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WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT III

October 23, 2020

To:

Hon. James C. Babler
James.Babler@WICOURTS.GOV

Hannah Schieber Jurss
jurssh@doj.state.wi.us

Marge Kelsey
Clerk of Circuit Court
Marge.Kelsey@WICOURTS.GOV

Erick G. Kaardal
kaardal@mklaw.com

Andrew M. Bath
abath@thomasmoresociety.org

Kevin M. LeRoy
kevin.leroy@troutman.com

Thomas C. Bellavia
bellaviatc@doj.state.wi.us

Andrew T. Phillips
aphillips@vonbriesen.com

Colin Hector
hectorca@doj.state.wi.us

Rebecca J. R. Roeker
rroeker@vonbriesen.com

Josh Johannimgmeier
jjohannimgmeier@gklaw.com

Joseph Michael Russell
jrussell@vonbriesen.com

Misha Tseytlin
misha.tseytlin@troutman.com

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

2020AP1742-LV

Tavern League of Wisconsin, Inc. v. Andrea Palm
(L.C. # 2020CV128)

Before Stark, P.J., Hurz and Seidl, JJ.

Intervenor-Plaintiffs The Mix Up, Inc., Liz Sieben, Pro-Life Wisconsin Education Task Force, Inc., Pro-Life Wisconsin, Inc., and Dan Miller (collectively, "The Mix Up") have filed a petition for leave to appeal that part of the circuit court's October 20, 2020 order denying their motion for a temporary injunction of Emergency Order #3. The Intervenor-Plaintiffs have also filed an emergency motion for a temporary injunction pending appeal. Respondents Andrea

Palm, in her official capacity as Secretary-Designee of the Wisconsin Department of Health Services, and the Wisconsin Department of Health Services have filed responses opposing the petition and the motion.¹

We have discretion to review an order not appealable as of right when an appeal would materially advance the termination of the litigation or clarify further proceedings, protect the petitioner from substantial or irreparable injury, or clarify an issue of general importance in the administration of justice. *See* WIS. STAT. § 808.03(2). We also consider the petitioner's likelihood of success on appeal, and whether the necessity of intermediate review outweighs our general policy against the piecemeal disposition of litigation. *Cascade Mountain, Inc. v. Capitol Indem. Corp.*, 212 Wis. 2d 265, 268 n.2, 569 N.W.2d 45 (Ct. App. 1997); *State v. Salmon*, 163 Wis. 2d 369, 374-75, 471 N.W.2d 286 (Ct. App. 1991). Having considered those factors, and given the expiration date of the order at issue, we conclude interlocutory review is warranted here and sua sponte expedite this appeal.

When presented with a motion for relief pending appeal in a case where, as here, the circuit court has already addressed the motion, this court reviews the circuit court's order 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 finds that the

¹ Julia Lyons, in her official capacity as Health Officer of Sawyer County, did not take a position on the petition or the motion.

trial 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 other interested parties; and (4) shows that a stay will do no harm to the public interest. *Id.* These factors are not prerequisites, but rather are interrelated considerations that must be balanced together. *Id.* More of one factor may excuse less of another. *Id.* at 441. However, the moving party is always required to show more than the mere possibility of success. *Id.*

Based on the submissions currently before this court, we conclude The Mix Up has shown a sufficient likelihood of success on the merits of an appeal to warrant granting a stay pending appeal.

Therefore, upon the foregoing,

IT IS ORDERED that the petition for leave to appeal is granted and this appeal is expedited. Pursuant to WIS. STAT. RULE 809.11(2), the clerk of the circuit court or responsible court official shall return the copy of the order granting this petition and the circuit court case entries maintained pursuant to WIS. STAT. § 59.40 to the clerk of this court within three days of receipt of this order. Entry of this order has the effect of the filing of the notice of appeal. WIS. STAT. RULE 809.50(3).

IT IS FURTHER ORDERED that the requirement of a statement on transcript is waived.

IT IS FURTHER ORDERED that transmittal of the record is expedited and the inspection period is waived. The clerk shall compile and submit the record within three days of the date of this order. The clerk shall use the circuit court document numbers as the document numbers in the appellate index.

IT IS FURTHER ORDERED that the appellants' brief is due no later than 4:00 p.m. on Tuesday, October 27, 2020. The respondents' brief is due no later than 4:00 p.m. on Thursday, October 29, 2020. The appellants' reply brief is due no later than 4:00 p.m. on Friday, October 30, 2020.

IT IS FURTHER ORDERED that the motion for relief pending appeal is granted. That part of the circuit court's order denying the motion for a temporary injunction is stayed, thus reinstating the ex parte order for a temporary injunction.

Stark, P.J., Dissenting

I would deny the petition for leave to appeal and the motion for relief pending appeal.

Sheila T. Reiff
Clerk of Court of Appeals