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May 24, 2016

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

2016AP820 Machinists Local Lodge 1061 v. Scott Walker (L.C. # 2015CV628)

Before Stark, P.J.

On April 15, 2016, the Dane County Circuit Court granted summary judgment to the International Association of Machinists District 10 and its Local Lodge 1061, United Steel Workers District 2, and Wisconsin State AFL-CIO (Unions), concluding that the "right-to-work" law, WIS. STAT. § 111.04(3)(a)3. & 4., effects an unconstitutional taking of the private property of Wisconsin's labor organizations. As a result, the court enjoined the State of Wisconsin, the Attorney General, and the Wisconsin Employment Relations Commission, from enforcing the statute. The State of Wisconsin, Governor Scott Walker, Attorney General Brad D. Schimel and WERC Commissioners James R. Scott and Rodney G. Pasch (the State) moved to stay the judgment pending appeal, and after a hearing, the motion was denied. The State now moves for relief pending appeal with expedited consideration requested, seeking a stay of the circuit court judgment during the pendency of this appeal or any petition for review pursuant to WIS. STAT. § 808.07.

The State filed a memorandum and appendix in support of its motion for a stay. We have also considered the memorandum filed by the Unions opposing the stay motion. The Unions filed a Motion to Supplement the Record with an affidavit of Alex Hoekstra. The motion indicates the affidavit is only relevant to the stay issue. We will consider the affidavit filed as part of the Unions' response to the stay motion, but to the extent the submission may have been intended as a motion to supplement the record on appeal, we consider the motion as improvidently filed because it was not filed in the circuit court, which has the record. The record has not yet been transmitted to the Court of Appeals.

The State filed a Motion to Reply to the Unions' opposition to the stay, and we granted that motion and have considered that Reply. We also granted Motions to Appear as Amicus Curiae filed by Wisconsin Manufacturers and Commerce, Arnie Dieringer, Randy Darty, Todd

Momberg, Daniel Sarauer, Daniel Zastrow and The National Federation of Independent Business Small Business Legal Center and have considered the briefs and appendices filed by those entities in Support of the State's Motion to Stay.

When presented with a motion for relief pending appeal in a case where, as here, the circuit court has already denied a motion for relief pending appeal, this court reviews the circuit court's decision under an erroneous exercise of discretion standard. ***State v. Gudenschwager***, 191 Wis. 2d 431, 439, 529 N.W.2d 225 (1995). An appellate court will sustain a discretionary act if it determines that 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.*** at 440.

A stay pending appeal is appropriate where the moving party: (1) makes a strong showing that he or she is likely to succeed on the merits of the appeal; (2) shows that, unless the stay is granted, he or she will suffer irreparable injury; (3) shows that no substantial harm will come to the 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 not prerequisites, but rather are interrelated considerations that must be balanced together. ***Id.*** A movant need not always establish a high probability of success on the merits, and the probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury the movant will suffer absent the stay. ***Id.*** at 441. Thus, more of one factor may excuse less of the other. The movant, however, "is always required to demonstrate more than the mere "possibility" of success on the merits. ***Id.***

With respect to the first ***Gudenschwager*** factor, the circuit court acknowledged that "regularly enacted statutes are presumed to be constitutional," thus establishing a strong likelihood of success on the merits. However, the court stated that it cannot be the case that any enactment of a statute is likely to succeed, and concluded it all boiled down to "something as simple as there is no free lunch." The court ultimately determined:

> [I]t's not about a right-to-work and it's not about a right to join or not join a union. It's about whether or not a non-member has an obligation to pay for the services they receive or whether an entity can be required to provide services at no charge to someone, and I think there are years of weight in support of the decision that I reached.

The court concluded: "I don't think there's a likelihood of success that causes me to think oh, I ought to just put this on hold while the appeal runs its course."

With respect to the remaining ***Gudenschwager*** factors, the circuit court determined that the State had provided no evidence it would suffer one way or another, and ultimately balanced what it deemed to be a small injury to a large number of people with a larger injury to a small number of organizations. It stated that if the judgment were reversed on appeal, the harm to current non-members who are required to pay for the services they receive is not very significant when compared to the size of the loss suffered by the unions if required to provide services without fees from non-members. In considering the public interest, the court questioned whether the status quo to be preserved was that which existed during the last twelve months or the previous seventy years, and concluded it did not harm the public interest to say that "there isn't a free lunch."

We conclude the circuit court examined the relevant facts, applied the proper standard of law, and well articulated the basis for its decision to deny the stay pending appeal. However, we

determine the court's conclusion the Unions would suffer substantial harm if a stay was imposed pending appeal is not supported by the court's factual findings and the record. As a result, the court erroneously exercised its discretion in according that factor more weight in its analysis. Given a relative lack of harm shown to either party or the public interest, the presumption of constitutionality of this duly enacted statute and the preference under the law to maintain the status quo to avoid confusion, we conclude the State has established there is sufficient likelihood of success on appeal to warrant the grant of the stay.

Therefore, upon the foregoing,

IT IS ORDERED that the April 15, 2016 order granting summary judgment to the International Association of Machinists District 10 and its Local Lodge 1061, United Steel Workers District 2, and Wisconsin State AFL-CIO (Unions), concluding that the "right-to-work" law, WIS. STAT. § 111.04(3)(a)3. & 4., effects an unconstitutional taking of the private property of Wisconsin's labor organizations and enjoining the State of Wisconsin, the Attorney General, and the Wisconsin Employment Relations Commission from enforcing the statute is stayed pending remittitur of this appeal.

Diane M. Fremgen
Clerk of Court of Appeals