

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

FILED

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Case No. 2020AP1742-LV

**CLERK OF SUPREME COURT
OF WISCONSIN**

TAVERN LEAGUE OF WISCONSIN, INC.,
SAWYER COUNTY TAVERN LEAGUE,
INC., and FLAMBEAU FOREST INN LLC,

Plaintiffs,

v.

ANDREA PALM, JULIA LYONS, and
WISCONSIN DEPARTMENT OF HEALTH
SERVICES,

Defendants-Respondents.

THE MIX UP, INC. (D/B/A MIKI JO'S MIX
UP), LIZ SIEBEN, PRO-LIFE WISCONSIN
EDUCATION TASK FORCE, INC., PRO-LIFE
WISCONSIN, INC., and DAN MILLER,

Intervenors-Plaintiffs-Petitioners

**RESPONSE OPPOSING MOTION FOR EMERGENCY
TEMPORARY RELIEF PENDING APPEAL**

INTRODUCTION

Wisconsin currently faces by far the worst COVID-19 surge our State has yet seen in this pandemic. We are quickly approaching hospital capacity, we are a national COVID-19 hotspot, and more and more Wisconsinites are dying from this dangerous, novel disease. In direct response to the current dangerous COVID-19 escalation in Wisconsin, Emergency Order 3, issued by Department of Health Services (DHS) Secretary-Designee Palm, forbids certain public gatherings for 28 days—two 14-day COVID-19 incubation periods.

Following the denial of their motion for a temporary injunction in the circuit court, the intervenor-plaintiffs—Petitioners here—now ask this Court to temporarily enjoin Emergency Order 3.

Success on the merits for Petitioners would require a showing of an erroneous exercise of the circuit court's discretion in denying a temporary injunction. The question before this Court would be whether the circuit court erroneously exercised its discretion in concluding that Petitioners failed to meet three of their four requisite burdens to warrant an injunction. Petitioners failed to present facts sufficient to persuade the court on two of those factors. And on the third—their legal premise that Emergency Order 3 is barred by the Wisconsin Supreme Court's decision in *Wisconsin Legislature v. Palm*, 2020 WI 42, 391 Wis. 2d 497, 942 N.W. 2d 900—the circuit court was right: the *Palm* Court did not include Wis. Stat. § 252.02(3) in its rationale and analysis and left in place the part of the Safe at Home order that issued under that subsection.

But most importantly, in considering whether to grant an emergency temporary injunction, this Court must weigh whether so doing would harm the public interest. Here, the harm to the public if this Court granted temporary relief pending appeal would be severe. Secretary-Designee Palm and DHS (hereinafter the “State Defendants”) do not mean to make light of the economic hardship Petitioners face from COVID-19. But the economy can only come back once the virus is controlled, and that is precisely what the short-term public gatherings limitations imposed by Emergency Order 3 are aimed to accomplish. Ultimately, the scales here should fall heavily against granting a temporary injunction, because the harm in enjoining a statewide public health order may be measured in illnesses, hospitalizations, and deaths.

Thankfully, most of the time this Court is asked to consider whether to grant a temporary injunction effectively reversing a lower court's ruling pending appeal, the health and lives of people across Wisconsin do not potentially hang in the balance. Here, however, they do. This Court should deny the request for an emergency temporary injunction.

BACKGROUND

Emergency Order 3, issued by DHS Secretary-Designee Palm, prohibits certain gatherings of the public pursuant to Wis. Stat. § 252.02(3), in response to the recent skyrocketing of COVID-19 in Wisconsin. Per the order, it went into effect on October 8, 2020, and ends on November 6, 2020.

On October 13, 2020, a group of plaintiffs filed a complaint to declare Emergency Order 3 unlawful. They also moved for an ex parte restraining order and temporary injunction. On October 14, 2020, the circuit court, the Honorable John M. Yackel presiding, granted the plaintiffs' motion for an ex parte temporary restraining order. The State Defendants filed a motion for substitution; the plaintiffs then filed a motion for substitution, and the Honorable James C. Babler was assigned to preside.

On October 16, the State Defendants filed a response opposing the plaintiffs' request for a temporary injunction.

