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March 12, 2013

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

2012AP2067

Madison Teachers, Inc. v. Scott Walker (L.C. # 2011CV3774)

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

Appellants Scott Walker, James Scott, Judith Neumann, and Rodney Pasch move to stay a circuit court order that declared unconstitutional certain portions of the Municipal Employment Relations Act ("MERA," located at Wis. STAT. §§ 111.70 to 111.77) while an appeal from that order is pending. Specifically, the order at issue struck down provisions prohibiting collective bargaining with municipalities on any subject other than total base wages; requiring a local referendum to authorize negotiation of any increase in base wages exceeding a cost-of-living increase; requiring mandatory annual recertification elections for unions; prohibiting the forced

payment of dues from non-union-member employees; prohibiting payroll deductions for union dues; and prohibiting the City of Milwaukee from paying employee contributions to the retirement system.

The appellants first sought relief in the circuit court, under the procedures set forth in WIS. STAT. § 808.07(2)(a)3. and RULE 809.12. We therefore review the circuit court's decision to deny a stay under the erroneous-exercise-of-discretion standard, rather than considering the matter de novo. See *State v. Gudenschwager*, 191 Wis. 2d 431, 439-40, 529 N.W.2d 225 (1995). We will sustain a discretionary decision so long as 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." *Liddle v. Liddle*, 140 Wis. 2d 132, 136, 410 N.W.2d 196 (Ct. App. 1987). For the reasons discussed below, we conclude that the circuit court acted within its discretion in denying the stay.

The proper standard of law for evaluating a stay request was set forth by the supreme court in *Gudenschwager*. A stay pending appeal is appropriate if the moving party:

(1) makes a strong showing that 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.

Gudenschwager, 191 Wis. 2d at 440. These factors are interrelated considerations that must be balanced. *Id.*

The circuit court evaluated the appellants' stay request in this case by balancing the factors set forth in *Gudenschwager*. The circuit court concluded that the first factor, the likelihood of success on appeal, weighed in favor of a stay, but that this factor was "outweighed by the [appellants'] failure to show irreparable harm to them if a stay is denied and by the harm to others and to the public if a stay is granted."

The appellants contend that the circuit court erroneously exercised its discretion because its application of the *Gudenschwager* factors was flawed in multiple respects as a matter of law. They further argue that, if the circuit court had correctly interpreted and applied the *Gudenschwager* factors, the only reasonable exercise of discretion would have been to grant their stay request.

We note that the way in which the appellants have structured their arguments on appeal complicates our review of the *Gudenschwager* factors. Rather than discussing, individually, the nature of each factor and its application to the facts of this case, the appellants present purely legal arguments—that is, arguments that do not depend on the particular statute or particular facts at issue here—as to how the factors should be interpreted and then, essentially, lump together a discussion of harms that the appellants argue will occur if a stay is not granted.

We recognize that the interests at stake in a particular case do not always fit squarely within one of the enumerated *Gudenschwager* factors. Indeed, *Gudenschwager* itself did not contain a neatly individualized discussion of each of the stay factors. For example, the *Gudenschwager* court seems to discuss the risk that a person will commit future acts of sexual violence as both a matter of irreparable injury under factor two and as a matter of potential harm to the public under factor four. *See id.* at 441-43.

As a practical matter, then, we acknowledge that the balancing test must be flexible enough to accommodate some variation in the ways in which a particular harm may be analyzed under one or more of the final three factors. We emphasize, however, that flexibility as to which factor or factors apply to a particular harm does not alter the appellants' overall burden to address all factors in some manner and, ultimately, to demonstrate that the factors favoring a stay outweigh the factors disfavoring a stay.

Accordingly, we will structure this order around the appellants' arguments, even though those arguments do not precisely match up with the list of factors in *Gudenschwager*. We will, however, note throughout our discussion points at which the appellants' framing of a particular argument ignores relevant considerations or otherwise fails to satisfy their burden of proof.

