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DISTRICT IV

April 26, 2012

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

2012AP584 League of Women Voters of Wisconsin Education Network, Inc. v. Scott Walker (L.C. # 2011CV4669)

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

By order dated April 16, 2012, the Wisconsin Supreme Court denied certification, and this appeal is once again before this court. In this order, we address two pending motions.

Appellants Scott Walker and the members of the Government Accountability Board (GAB) have moved to expedite this appeal and moved to stay the circuit court's permanent injunction preventing enforcement of the voter identification law pending our resolution of the

appeal. Respondents League of Women Voters of Wisconsin Education Network and Melanie Ramey object to both requests.

Although the appellants labeled their first motion as a "Motion To Expedite Appeal," they do not cite the expedited appeals statute. *See* WIS. STAT. RULE 809.17 (2009-10)[1] (setting up an "expedited appeals program" for an "accelerated briefing and decision process" when the parties voluntarily agree to limit the size of their briefs and the number of issues to be raised). Instead, the appellants cite the "advance submission" and "reduction of time" statutes. *See* WIS. STAT. RULES 809.20 (allowing this court to advance the submission of any case) and 809.82(2)(a) (allowing this court to reduce the time prescribed by the appellate rules for doing any act).

Since the appellants have not agreed to limit the size of their brief or the number of issues, as required for participation in the expedited appeals program, we construe their motion as one to advance submission. Given the importance of the case and the need for timely resolution, we grant that motion.

To the extent that the appellants may also desire shortened deadlines to speed the appeal, we note that the transcripts have been filed and the record has been transmitted to this court more than a month early, meaning that the briefing schedule has already commenced. Because the appellants may submit their brief and reply brief sooner than the statutory time limits prescribe, they have the ability to substantially speed briefing, regardless what the respondents do.

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

We turn next to the appellants' motion for a stay. For the reasons that follow, we deny that motion.

A party seeking a stay from this court must first either seek relief in the circuit court or demonstrate that it would be impractical to do so. WIS. STAT. § 808.07(2)(a)3. and RULE 809.12. Here, the appellants have obtained a ruling from the circuit court denying their stay request.

We review a circuit court's ruling on a stay request under the erroneous exercise of discretion standard. *See* ***State v. Gudenschwager***, 191 Wis. 2d 431, 440, 529 N.W.2d 225 (1995). A party seeking a stay must demonstrate that: (1) there is a likelihood of success on appeal; (2) there will be irreparable harm to the moving party if the stay is not granted; (3) there will be no substantial harm to other interested parties if the stay is granted; and (4) the stay would not harm the public interest. ***Id.*** These are interrelated considerations "that must be balanced together." ***Id.***

The circuit court's order denying the stay is short and appears to address, at most, only the first ***Gudenschwager*** consideration, the likelihood of success. The circuit court simply repeats its bottom-line holding that the photo identification law is void, states that there is no justification for enforcing the unconstitutional photo identification requirement, and denies the motion. The decision does not engage in the sort of balancing of considerations required by ***Gudenschwager***. When, as here, a circuit court fails to provide reasoning supporting a discretionary decision, we apply our general rule of affirming the circuit court's exercise of discretion if our independent review provides a basis for the circuit court's decision. *See* ***State v. Gray***, 225 Wis. 2d 39, 51, 590 N.W.2d 918 (1999). Accordingly, we turn to the four ***Gudenschwager*** considerations, keeping in mind that the burden is on the party seeking the stay.

With respect to the first consideration, the likelihood of success on appeal, we note that our ability to assess this topic is necessarily limited by the fact that the parties have not submitted full briefs. It is sufficient to note here, as the court did in ***Gudenschwager***, that the presumption of the constitutionality of regularly enacted statutes supports the appellants' assertion that they are likely to succeed on appeal. ***Gudenschwager***, 191 Wis. 2d at 441. Thus, appellants have met the requirement that they demonstrate "more than the mere 'possibility' of success on the merits." ***Id.*** The first consideration favors the appellants' request for a stay.

The second consideration is whether the moving parties will suffer irreparable injury if a stay is not granted. The appellants' motion does not suggest any reason why the appellants themselves will suffer injury if the injunction remains in effect during the pendency of this appeal. Thus, the second consideration weighs against granting a stay.

The third and fourth considerations, respectively, address harm with respect to "other interested parties" and "the public interest." Our discussion of these remaining considerations requires two clarifications.