Additionally, on October 16, Petitioners—THE MIX UP, INC., Liz Sieben, Pro-Life Wisconsin Education Task Force, Inc., Pro-Life Wisconsin, Inc., and Dan Miller—appeared and filed motions to intervene. They argued that Emergency Order 3 also harmed them and joined in the request for a temporary injunction.

On October 19, the circuit court held a hearing on the motions. After granting the motions to intervene, it denied the motion for a temporary injunction. The circuit court concluded that the plaintiffs failed to make three necessary showings.

The court first concluded that they failed to show a likelihood of success on the merits of their challenge. The court noted that the Wisconsin Supreme Court in *Palm* did not provide clarity on how its analysis applied to subsection (3) of Wis. Stat. § 252.02—the provision at issue here. Rather, the circuit court explained, the *Palm* Court barely discussed that law, and also left in place a provision of the Safer at Home Order that closed schools pursuant to Wis. Stat. § 252.02(3).

The circuit court also concluded that the plaintiffs failed to show both that a temporary injunction was necessary to preserve the status quo, or that they would suffer irreparable harm absent the injunction. The court stressed that the affidavits the movants relied on did not set forth specific allegations establishing that they had been complying with Emergency Order 3.

The court then denied a request for stay pending appeal, concluding that a stay was inappropriate as the temporary restraining order had been granted ex parte, and that full briefing reflected that the movants were not entitled to emergency relief. Petitioners then filed a petition for leave to appeal and this motion; the other plaintiffs did not.

STANDARDS OF REVIEW

Here, Petitioners' request for a temporary injunction pending appeal would both reverse the circuit court's discretionary denial of that requested relief and impose an extraordinary remedy against the State Defendants.

Appellate courts “will not overturn a circuit court's denial of injunctive relief absent a showing that the circuit court erroneously exercised such discretion.” *Milwaukee Deputy Sheriffs' Ass'n v. Milwaukee County*, 2016 WI App 56, ¶ 20, 370 Wis. 2d 644, 883 N.W.2d 154. “An abuse of discretion exists if the trial court failed to exercise its discretion or if

there was no reasonable basis for its decision.” *Robertson-Ryan & Assocs., Inc. v. Pohlhammer*, 112 Wis. 2d 583, 587, 334 N.W.2d 246 (1983). That means that if the circuit court has examined relevant facts and applied the proper legal standards using a demonstrated process of reasoning—reaching a conclusion a reasonable court could reach—this Court will affirm the circuit court’s exercise of discretion. *Kocken v. Wisconsin Council 40, AFSCME, AFL-CIO*, 2007 WI 72, ¶ 25, 301 Wis. 2d 266, 732 N.W.2d 828.

This Court may grant relief pending appeal, under Wis. Stat. § 808.07(2) and § (Rule) 809.12, where a movant shows that the balancing of four factors weighs in the movant’s favor: (1) unless a stay is granted, the movant will suffer irreparable injury; (2) no substantial harm will come to other interested parties; (3) a stay will do no harm to the public interest; and (4) the movant makes a “strong showing” that it is likely to succeed on the merits of the appeal. *State v. Gudenschwager*, 191 Wis. 2d 431, 440–41, 529 N.W.2d 225 (1995). The *Gudenschwager* factors are not prerequisites but are instead interrelated factors; the Court must balance the relative strength of each. *See id.* at 440.

ARGUMENT

I. The harm to the health and lives of Wisconsinites that would result from a temporary injunction tips the scales against this Court granting one.

Gudenschwager requires this Court to balance other factors against whether a temporary injunction pending appeal will do any harm to the public interest, or other interested parties. Here, an injunction would cause severe harm to the public—harm of COVID-19 spread, hospitalizations, and to lives. That alone should tip the scales against granting an injunction pending appeal here.

Wisconsin currently faces an unprecedented skyrocketing of COVID-19 cases, hospitalizations, and deaths. Wisconsin is now a national COVID-19 hotspot.¹ We are approaching hospital capacity. According to the data available to DHS, 85% of licensed hospital beds are currently unavailable across the State.² And unfortunately, Wisconsin has also seen a surge in COVID-19 deaths: on October 20, 2020, *alone*, for example, COVID-19 killed 48 Wisconsinites.³

We also know that COVID-19 spreads most easily in indoor places where members of different households come together, and particularly where social distancing and mask-wearing may be challenging.⁴ If this Court reverses the circuit court's decision and grants a temporary injunction pending appeal, the State Defendants will be left without a powerful tool to help contain the recent, and terrible, COVID-19 surge.