Scope of Required Examination into Likelihood of Success on Appeal

The first factor looks at the likelihood of success on appeal. The appellants must make "a strong showing that [they are] likely to succeed on the merits of the appeal." *Id.* at 440. "[T]he probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury the plaintiff will suffer absent the stay," but the probability of success must in any case be more than a "mere 'possibility.'" *Id.* at 441.

The appellants' first legal argument is that the circuit court misapplied this stay factor by relying entirely on the legal presumption of constitutionality afforded to statutes to determine that the appellants had shown a basic likelihood of success on appeal, without directly addressing the specific claims of error the appellants proposed to raise on appeal. They argue that the inversely proportional relationship described in *Gudenschwager* between the showing needed on the first and second factors requires a circuit court to closely evaluate the merits of a movant's

appellate issues in order to determine where the issues fall on a continuum of likely success. Stated another way, the appellants contend that the circuit court deprived them of the benefit that comes from showing an especially high likelihood of success on appeal—*i.e.*, the benefit that they are required only to make a lesser showing of irreparable harm—by stopping its analysis after concluding that the appellants had satisfied the basic threshold of more than a mere possibility of success.

The respondents, on the other hand, take the position that it would be improper for the circuit court or this court to engage in a substantive evaluation of the merits of the appeal. The respondents correctly point out that, in a similar situation, the *Gudenschwager* court itself did just what the circuit court did here—the *Gudenschwager* court simply applied the presumption, broadly determined that the appellants had a likelihood of success on appeal, and moved on to consider the other factors. *See id.* at 441-44. Accordingly, the respondents have declined to provide a substantive discussion of the issues on appeal.

Although we agree with the general proposition that the required showing for irreparable harm is inversely proportional to the strength of a movant's showing regarding the likelihood of success on appeal, we conclude that, in a case presenting a novel constitutional challenge to a recently enacted statute like the one before us, the proper course is the one followed by the circuit court here and the supreme court in *Gudenschwager*. That is, a court should apply the presumption of constitutionality and conclude that the appellants have made a showing that they are likely to succeed on the merits of the appeal, without attempting to more precisely identify the appellants' likelihood of success. In reaching this conclusion, we make the following observations.

Our experience with examining the merits of appellate issues in the context of stay motions tells us that cases generally fall into one of three categories: (1) “near frivolous” appeals in which the appellant obviously has virtually no chance of success on appeal; (2) “near certain to win” appeals in which the appellant obviously has a very high chance of success on appeal; and (3) “middle ground” appeals in which it is difficult or impractical to predict the outcome. As we understand the first factor, and as we will discuss further below, the presumed constitutionality of statutes automatically puts the present case, at a minimum, in the last of these, the middle-ground category.

The appellants have attempted to persuade us that this case falls into the near-certain-to-win category, an appeal that we can determine from their motion has a very high likelihood of success on appeal. The appellants assert that the decision under review is “in direct conflict with the settled law that employees have no constitutional guarantee to any level or type of collective bargaining” and that the circuit court placed primary reliance on a case that has no application here. It is hard to assess the accuracy of these assertions. The issues presented here are complex, and it is not readily apparent that the authority cited by the appellants is either directly on point or controlling. Similarly, it is not readily apparent that the case on which the circuit court placed substantial reliance is inapposite. And, it is especially difficult to assess the complex issues raised in the absence of adversarial briefing. Thus, we are not persuaded that this is a near-certain-to-win situation or that the circuit court was required to conclude that the appellants had such a high likelihood of success on appeal as to lower the necessary showing on any of the three harm factors.

We conclude, instead, that this is a middle-ground case. The presumption applied by the circuit court here yields a “likelihood of success,” defined elsewhere in *Gudenschwager* as

“more than the mere ‘possibility’” of success. *Id.* at 441. More than a mere possibility of success, broadly speaking, defines our middle-ground category. It would not be appropriate for us to more specifically identify where in the middle this case falls for two reasons.

