FILED
08-17-2022
CLERK OF WISCONSIN
COURT OF APPEALS

OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT II

August 17, 2022

To:

Hon. Susan M. Crawford
Circuit Court Judge
Electronic Notice

Carlo Esqueda
Clerk of Circuit Court
Dane County Courthouse
Electronic Notice

Thomas C. Bellavia
Electronic Notice

Hannah Schieber Jurss
Electronic Notice

Kevin M. LeRoy
Electronic Notice

Misha Tseytlin
Electronic Notice

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

2022AP790 Josh Kaul v. Wisconsin State Legislature (L.C. # 2021CV1314)

Before Grogan, J.

On August 4, 2022, the Wisconsin State Legislature, et al., (collectively, "the Legislature") moved this court for relief pending appeal pursuant to WIS. STAT. § 808.07(2).[1] First, the Legislature seeks an order staying the circuit court's order, which declared WIS. STAT. § 165.08(1) unconstitutional and enjoined enforcement of this statute with respect to all plaintiff-side civil enforcement cases described in Count I of a Complaint that Josh Kaul, et al.,

[1] The Legislature, citing WIS. STAT. RULE 809.82(2)(a), asks for an *expedited* stay. All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

(collectively, "the Attorney General") filed against the Legislature.[2] Second, the Legislature asks this court to lift the stay of appellate proceedings to allow this appeal to proceed.

On August 15, 2022, the Attorney General filed a response opposing reversal of the circuit court's decision denying the stay pending appeal.[3] He asserts that the circuit court did not erroneously exercise its discretion and requests that this court affirm the circuit court's order. The Attorney General's response indicates he has no objection to lifting the stay of appellate proceedings.

Because the circuit court litigation has been completed, this court agrees with the parties that the appellate proceedings should now continue. This court lifts the stay of appellate proceedings that it ordered on May 23, 2022, and directs the clerk of the circuit court to compile and submit the record within twenty days.

The remainder of this order addresses whether the circuit court's order enjoining the enforcement of WIS. STAT. § 165.08(1) with respect to the plaintiff-side civil enforcement cases described in Count I of the Complaint should be stayed pending the resolution of this appeal.

---

[2] The Complaint identified the Plaintiffs as: "Josh Kaul, in his official capacity as Attorney General, Wisconsin Department of Justice; Wisconsin Department of Justice; Tony Evers, in his official capacity as Governor; and Joel Brennan, in his official capacity as Secretary of the Department of Administration." (Capitalization omitted.) The Attorney General has also notified this court that the appellate caption should no longer include Joel Brennan, who was succeeded by Kathy Koltin Blumenfeld in January 2022. The appellate caption shall be amended to remove Joel Brennan.

[3] On August 16, 2022, the Legislature filed a motion seeking permission to file a reply memorandum so that it could address the Attorney General's response. This court has concluded that a reply is unnecessary. Therefore, the motion is denied.

Background

In June 2021, the Attorney General filed suit against the Legislature[4] in Dane County Circuit Court seeking declaratory judgment and injunctive relief.[5] The Attorney General asked the circuit court to declare WIS. STAT. § 165.08(1),[6] as amended by Section 26 of 2017 Wis. Act 369, unconstitutional with respect to certain civil actions prosecuted by the Attorney General and to enjoin the statute's enforcement with respect to two categories of cases. Specifically, Count I of the Complaint involved plaintiff-side civil enforcement cases the Attorney General prosecutes "in areas including consumer protection, environmental protection, and other areas of public interest." Count II of the Complaint involved "civil actions the [Attorney General] prosecutes on behalf of executive-branch agencies relating to the administration of the statutory programs they execute, such as common law tort and breach of contract actions."

The circuit court granted the Attorney General's motion for summary judgment with respect to both Count I and Count II, although it did so on different dates. First, on May 5, 2022,

[4] The Complaint identified the Defendants as: "Wisconsin State Legislature; Wisconsin State Legislature Joint Committee on Finance; Chris Kapenga, in his official capacity as President of the Wisconsin Senate; Devin LeMahieu, in his official capacity as the Majority Leader of the Wisconsin Senate; Robin Vos, in his official capacity as the Speaker of the Wisconsin Assembly; Jim Steineke, in his official capacity as the Majority Leader of the Wisconsin Assembly; Howard L. Marklein, in his official capacity as a Co-Chair of the Joint Committee on Finance; Mark Born, in his official capacity as a Co-Chair of the Joint Committee on Finance; Duey Stroebel, in his official capacity as a Vice Chair of the Joint Committee on Finance; and Amy Loudenbeck, in her official capacity as a Vice Chair of the Joint Committee on Finance." (Capitalization omitted.)