The State Defendants do not suggest that the economic harm Petitioners *alleged* they have suffered from the COVID-19 pandemic is not significant. No one wants the Wisconsin economy, particularly small businesses, to suffer. But it is important to note that any delay in getting COVID-19 under

¹ *COVID in the U.S.: Latest Map and Case Count*, The New York Times, <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html> (last updated Oct. 18, 2020) (information updated regularly).

² Wis. Dep't. of Health Servs., *COVID-19: Hospitals*, <https://www.dhs.wisconsin.gov/covid-19/hosp-data.htm> (last revised Oct. 21, 2020) (information updated regularly).

³ Wis. Dep't. of Health Servs., *COVID-19: Wisconsin Deaths*, <https://www.dhs.wisconsin.gov/covid-19/deaths.htm> (last revised Oct. 21, 2020) (information updated regularly).

⁴ See, e.g., Kiva Fisher et al., *Community and Close Contact Exposures Associated with COVID-19 Among Symptomatic Adults ≥ 17 Years in 11 Outpatient Health Care Facilities—United States, July 2020*, 69 Morbidity & Mortal Wkly Rep. 1258, 1259 (2020) <https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6936a5-H.pdf>. A summary of the study is available. *Id.* at 1263.

control—which is precisely what health measures like Emergency Order 3 are aimed at doing—will cause grave and prolonged injuries to the economy. And fundamentally, the economic harms need to be balanced against the dangers of enjoining a decision that is helping to save lives in the midst of an unprecedented surge of a deadly, novel pandemic. Those harms should be given great weight, and tip in favor of protecting lives and against issuing a temporary injunction.

II. Petitioners do not carry their burden in showing a strong likelihood of success on the merits and irreparable harm.

Temporary injunctions are an extraordinary form of relief, which are not to be issued lightly. *Werner v. A.L. Grootemaat & Sons, Inc.*, 80 Wis. 2d 513, 520, 259 N.W.2d 310 (1977). For a circuit court to exercise its discretion to grant a temporary injunction, the party moving for the injunction *must* demonstrate four elements: (1) the movant is likely to suffer irreparable harm if a temporary injunction is not issued; (2) the movant has no other adequate remedy at law; (3) a temporary injunction is necessary to preserve the status quo; and (4) the movant has a reasonable probability of success on the merits. *Milwaukee Deputy Sheriffs' Ass'n.*, 370 Wis. 2d 644, ¶ 20.

Petitioners face a high bar in their request for an emergency injunction before this Court: they must show both that the circuit court was wholly unreasonable in its decision-making, and that they have a “strong showing” that they are likely to succeed on the merits. They do not carry this considerable burden.

First, the fact that the circuit court’s grant or denial of a temporary injunction is a discretionary decision in and of itself shows how unlikely Petitioners are to succeed on the merits of their claim that the circuit court acted erroneously

in denying the temporary injunction. *See Kocken*, 301 Wis. 2d 266, ¶ 25.

Second, Petitioners are unlikely to be able to show that the circuit court erroneously exercised its discretion with regard to every one of the three criteria upon which it based its decision. To do so, they would need to show that no reasonable judge could reach the circuit court's conclusions as to *each and every* one of the three prerequisites for a temporary injunction. *Id.*

And Petitioners cannot show that the circuit court rested its decision on an incorrect legal determination with regard to the merits of the challengers' claim. Their entire position rests on the incorrect premise that any statewide DHS order must proceed through rulemaking, or is otherwise in violation of *Palm*. But *Palm* did not so hold.

