circuit court. Again, had the circuit court thought the Legislators presented a "strong" case for winning on appeal, it would not have granted summary judgment for the Taxpayers in the first place. And the fact that an appellate court will review the circuit court's merits decision de novo "does not make the merits of a party's arguments any stronger." LWV at 11 (Ann Walsh Bradley, J., dissenting). It just means that rational jurists may disagree about a legal question, giving the movant some chance to win on appeal. To warrant a stay, however, "the movant is always required to demonstrate more than the mere 'possibility' of success on the merits." See Gudenschwager, 191 Wis. 2d at 441. The circuit court here applied that standard and determined that, for the same reason the Legislators lost at summary judgment, they failed to demonstrate more than a mere possibility of success on appeal. The Legislators' likelihood of success does not increase simply because de novo review grants them another bite at the apple, and the majority fails to explain otherwise.

While the majority order acknowledges that our precedent holds that "more than the mere possibility" of success on appeal is "always required," it then makes the contradictory and unsupported statement that the first prong "does not require a particular chance or odds of success; it is not even a showing of being more likely than not." But what is the difference between a "mere possibility," which is automatically disqualifying, and a chance that is "not even . . . more likely than not," which is apparently sufficient? The majority has no answers, making it unclear how the circuit court erred.

But even putting aside the majority's imagined legal errors, the Legislators' stay request is still doomed because they have failed to allege a cognizable irreparable harm. An alleged harm "must be evaluated in terms of its substantiality, the likelihood of its occurrence, and the [movant's] proof" of the harm. Id. at 441-42. As four judges below have already concluded, there is no record support for the Legislators' claim that a stay is necessary to prevent irreparable harm. Unlike in LWV or SEIU, the circuit court here neither declared a statute constitutionally invalid nor enjoined the legislature from carrying out a core legislative function. The Legislators make no argument that they retained outside counsel for their core purpose of "drafting redistricting legislation." In fact, the contracts' language states that the legal services here are for purposes ancillary to the legislature's redistricting function: Consovoy's contract is limited to "possible litigation," and BGSJ's contract explicitly states that its representation "does not include . . . the drawing of redistricting maps."

Moreover, the Legislators offer no argument or evidence for why the staff attorneys at the Department of Justice, the Legislative Council, the Legislative Reference Bureau, and the Legislative Technology Services Bureau are incapable of providing legal advice related to the redistricting rules and regulations. The majority offers only its own baseless speculation that Wisconsin's redistricting law is too "specialized and complex" for Wisconsin's public attorneys to handle. Not only is there no record support for that position, but the majority does the opposite of what is required when reviewing a circuit court's discretionary decision: rather than "search the record for reasons to sustain" the circuit court, the majority creates reasons outside the record to reverse it. See Dobbs, 392 Wis. 2d 505, ¶48.

Next, the Legislators attempt to raise the ghost of Koschkee v. Evers, likening the circuit court's order to a deprivation of "constitutional officers[']" right to counsel of their choice in litigation. See 2018 WI 82, 382 Wis. 2d 666, 913 N.W.2d 878. But Koschkee's holding is limited to instances in which there is existing litigation. No such litigation exists here.[18] This court has never held that an elected official's inability to hire outside counsel for non-litigation purposes is a cognizable harm. Absent such a holding, the circuit court did not err in finding that harm insufficient to warrant a stay.

[18] All parties agree that the Legislators may retain private outside counsel once such litigation commences, if it ever does.

Because the Legislators have not demonstrated that the circuit court either applied the incorrect legal standard or that its decision is not reasonably supported by the record, I would affirm the circuit court's discretionary denial of the stay. The majority reaches a contrary conclusion based on a convoluted interpretation of Gudenschwager and its own assumptions that find no support in the record. I therefore respectfully dissent.

I am authorized to state that Justices ANN WALSH BRADLEY and JILL J. KAROFSKY join this dissent.

Sheila T. Reiff
Clerk of Supreme Court