[5] This appeal is being heard in District II of the court of appeals pursuant to WIS. STAT. § 752.21(2).

[6] Section 26 of 2017 Wis. Act 369 amended WIS. STAT. § 165.08(1). The amendment requires approval by 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, before the Attorney General may "compromise or discontinu[e]" "[a]ny civil action prosecuted by the department."

the circuit court addressed cases falling under Count I. The circuit court granted partial summary judgment to the Attorney General and declared "WIS. STAT. § 165.08(1) unconstitutional and in violation of the separation of powers under the Wisconsin Constitution as applied to the category of cases described in Count I of the complaint, and enjoins its enforcement as to that category of cases." The circuit court temporarily stayed its decision on Count I based on a stipulation from the parties. The circuit court held open its summary judgment decision as to Count II to allow the Attorney General to file an amended complaint.

On May 11, 2022, the Legislature appealed, pursuant to WIS. STAT. § 813.025(3),[7] from the circuit court's order granting summary judgment to the Attorney General on Count I. The Legislature then moved this court to stay all appellate proceedings pending the conclusion of circuit court proceedings. In a May 23, 2022 order, this court granted the request and imposed a stay on appellate proceedings to allow the circuit court to complete proceedings in this case.

On June 24, 2022, the circuit court entered an order granting summary judgment to the Attorney General as to cases falling under Count II. It declared WIS. STAT. § 165.08(1) unconstitutional as to Count II's category of cases and enjoined "enforcement of the statute as applied to this category of cases." The circuit court imposed a temporary stay of its decision on Count II to allow the Legislature to file a motion to stay the circuit court's decision pending appeal.

---

[7] WISCONSIN STAT. § 813.025(2) provides:

> If a circuit court or a court of appeals enters an injunction, a restraining order, or any other final or interlocutory order suspending or restraining the enforcement of any statute of this state, the injunction, restraining order, or other final or interlocutory order is immediately appealable as a matter of right.

On July 1, 2022, the Legislature moved to stay the circuit court's decisions enjoining the enforcement of WIS. STAT. § 165.08(1) with respect to the categories of cases in Count I and Count II of the Complaint. After the parties filed written briefs, the circuit court held a hearing on the motion on July 25, 2022. The circuit court granted the stay as to Count II cases, but it denied the stay as to Count I cases. The circuit court signed a written order on July 27, 2022, to that effect, explaining that its decision was based on the reasons it set forth at the July 25th hearing. The Legislature ordered an expedited transcript and, once that was filed in the circuit court, the Legislature filed the motion for relief pending appeal with respect to the Count I cases that is currently before this court.

Analysis

Because the circuit court granted the Legislature's stay motion with respect to Count II cases, this court must consider only whether to grant the requested stay on Count I cases.[8]

In ***Waity v. LeMahieu***, 2022 WI 6, ¶49, 400 Wis. 2d 356, 969 N.W.2d 263, our supreme court reiterated the standards applicable to stay decisions:

> Courts must consider four factors when reviewing a request to stay an order pending appeal: (1) whether the movant makes a strong showing that it is likely to succeed on the merits of the appeal; (2) whether the movant shows that, unless a stay is granted, it will suffer irreparable injury; (3) whether the movant shows that no substantial harm will come to other interested parties; and (4) whether the movant shows that a stay will do no harm to the public interest.

[8] The Attorney General does not seek relief from the circuit court's order granting the stay on Count II cases.

(Formatting altered.) ***Waity*** also directed: "The relevant factors 'are not prerequisites but rather are interrelated considerations that must be balanced together.'" ***Id.*** (quoting ***State v. Gudenschwager***, 191 Wis. 2d 431, 440, 529 N.W.2d 225 (1995)).

In considering a motion for relief pending appeal, this court reviews whether the circuit court erroneously exercised its discretion in deciding the motion. ***Waity***, 400 Wis. 2d 356, ¶50; ***Gudenschwager***, 191 Wis. 2d at 439-40. We affirm if the circuit court examined the relevant facts, applied a proper standard of law and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. ***Id.***

Consistent with ***Waity***, this court has reviewed the circuit court's decision denying the Legislature's request for a stay of the circuit court's decision concerning Count I cases. Before turning to the circuit court's decision, however, this court notes that our supreme court in ***Waity*** sent a strong signal to circuit courts about the importance of properly analyzing the ***Gudenschwager*** factors in deciding whether to grant a stay pending appeal. The circuit courts, like this court, are bound by our supreme court's decisions. *See generally* ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997); ***State v. Clark***, 179 Wis. 2d 484, 493, 507 N.W.2d 172 (1993).