The first clarification concerns the difference between showing harm and showing no harm. Under the ***Gudenschwager*** formulation, the third and fourth considerations require the moving party to *show no harm if the stay is granted.* The appellants come at this from a different angle—they argue that *there would be harm if the stay is not granted.* The respondents do not take issue with this approach. Rather, the respondents argue both that there would be no harm if a stay is not granted and that there would be harm if the stay is granted. We conclude that it makes sense to discuss this case as the appellants have framed it, that is, in terms of whether the appellants have shown that there would be harm if a stay is not granted.

The second clarification concerns the proper categorization of the appellants' only remaining argument, that a stay is necessary to protect qualified voters who would vote but do not currently possess acceptable photo identification. These potential voters are a subset of a subset, that is, members of the public who desire to vote in the recall elections and, within that group, those who do not possess the photo identification specified in the voter identification law. Thus, this topic implicates both a defined subset of voters and, more generally, "the public interest." Not surprisingly, neither the appellants nor the respondents address whether the appellants' alleged concern is properly addressed as a third or fourth ***Gudenschwager*** consideration. We follow their lead and do not differentiate between the third and fourth considerations in the remainder of this order. Placement in one category or the other does not affect the result.

What remains then, is to address the merits of the appellants' argument that, if a stay of the injunction is not granted, qualified voters may be deprived of the opportunity to vote.

The appellants filed their motion in this court on March 22, 2012. At that time, their attention was focused on the pending April 3 election. We did not act then because we certified the matter to the supreme court. Because the supreme court acted on our certification on April 16, the situation has changed. And, since the supreme court acted, the appellants have neither submitted additional argument nor requested permission to do so. We will, therefore, assume that the appellants would make the same arguments now, except that they would be focused on the primary and recall elections scheduled for May 8 and June 5, 2012.

The appellants argue that, absent a stay, GAB community outreach programs to educate voters about the new photo identification requirements will remain suspended, and some voters

might rely upon the injunction in deciding not to take the necessary steps to obtain photo identification specified by the law. As a result, the appellants argue, some voters may be disenfranchised if the statute's constitutionality is upheld and the injunction is vacated shortly before one of the recall elections. The reason, according to the appellants, is that in this scenario there may be qualified voters without the specified photo identification who want to vote but do not have sufficient time to obtain the required identification. In short, the appellants express a concern about qualified voters who could vote while the injunction is in place but might not be able to vote if the injunction were to be lifted shortly before one of the elections.

The uncertainty regarding a final decision that would cause the situation the appellants express concern about has diminished substantially since the appellants first moved for a stay. The Wisconsin Supreme Court's decision to decline our certification means, as a practical matter, that there will be no definitive court ruling before the May 8 and June 5 recall elections. Given that the briefing period in this appeal has just begun, there is no realistic possibility that this court will issue an opinion before the June 5 election. And, even if we did, our decision would not take effect until at least 31 days after it was issued. WIS. STAT. RULE 809.26 (setting the time for remittitur). Additionally, if this court were to reverse the circuit court's decision to issue a permanent injunction, the respondents would, in all likelihood, petition the supreme court for review and there would be good reason to maintain the status quo—which the injunction does—while the supreme court definitively resolves the issue.

We also take into account the status of Dane County Case No. 2011CV5492, another voter identification law case pending before a different circuit court judge. The circuit court in that case has issued a temporary injunction with the same effect as the permanent injunction here. We now know that interlocutory relief has been denied in the other case. Thus, both the

supreme court and the court of appeals have declined to disturb the circuit court's decision to issue a temporary restraining order. The other case remains with the circuit court, and it is our understanding that the post-trial briefing schedule set by the court will not conclude until after the recall elections. This means there is no reason to believe that the injunction in that case will not remain in place until after the recall elections. And, for our purposes, it means that, regardless what happens in this case before the recall elections, the harm envisioned by the appellants will not occur.

Apart from the argument regarding the subset of voters we have addressed above, the appellants make no "other interested parties" or "public interest" argument. The respondents point out that the appellants do not, for example, assert public harm resulting from voter impersonation fraud.

Thus, the appellants have failed to demonstrate that harm would result if the injunction remains in place and, therefore, the third and fourth considerations weigh against granting a stay.

In sum, the only consideration that arguably favors granting a stay is the first, the likelihood of success on appeal. We agree with the respondents that this is not enough. The ***Gudenschwager*** four-consideration balancing test plainly contemplates that a stay will not be granted absent some showing of irreparable injury or harm during the pendency of the appeal. Because no such showing has been made, it follows that the circuit court's denial of the stay motion was reasonable.

Accordingly,

IT IS ORDERED that submission of the appeal shall be advanced for consideration immediately upon the filing of the appellants' reply brief.

IT IS FURTHER ORDERED that the motion to stay the circuit court's injunction of the voter identification statute pending appeal is denied.

Diane M. Fremgen
Clerk of Court of Appeals