



# Supreme Court of Wisconsin

OFFICE OF COURT COMMISSIONERS

110 E. MAIN STREET, SUITE 440

MADISON, WISCONSIN 53703

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Commissioners

Telephone (608) 266-7442

May 26, 2023

To: Attorney Caleb R. Gerbitz  
Attorney James M. Sosnoski  
Meissner Tierney Fisher & Nichols S.C.  
111 East Kilbourn Avenue  
19th Floor  
Milwaukee, WI 53202

Re: Rule Petition 23-01, In the Matter of Amending Wis. Stat. § 809.12, Relating to  
Appellate Review of Motion for Relief Pending Appeal

Dear Attorneys Caleb R. Gerbitz and James M. Sosnoski:

I am assisting the Wisconsin Supreme Court with its consideration of rule petition 23-01, filed on January 23, 2023. The petition asks the court to amend Wis. Stat. § (Rule) 809.12 "to clarify the standard of review for a decision on a motion for a stay pending appeal." At a closed conference on May 24, 2023, the court voted to solicit written comments from interested persons and conduct a public hearing at a date yet to be determined in the fall of 2023.

In addition, the court invites the petitioners to provide answers to the following questions concerning the proposed changes:

1. As set forth in State v. Gudenschwager, 191 Wis. 2d 431, 440, 529 N.W.2d 225 (1995), a party seeking a stay pending appeal must demonstrate: (1) "a strong showing that it is likely to succeed on the merits of the appeal"; (2) "unless a stay is granted, it will suffer irreparable injury"; (3) "no substantial harm will come to other interested parties"; and (4) "a stay will do no harm to the public interest." Please identify which of these factors the petitioners believe involve a "legal determination" by the circuit court as opposed to a factual determination.
2. Also, please clarify whether the petitioners intend the phrase "legal determination" to be synonymous with "conclusion of law."
3. Why is it necessary to specify that appellate courts shall "independently review the trial court's legal determinations" when Waity v. LeMahieu, 2022 WI 6, ¶¶50, 52-53, 400 Wis. 2d 356, 969 N.W.2d 263, demonstrates that an appellate court does not defer to a circuit court's legally erroneous application of the likelihood of success on the merits factor?

Please file your response by Friday, June 23, 2023, with the Clerk of Supreme Court, Attention: Deputy Clerk-Rules, P.O. Box 1688, Madison, WI 53701-1688. Additionally, please e-mail a Microsoft Word version of your response to [clerk@wicourts.gov](mailto:clerk@wicourts.gov). You might wish to consult the court's website at <https://www.wicourts.gov/scrules/pending/2301.htm> to follow this rule petition. Court communications on the petition and any written comments filed with the clerk's office are posted on the website.

If you have specific questions other comments regarding this matter, please contact me by mail at P.O. Box 1688, Madison, WI 53701-1688; by telephone at 608-266-7442; or by email at [tim.barber@wicourts.gov](mailto:tim.barber@wicourts.gov).

Sincerely,

/s/

Timothy M. Barber

Supreme Court Commissioner

cc: Chief Justice Annette Kingsland Ziegler  
Justice Ann Walsh Bradley  
Justice Patience Drake Roggensack  
Justice Rebecca Grassl Bradley  
Justice Rebecca Frank Dallet  
Justice Brian Hagedorn  
Justice Jill J. Karofsky