This case is unusual in the sense that the circuit court here had the benefit of our supreme court's stay analysis, which it provided before its merits decision in ***Service Employees International Union, Local 1 v. Vos***, 2020 WI 67, 393 Wis. 2d 38, 946 N.W.2d 35. *See* ***SEIU, Local 1 v. Vos***, No. 2019AP622, Wis. S. Ct. Order (June 11, 2019) (hereinafter generally referred to as "***SEIU***" and subsequently cited as "***SEIU*** Order"). That case involved a constitutional challenge to the same statute involved here—WIS. STAT. § 165.08(1). Although

that case involved a broader challenge because the ***SEIU*** plaintiffs challenged multiple statutes as unconstitutional, the ***Gudenschwager*** analysis set forth by our highest court in its ***SEIU*** stay order cannot be disregarded.

This court reviewed the circuit court's decision and all the parties' submissions. The record reflects that the circuit court mentioned ***Waity***, acknowledged ***SEIU***, and correctly identified the four ***Gudenschwager*** stay factors. Further, the record demonstrates that the circuit court properly applied the law in ***SEIU*** with respect to the first ***Gudenschwager*** factor—whether the Legislature as the movant made a "strong showing of its likelihood of success on the merits." The circuit court, relying on ***SEIU***, correctly concluded that the Legislature satisfied this factor because the "'strong showing' is met when the circuit court has enjoined a statute based on its conclusion that the statute is unconstitutional." *See* ***SEIU*** Order, No. 2019AP622, at 5 (citing ***Gudenschwager***, 191 Wis. 2d at 441).[9]

Likewise, the circuit court properly applied the law when it analyzed the second ***Gudenschwager*** factor. With respect to the second factor—"whether the movant shows that, unless a stay is granted, it will suffer irreparable injury," ***Waity***, 400 Wis. 2d 356, ¶49—the circuit court explained that because it "found a likelihood of success on the merits" this factor need not be as strong. Nevertheless, the circuit court, relying on the reasoning in ***SEIU***, concluded that the Legislature satisfied the irreparable harm factor. The circuit court, again referencing ***SEIU***, accepted the supreme court's analysis indicating that irreparable harm existed

---

[9] The Wisconsin Supreme Court reversed the circuit court's denial of a stay pending appeal in that case in an order dated June 11, 2019. *See* ***SEIU, Local 1 v. Vos***, No. 2019AP622, Wis. S. Ct. Order at 9 (June 11, 2019).

because if a stay was not imposed, the movants would "be prevented from exercising [the statutory] rights of review and consent, and that the settlement of plaintiff-side cases would not be able to [be] remedied or mitigated" as undoing an unapproved settlement "would be extremely difficult, if not impossible." *See* ***SEIU*** Order, No. 2019AP622, at 9. Moreover, as our supreme court further determined: "[W]hen a statute enacted by the people's elected representatives is declared unenforceable and enjoined before any appellate review can occur," "the public suffer[s] a substantial and irreparable harm of the first magnitude." ***Id.*** at 8. The circuit court in the instant case correctly analyzed and applied the irreparable harm factor because it followed ***SEIU***. It determined that the Legislature satisfied the irreparable harm factor and concluded that if a stay is not imposed pending appeal, irreparable harm will occur.

The circuit court's analysis of the third and fourth factors, however, reflects its failure to properly apply the law provided in ***SEIU***. The circuit court correctly described the third and fourth harm factors as "whether the movant shows that no substantial harm will come to other interested parties, and whether the movant shows that the stay would do no harm to the public interest." It addressed these factors together and concluded "[t]hey do demonstrate *the prospect* of substantial harms both to the attorney general and interested parties." (Emphasis added.) The circuit court then addressed the third factor—substantial harm—and said that "other parties in those cases *could* likewise be substantially harmed by the delays" associated with an appeal. (Emphasis added.) It said that "one *possible* harm is that the attorney general would have to expend resources litigating those cases." (Emphasis added.) It thought "[c]ases *might* have to be tried" leading to "a *possibility* that the State would come up short, or that the remedies" might be different. (Emphasis added.) It is important to note that the third factor looks for *substantial* harm to other interested parties. The circuit court spoke in terms of *potential* and *possible* harm,

but failed to identify a single case evidencing *substantial* harm to other interested parties.[10] Additionally, the circuit court ignored what ***SEIU*** recognized—the third factor harms raised by the Attorney General were speculative and temporary, making these harms *not substantial*. *See* ***SEIU*** Order, No. 2019AP622, at 9. Thus, the circuit court failed to properly apply the law provided in ***SEIU*** in analyzing the third factor.