Instead, the court in *Palm* left in place a provision of Safer at Home that closed schools in accordance with Wis. Stat. § 252.02(3), the statutory provision at issue here. 391 Wis. 2d 497, ¶ 58 n.21 ("This decision does not apply to Section 4. a. of Emergency Order 28."). And the Court also did not analyze Wis. Stat. § 252.02(3) when it reached conclusions about rulemaking. *See generally id.* ¶¶ 15–59. Rather, it focused on subsections (4) and (6) of Wis. Stat. § 252.02, both of which contain much broader language and do not, by their own terms, specify exactly the type of actions DHS may take. The supreme court then concluded that given the breadth of those statutory provisions, the scope of some of the Safer at Home order's provisions, and the fact that the order imposed criminal penalties, Safer at Home was a rule that had not been properly promulgated. *See generally id.*

As Justice Kelly opined in his concurrence, Safer at Home involved legislative action because it announced "profound public policy decision[s]." *Id.* ¶ 110 (Kelly, J., concurring, joined by R. Bradley, J.). In addition to deciding

that DHS “has the authority to confine people to their homes,” the order, Justice Kelly explained, also required “the public policy decision that the Secretary has the power to close private businesses, or forbid private gatherings, or ban intra-state travel, or dictate personal behavior.”⁵ *Id.* For that reason, the *Palm* court held that the Safer at Home order went beyond enforcement and application; it was an action “to implement, interpret, or make specific legislation enforced or administered by the agency.” Wis. Stat. § 227.01(13).

But public gatherings—like school closures—are directly authorized by the plain language of Wis. Stat. § 252.02(3). And, so, they do not involve a policy choice regarding the type of action the Secretary-Designee can take. Fundamentally, the *Palm* decision found that the open-ended grant of authority under Wis. Stat. § 252.02(4) and (6) did not cover the most far-reaching aspects of the Safer at Home order: it went beyond the application of the law and therefore fell under chapter 227’s rulemaking requirements.

By contrast, Emergency Order 3 is the application and enforcement of a law, Wis. Stat. § 252.02(3), that defines both the type of action that could be taken (closing schools and forbidding public gatherings) and the acceptable reason for taking this action (controlling outbreaks and epidemics). Such straightforward application of a well-delineated power is executive action, not rulemaking. Petitioners accordingly cannot show a substantial likelihood of showing that the circuit court erroneously exercised its discretion in denying a temporary injunction.

⁵ Notably, Justice Kelly observed that under his view of the nondelegation doctrine, if the statute provided the type of action DHS could take, then even the most far-reaching elements of the order would conceivably be purely executive in nature. *Id.* ¶ 116 (Kelly, J, concurring).

Petitioners are also unlikely to be able to show that the circuit court erroneously exercised its discretion in concluding that they failed to show that a temporary injunction was necessary to preserve the status quo and prevent irreparable harm. The circuit court appropriately noted that while the movants' affidavits made general allegations about how the order could affect or harm their businesses or interests, they failed to make specific allegations to directly connect those harms to Emergency Order 3 itself (as opposed to harms caused by the COVID-19 pandemic generally).

That was a factual determination based on a review of the evidence and a lengthy colloquy between the circuit court judge and the movants. Given that the movants had shown neither that they were actually enforcing the capacity limitations nor that the predicted loss in business was attributable to Emergency Order 3 (as opposed to, for example, people reacting to the dangers of COVID-19), the circuit court appropriately exercised its discretion. Petitioners cannot establish that they will be likely to show the circuit court erroneously exercised its discretion in holding that they failed to demonstrate irreparable harm.

Petitioners suggest they will be able to show that the circuit court erroneously exercised its discretion as to preserving the status quo because the circuit court, prior to clarification, stated that Emergency Order 3 was a 60-day order. (Mem. 19). But as Petitioners' memorandum reflects, (*see* Mem. at 19–20), counsel brought this to the court's attention, and the circuit court further explained—but did not change—its rulings. The circuit court did not rest its determination on an inaccurate understanding of the length of time of Emergency Order 3.

Given the tremendous danger to the public health should this Court grant a temporary injunction, in addition to the challengers' low likelihood of success on the merits of a challenge to a discretionary decision, the overwhelming

weight of the *Gudenschwager* factors accordingly favors and necessitates this Court denying the requested temporary injunction of Emergency Order 3 pending appeal.

CONCLUSION

This Court should deny the request to issue a temporary injunction pending appeal of Emergency Order 3.

Dated this 23rd day of October 2020.

Respectfully submitted,

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