First, the appellants effectively invite us to tentatively decide the merits of the appeal, thus giving the appearance that we have prejudged the appeal. The appellants provide lengthy and detailed arguments in their motion and, if we were to address these arguments in a meaningful way, we would necessarily need to identify legal principles and authority and indicate our thinking on the merits. This seems to run afoul of the *Gudenschwager* court’s concern with not appearing to have prejudged the merits. The *Gudenschwager* court stressed that its conclusion that the State had made a showing of a likelihood of success on appeal “should in no way be construed to mean that we have prejudged the merits.” *Id.* at 441 n.2.

Second, we agree with the respondents that, in a similar circumstance, the supreme court itself declined to be more specific. The topic at issue in *Gudenschwager* was the constitutionality of Wisconsin’s sexual predator law. After explaining that the challenged sexual predator law would enjoy a presumption of constitutionality, the *Gudenschwager* court concluded that the State had made a strong showing that it was likely to succeed on the merits of its appeal. *Id.* at 441. The *Gudenschwager* court did not more specifically determine the State’s chances of success on appeal with regard to specific legal issues. That is, the *Gudenschwager* court did no more than to make a broad-strokes finding that the State’s chances of success on appeal fell in to what we have characterized as a middle-ground category. Thus, in a middle-ground case like this, we have no guidance on how we might go about identifying more specifically the chances of success without venturing too deeply into the merits and prejudging a case.

Our discussion here focuses on our role and not the circuit court's analysis of the likelihood of success factor, but the net result is the same. Like the circuit court and like the supreme court in *Gudenschwager*, we do no more than apply the presumption of constitutionality of regularly enacted statutes and weigh this factor in favor of the appellants. Since we decline to address the appellants' more specific arguments regarding the merits of their appeal, we move on to their next claim of legal error, which relates to the second stay factor.

Proof Required to Show Irreparable Injury Resulting from the Voiding of Legislation

The second stay factor addresses whether the moving party will suffer irreparable injury if a stay is not granted. *Gudenschwager* directs that an alleged irreparable injury "must be evaluated in terms of its substantiality, the likelihood of its occurrence, and the proof provided by the movant." *Id.* at 441-42.

The appellants contend that they, as state actors, will be irreparably harmed as a matter of law if the statutory provisions at issue are not in force pending the appeal. Specifically, they assert that the circuit court erred in failing to acknowledge that the State "suffers irreparable injury whenever validly enacted legislation is declared void." The appellants further contend that such injury is always substantial, "self-proving," and 100% likely to occur. That is to say, the appellants claim that, any time a circuit court decision prevents the enforcement of a statute, there is, by definition, irreparable injury of such degree as to relieve a government appellant of the burden of making any additional showing on this factor. We disagree.

We begin by noting that the appellants' argument conflates two separate aspects of the irreparable injury inquiry: (1) whether the alleged injury to the movant could be compensated or otherwise remedied and, if not, (2) how substantial the injury would be in relation to any other

alleged harms being considered under the last two factors if a stay were granted. *See* BLACK'S LAW DICTIONARY 856 (9th ed. 2009) (term "irreparable injury" generally means that monetary damages would provide an inadequate remedy). Even accepting the appellants' first proposition that a denial of the will of the people as expressed by their elected representatives (*i.e.*, a representational injury) is an intangible harm that cannot be adequately compensated by money damages and is thus always "irreparable," it does not follow that the degree of such harm is always uniformly substantial. To the contrary, we are persuaded that the degree of irreparable injury resulting from voiding legislation varies widely depending on the legislation at issue.

Our conclusion is supported by two observations. First, there is no reason to suppose that *Gudenschwager's* direction that an alleged irreparable injury must be evaluated in terms of the proof submitted on its substantiality and probability does not apply when legislation is declared unconstitutional. After all, a declaration that a statute was unconstitutional was the very topic at issue in *Gudenschwager*.