With regard to public harm, the circuit court decided that in some of these cases, like environmental litigation, "there is also a *potential* harm" because delays *may* prevent injunctive relief, timely remediation and/or a delay in settlement moneys for remediation. (Emphasis added.) The circuit court then said these *potential* harms "can't be remedied or mitigated after the case is fully resolved." (Emphasis added.) Again, the circuit court failed to apply the law in analyzing this factor. It did not follow ***SEIU***, where our supreme court—looking at the same alleged *potential* and *possible* harms regarding this same statute—concluded that all of these alleged harms are speculative and therefore cannot outweigh the irreparable harm of the "first

[10] The Attorney General claimed confidentiality prevented it from identifying any specific cases demonstrating the harms it contended exist. Confidentiality in identifying cases, however, could be protected by submitting the evidence under seal for in camera inspection by the circuit court. That did not occur here.

magnitude" that occurs if a circuit court denies a stay pending appeal in these types of cases. *See* ***id.***[11]

Our supreme court in ***SEIU*** emphasized that granting a stay will, at most, delay resolution of the Attorney General's prosecutions *only* until the merits of the appeal are resolved. In other words, imposing a stay pending appeal is not permanent. It is temporary, and thus any significant harm to the public is limited. Because "in most cases there will be some harm to both sides," ***id.*** at 7, any temporary harm in *not* granting the stay from enjoining enforcement of the exact statute involved here (enacted by the people's representatives and entitled to the presumption of constitutionality) is a lesser, speculative harm, which should not preclude granting a stay that will prevent "irreparable injury of the first magnitude." *See* ***id.*** at 9-10.

The circuit court improperly disregarded the law from our supreme court and elevated *potential* and *possible*, *temporary* harms over concrete, irreparable harm. The circuit court was bound to follow the law set forth by our supreme court in ***SEIU***. It failed to do so.

Had the circuit court properly applied the law set forth in ***SEIU*** on all four factors, it would have concluded that the stay request here was not a close question. The circuit court

[11] The Attorney General argues in its response that, with the passage of time since ***SEIU***, he has "more knowledge—through experience—about what will occur during the pendency of the appeal" and "[h]arms [he] anticipated months after Act 369's enactment that the supreme court then deemed 'speculative' have been proven to be very real and have led to direct and concrete harms that will continue during the pendency of this appeal." The Affidavit that the Attorney General relies on for this proposition, however, appears to allege only the same general harms alleged in ***SEIU***. Moreover, although the Affidavit certainly contains multiple allegations that WIS. STAT. § 165.08(1) makes the Attorney General's job more challenging in a variety of ways, these allegations do not establish concrete harm under the third or fourth stay factors. With only speculative harm alleged, having Wisconsin's Attorney General follow the law enacted by the people's representatives while an appellate court decides the merits of a constitutional statutory challenge presumably protects, rather than harms, the people of Wisconsin.

would have recognized that the harm it referenced in the third and fourth factors was speculative and temporary because our supreme court has already said as much when it resolved the stay issue in ***SEIU***.

Conclusion

Having reviewed the circuit court's decision and all the materials submitted, this court concludes that the circuit court erroneously exercised its discretion when it denied the Legislature's request for a stay pending appeal because the circuit court failed to correctly apply the law. The circuit court's analysis was inconsistent with our supreme court's analysis in ***SEIU***, which concerned a motion for a stay of a decision involving the same statute with substantially similar facts. Based on our supreme court's rulings, a stay is required while this appeal is pending. The Legislature demonstrated that it is likely to succeed on appeal, it will suffer irreparable injury unless a stay is granted, no substantial harm will come to other interested parties, and a stay will not harm the public interest. Although the circuit court correctly applied the law with respect to its analysis of the first two ***Gudenschwager*** factors, its application of the third and fourth factor was legally flawed. By disregarding the supreme court precedent in ***SEIU***, the circuit court failed to engage in the proper legal analysis of the third and fourth harm factors, which caused it to erroneously exercise its discretion when it denied the request for a stay pending appeal.

The Legislature is entitled to a stay of the circuit court's order.

Therefore,

IT IS ORDERED that the motion for relief pending appeal is granted; any Dane County Circuit Court orders in this case enjoining the enforcement of WIS. STAT. § 165.08(1) are hereby stayed pending the final resolution of the appeal of this matter.

IT IS FURTHER ORDERED that this court's stay of appellate proceedings imposed in our May 23, 2022 order is lifted, and the clerk of the circuit court shall compile and submit the record within twenty days.

IT IS FURTHER ORDERED that the appellate caption shall be amended to reflect that Kathy Koltin Blumenfeld has succeeded Joel Brennan as Secretary-Designee of the Department of Administration.

IT IS FURTHER ORDERED that the Legislature's motion to file a reply memorandum is denied as unnecessary.

Sheila T. Reiff
Clerk of Court of Appeals