

Rules Petition No. 23-01

In the Supreme Court of Wisconsin

**IN THE MATTER OF AMENDING
WIS. STAT. § (RULE) 809.12
RELATING TO APPELLATE REVIEW
OF MOTIONS FOR RELIEF PENDING APPEAL**

**SUPPLEMENTAL COMMENT
IN SUPPORT OF THE PETITION**

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INTRODUCTION

A pending rulemaking petition requests this Court to amend Wis. Stat. § (Rule) 809.12 to clarify that an appellate court must independently review a circuit court's legal conclusions when deciding a motion for relief pending appeal.

This Court should grant Rules Petition No. 23-01 and amend Rule 809.12 to clarify that, when reviewing a circuit court decision granting a stay pending appeal, an appellate court must (1) review the decision for an erroneous exercise of discretion, (2) review factual findings for clear error, and (3) review legal conclusions de novo.

This supplemental comment raises two points. First, a mixed standard of review applies to the second through fourth stay factors. Second, federal case law recognizes a distinction between orders granting stays and order denying stays. When a trial court *grants* a stay, an appellate court may review that decision and apply a mixed standard of review. But if a trial court *denies* a stay, a litigant may separately request the court of appeals to grant a stay pending appeal. In the denial context, the court of appeals should use a de novo standard of review because the court is independently reviewing a motion for a stay, not reviewing a trial court decision.

ARGUMENT

I. Appellate courts should independently review legal conclusions made under any of the four stay factors, while employing an overall mixed standard of review.

“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.” *Waity v. LeMahieu*, 2022 WI 6, ¶ 49, 400 Wis. 2d 356, 969 N.W.2d 263.

On May 26, 2023, this Court invited the petitioners to explain which of those four factors involve a legal determination rather than a factual determination. On June 23, 2023, the petitioners filed a supplemental memorandum in which they argued that only the first factor involves a conclusion of law, while the other three factors involve factual issues.

That position is partly correct. The first factor “involves a purely legal determination” that is reviewed de novo. *In re Revel AC, Inc.*, 802 F.3d 558, 567 (3d Cir. 2015); *accord S.S. Body Armor I., Inc. v. Carter Ledyard & Milburn LLP*, 927 F.3d 763, 772–73 (3d Cir. 2019); *Matter of Forty-Eight Insulations, Inc.*, 115 F.3d 1294, 1301 (7th Cir. 1997).

But the other three factors and the balancing of all four factors involve a mixed standard of review. “In reviewing a motion for a stay pending appeal, [appellate courts] review the [trial] court’s findings of fact for clear error, its balancing of the factors under the [erroneous exercise] of discretion standard and its legal conclusions de novo.” *Hinrichs v. Bosma*, 440 F.3d 393, 396 (7th Cir. 2006); accord *U.S. Student Ass’n Found. v. Land*, 546 F.3d 373, 380 (6th Cir. 2008).

So, when ruling on a motion for a stay pending appeal, a trial court determines the facts. But whether those facts fulfill the relevant legal standards—whether those facts constitute “irreparable injury” to the movant, “substantial harm” to other interested parties, or “harm to the public interest”—might be questions of law.

Because all four stay factors might involve questions of law, this Court should *not* add language to Wis. Stat. § (Rule) 809.12 that would limit de novo review to the first factor. (*Cf.* Pet. Supp. Mem. 5.) Instead, this Court should amend Rule 809.12 to clarify that an appellate court independently reviews any legal conclusion when reviewing a decision on a motion for a stay pending appeal. (*See* Pet. 2; Pet. Mem. 11.)

This clarification is necessary. This Court has recently stated that “[a]n appellate court reviews a circuit court’s order on a motion for stay for an erroneous exercise of discretion.” *State v. Scott*, 2018 WI 74, ¶ 36, 382 Wis. 2d 476, 914 N.W.2d 141. That statement is accurate in a general sense, but a motion for a stay also involves legal conclusions (which are

reviewed independently) and can involve factual findings (which are reviewed for clear error).

On May 26, this Court invited the petitioners to explain why this clarification is necessary in light of *Waity*, 2022 WI 6, ¶¶ 50, 52–53. But *Waity* did not clarify that a mixed standard of review applies to a decision on a motion for a stay or that de novo review applies to legal conclusions when reviewing such a decision. Instead, this Court stated that “a circuit court’s decision to grant or deny a motion to stay is reviewed under the erroneous exercise of discretion standard.” *Waity*, 2022 WI 6, ¶ 50. When this Court acknowledged that questions of statutory interpretation are reviewed de novo, it was referring to the standard of review that would apply *in the underlying appeal* in that case. *Waity*, 2022 WI 6, ¶ 53 & n.16. The standard of review for an underlying appeal and the standard of review for a stay motion are two different things. *See, e.g., Does 1–3 v. Mills*, 39 F.4th 20, 24 (1st Cir. 2022) (applying de novo review to a stay motion while noting that the deferential standard of review for the underlying appeal in that case was relevant to the likelihood-of-success factor). This Court should thus amend Rule 809.12 to make clear what *Waity* implied: de novo review applies to legal conclusions made in the context of a motion for a stay pending appeal.