Second, it is self-evident that not all statutes are created equal in terms of the breadth of their application or the depth of their impact. Suppose, for example, the state legislature were to amend WIS. STAT. § 1.10(3)(f) to make the sparrow, rather than the robin, the state bird. Suppose further that a circuit court struck down the legislation as unconstitutional based on some alleged deficiency in the legislative process, and the State moved to stay the circuit court's decision. It cannot be the case that a court considering whether to grant a stay in those circumstances would afford *exactly the same weight* to the appellants' claim of irreparable harm that a court would if it struck down, for example, a statute with the effect that all highway construction in the state must immediately come to a halt. The point of this example is not that

we have low impact statutes at issue here; plainly we do not. Rather, our point is that the appellants' per se approach to this factor is unsound.

Rather than a per se harm rule, a proper analysis of the ramifications of staying or not staying a decision declaring statutory provisions unconstitutional requires an analysis that looks at the particular legislation at issue. The appellants do not challenge the circuit court's finding that they failed to offer any facts or argument as to the stated *Gudenschwager* criteria of substantiality that was applicable to their claim of an irreparable injury to the representational interests of the State. We conclude, therefore, that the circuit court did not apply an improper standard of law or otherwise erroneously exercise its discretion in its assessment of that particular claim of irreparable harm made by the appellants.

We pause here to note that the appellants made a decision to discuss other potential harms that might occur in the absence of a stay, such as statewide confusion among municipal employers, only as part of their arguments relating to the last two factors, without addressing such harms in the context of the second irreparable injury factor. Logically speaking, we believe it would make more sense to address together under the second factor all of the claims of irreparable injury that might result if a stay were not granted (*i.e.*, the main harm factors weighing in favor of a stay), so that such harm could more clearly be balanced against all of the allegations of substantial harm to other interested parties under factor three if a stay were imposed (*i.e.*, the main harm factors weighing against a stay). However, as we stated above, this order is organized around the specific arguments made in the appellants' stay motion. We will, therefore, discuss other potential irreparable injuries that might result if a stay were not granted as those claims have been framed by the appellants.

Definition of Interested Parties

Regarding the framework of the stay analysis, the appellants next assert that the third and fourth stay factors should be considered together in this case in light of the “multitude” of interested parties and public interests that could be affected by the decision whether to stay the court’s order. This assertion ties directly to another argument the appellants make, that the circuit court erred in limiting its discussion of other interested parties to the unions that brought this suit. The appellants contend that the circuit court should have expanded its definition of interested parties to include the “literally thousands of municipal employers and tens of thousands of municipal employees” affected by the challenged provisions of MERA, and points out that the interests of those employers and employees are not uniform.

We agree that the interests of municipal employers and employees—and, for that matter, members of the public generally—are not monolithic and could be considered on either side of the stay equation. We have already explained, however, that the crux of the balancing test is to consider collectively how those factors favoring a stay weigh against those factors opposing a stay. Therefore, it is a distinction without a difference whether the circuit court considered the interests of those municipal employers and employees who support the challenged provisions of MERA under the rubric of “other interested parties,” or as part of its consideration of the public interest. We are satisfied from our own review of the circuit court’s decision that the court did consider alleged harms to the interests of municipal employers and employees who support the challenged provisions of MERA as part of its discussion of whether the appellants had demonstrated that there was widespread confusion resulting from the circuit court’s order.

Weight Accorded to Affidavits Regarding Statewide Confusion

The appellants' challenge to the way the circuit court categorized the interests of municipal employers and others—whom the appellants claim would be harmed by the absence of a stay—fails to acknowledge that the circuit court did, in fact, address those concerns in another portion of its decision. That is, the circuit court did not ignore claimed harm to municipal employers and others, but rather gave little weight to the evidence the appellants offered on this topic.

Although the appellants did not provide us with copies of their affidavits with their stay materials, we surmise from the parties' arguments and the circuit court's order that the allegations therein, made by several officials representing nonparty public employers, are as follows: (1) there is widespread confusion among municipal employers about the statewide effect of the circuit court's order on such topics as the scope of issues that must be bargained with public unions, the status of bargaining representatives that were decertified pursuant to MERA prior to the effective date of the circuit court's decision, and the continuing validity of unilateral changes implemented by municipal employers; (2) this confusion will have a negative impact on the municipal budgeting process; and (3) the confusion could lead to litigation.