II. The standard of review might be de novo if a lower court denies a stay pending appeal.

Based on “applicable federal law,” this Court held that “a trial court’s decision to grant or deny a stay pending appeal should be reviewed under an erroneous exercise of discretion

standard.” *State v. Gudenschwager*, 191 Wis. 2d 431, 439, 529 N.W.2d 225 (1995) (citing *Lopez v. Heckler*, 713 F.2d 1432, 1436 (9th Cir. 1983); *Beverly v. United States*, 468 F.2d 732 (5th Cir. 1972)). This Court recently echoed that notion: “On appeal, a circuit court’s decision to grant or deny a motion to stay is reviewed under the erroneous exercise of discretion standard.” *Waity*, 2022 WI 6, ¶ 50. That statement of law might be wrong in two respects.

First, as explained above and in the petitioners’ initial memorandum, federal law does not support an entirely deferential standard of review. (Pet. Mem. 8–12.) Instead, federal law supports de novo review of the “likelihood of success” factor and a mixed standard of review for the other factors.

Second, an appellate court perhaps does not review a trial court’s decision *denying* a stay. When a trial court denies a stay, a litigant may separately request a stay from an appellate court. In that scenario, an appellate court determines de novo whether to grant a stay because it is not reviewing a trial court decision. *See, e.g., Priorities USA v. Nessel*, 978 F.3d 976, 982 (6th Cir. 2020) (citing *A. Philip Randolph Inst. v. Husted*, 907 F.3d 913, 917 (6th Cir. 2018)); *see also Does 1–3*, 39 F.4th at 24 (independently reviewing a motion for a stay pending appeal after the trial court denied a stay).

Wisconsin statutes appear to support this distinction. If a circuit court “grant[s]” a stay, a “person aggrieved” by that order may move the court of appeals to vacate the stay

pending appeal. Wis. Stat. § (Rule) 809.12. In that context, an appellate court should apply the mixed standard of review discussed above. But Rule 809.12 does not authorize a party to seek appellate review of a circuit court order *denying* a stay. Instead, Wis. Stat. § 808.07 authorizes “a trial court or an appellate court” to “[s]tay execution or enforcement of a judgment or order.” Wis. Stat. § 808.07(2)(a)(intro.) & (2)(a)1. If a circuit court *denies* a stay, an appellate court should determine de novo whether to grant a stay upon request under Wis. Stat. § 808.07(2)(a).¹

The petitioners do not make this distinction in their supplemental memorandum. They propose amending Rule 809.12 to clarify the standard of review that applies to a “trial court’s decision to grant *or deny* a motion” for a stay pending appeal. (Pet. Supp. Mem. 5 (emphasis added).) Their proposed language suggests that an appellate court may review a circuit court order granting *or denying* a stay, although Rule 809.12 (even under the petitioners’ proposal) explicitly authorizes a litigant to seek appellate review only of an order “*granting* the relief requested.” (Pet. Supp. Mem. 4 (emphasis added).) If this Court adopts the language proposed in the petitioners’ supplemental memorandum, Rule 809.12 might suggest that a party may appeal a trial court’s order *granting or denying* a stay, although Wis. Stat. § 808.07(2)(a) suggests that a party may separately request an appellate court to

¹ Although appellate courts do not find facts, they may independently review the record in the stay-pending-appeal context. *See Mgmt. Computer Servs., Inc. v. Hawkins, Ash, Baptie & Co.*, 224 Wis. 2d 312, 330–31, 592 N.W.2d 279 (Ct. App. 1998).

grant a stay. This Court should not create tension between these two statutes.

This Court thus should not amend Rule 809.12 in a way that would imply that a party may seek appellate review of a decision *denying* a stay. Rule 809.12 states that a party may seek appellate review of an order *granting* a stay. By contrast, when a circuit court *denies* a stay, a litigant may request the court of appeals to independently determine whether to grant a stay. *See* Wis. Stat. § 808.07(2)(a).

* * *

This Court should amend Rule 809.12 to clarify that, when reviewing a circuit court decision granting a stay pending appeal, an appellate court must (1) review the decision for an erroneous exercise of discretion, (2) review factual findings for clear error, and (3) review legal conclusions de novo. This Court should also consider amending Rule 809.12 to clarify that an appellate court must conduct de novo review when deciding whether to grant a stay pending appeal.

CONCLUSION

This Court should grant Rules Petition No. 23-01 and amend Rule 809.12 as proposed in this supplemental comment.

Dated this 25th day of September 2023.

Respectfully submitted,

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