First, assuming that confusion over whether the circuit court's decision has statewide binding effect is a significant potential issue, we note that the appellants take the position that it clearly does not have statewide effect. If the reach of the circuit court's order is as plainly limited as the appellants argue, the appellants have no need for a stay because there is no underlying cause for confusion on the part of nonparty municipal employers. The circuit court essentially made this point when it noted that it did not find the affidavits persuasive, in part

because the affiants did not state that they had actually read the decision, consulted the Attorney General or separate legal counsel, or taken any other steps to allay their confusion or uncertainty.¹

Second, the appellants have failed to present a cogent explanation as to why a stay or the absence of a stay would affect the likelihood of the harms that the appellants contend flow from the alleged confusion.

The appellants assert that confusion—over whether the circuit court’s decision is binding state-wide—will have a negative impact on the municipal budgeting process. We understand the appellants to be arguing that municipal employers across the state might spend more as a result of engaging in contract negotiations based on confusion over whether they are now required to negotiate for wages in excess of cost-of-living increases and other items that would have an effect on the municipality’s budget. However, the appellants do not explain why the risk flowing from this alleged confusion does not cut equally both ways. It may be that some employers will choose to play it “safe” and engage in bargaining to protect themselves if the legislation at issue here is ultimately declared unconstitutional. And, if employers choose this route, as the appellants acknowledge in supplemental briefing, there would be no legal impediment to

¹ In their motion for a stay, the appellants indicated that the circuit court’s decision was not binding state-wide. In response to our request for supplemental briefing, the appellants expanded on this topic and more forcefully argued that the circuit court’s decision is not binding state-wide on nonparties.

We acknowledge that the *respondents* argue that the circuit court’s decision here *is* binding state-wide. But we reject out of hand the proposition that the circuit court’s decision has the same effect as a published opinion of this court or the supreme court. A more interesting issue is whether, if a union sues, a different circuit court might exercise its discretion to apply the doctrine of issue preclusion or a similar doctrine and, thereby, effectively choose to follow the circuit court’s decision here. So far as we can tell, different courts might make different decisions on that topic and, in any event, this is not the sort of statewide effect that would justify a stay order in this case.

negotiating conditional contracts or retroactive wages that take into account the uncertain legal status of the challenged statutory provisions, or to attempting to recoup any overpayments if Act 10 is ultimately upheld. Such action would reduce the risk of irreparable harm.

If, on the other hand, this confusion leads municipal employers to decline to bargain, such an effect is not harm, in the appellants' view, but rather the proper course. But this action also carries with it some risks. If these employers wrongly predict the outcome of the appellate proceedings regarding the merits, they may incur litigation costs and, ultimately, be required to compensate union members for losses owing to the employers' compliance with changes in MERA that are later deemed unconstitutional.

In sum, the appellants' arguments do not persuade us that confusion—over whether the circuit court's decision is binding state-wide—will have a negative impact on the municipal budgeting process. Based on the information before us, it appears that budgeting risk for public employers goes both ways. If there is a more sophisticated analysis that makes clear that the risk of bargaining (taking into account the parties' apparent agreement that the uncertain legal status of the challenged statutory provisions can affect the nature of the bargaining itself and, for example, result in conditional agreements) is substantially greater than the risk of not bargaining, such an argument is not before us.

The appellants assert that confusion—over whether the circuit court's decision here is binding state-wide—will lead to litigation. In this regard, the appellants are apparently talking about scenarios in which public employers decline to bargain on the topics covered by the challenged MERA provisions and are then sued by union members for a failure to bargain in good faith. On this topic, the appellants have not explained why a stay or the absence of a stay

would affect such litigation. Whether a stay is or is not granted, nothing brought to our attention by the appellants prohibits nonparty unions from suing municipal employers who decline to bargain on topics covered by the new MERA provisions. The imposition of a stay would not prevent such unions from filing suit. Indeed, because the imposition of a stay does not resolve the underlying legal issues, it is hard to imagine why the imposition of a stay would have any effect on whether nonparty unions filed suit. Until the Wisconsin Supreme Court finally resolves the issues, either by issuing a definite ruling on the merits or by issuing an order declining to review a merits decision of this court, it seems that ongoing litigation is inevitable.

In sum, the appellants have not persuaded us that the circuit court was required to give any more weight than it did to their affidavits alleging statewide confusion. It appears to us that the sort of confusion the appellants highlight is not a product of the circuit court's decision, but rather a product of ground-breaking legislation that is now subject to constitutional challenges. As we have explained, as best we can discern from the materials and arguments presented to us, it appears that the potential for litigation on this topic will not be lessened until the merits of the constitutional issues are finally resolved by action of our supreme court.

Assumption Underlying Claims of Substantial Harm

The appellants' final argument is that the circuit court erred by "assuming the correctness of its decision" when considering under the third and fourth factors whether any substantial harm might result to other interested parties or the public if a stay were granted. That is, the appellants argue that the premise that union members would suffer any harm—whether fiscal in nature or an intangible violation of their constitutional rights—rests upon an assumption that the circuit

court correctly ruled the statute unconstitutional, and that such an assumption “essentially eviscerated the presumption that the appellants are likely to succeed on appeal.”

We conclude that this argument is based on a misapprehension of how the *Gudenschwager* test works. It is implicit in the second, third, and fourth *Gudenschwager* factors that a court is to balance any harm that might result in the absence of a stay, *in the event that the decision on appeal is ultimately reversed*, against harm that might result from the imposition of a stay, *in the event that the decision on appeal is ultimately affirmed*. This is the only logical way to read the factors. See *Gudenschwager*, 191 Wis. 2d at 440.

Contrary to the appellants’ assertion, making an assumption under the third or fourth factor that the decision on appeal will be affirmed does not conflict with a determination made under the first factor that a movant has demonstrated a likelihood of success on appeal. As we have explained above, a movant can establish a likelihood of success on appeal by making a showing that there is “more than a mere ‘possibility’” that an appeal will succeed. The first factor does not require a finely calibrated evaluation of the merits, or even a determination that it is more likely than not that an appeal would succeed. And, as we have explained, we are not persuaded that this case falls into that category of cases in which it is apparent that the appellants are nearly certain to win on appeal.

Therefore, we see nothing inconsistent about assuming that the circuit court’s decision will be affirmed when considering the potential harm to other parties if a stay were granted, and weighing that against the harm that could result in the absence of a stay assuming that the circuit court’s decision were reversed. Rather, we believe those are precisely the competing possibilities that are supposed to be balanced in considering whether to grant a stay.

Having rejected the appellants' legal challenge to how the third and fourth factors should be interpreted in relation to the first factor, we reiterate that it was the appellants' burden under the third and fourth factors to show that no interested parties would be harmed if a stay were granted. The appellants did not develop, either before the circuit court or this court, any fact-based argument as to why publicly employed union members would not be harmed if a stay were granted and they were thereby prohibited from bargaining for benefits, limited in their negotiations for wage increases, and required to recertify their unions according to the challenged provisions. Therefore, the circuit court did not apply an improper standard of law or otherwise erroneously exercise its discretion when it determined that the appellants had failed to meet their burden of showing a lack of substantial harm to other interested parties or the public.

Rather, we conclude that the circuit court reasonably considered, as weighing against a stay, the proposition that, even with a stay imposed, municipal employers could not be compelled to grant wage increases higher than the cost of living, whereas, in the absence of a stay, public employees would be flatly prohibited from bargaining on benefits or work conditions, and would be limited to cost-of-living wage increases. Because the ultimate weighing of such factors was within the circuit court's discretion, we see no basis to set aside the circuit court's decision that a stay was not warranted.

IT IS ORDERED that the motion for relief pending appeal is denied.

Diane M. Fremgen
Clerk of Court of Appeals