WISCONSIN SUPREME COURT
CALENDAR AND CASE SYNOPSES
DECEMBER 2020

NOTICE: Due to the COVID-19 pandemic, oral arguments during December will be conducted via video/audio conferencing. The Supreme Court Hearing Room will not be open to the public. The media and public may view the proceedings live on WisconsinEye or on www.wicourts.gov.

The cases listed below originated in the following counties:

Dane
Milwaukee
Portage
Sawyer
Washburn

TUESDAY, DECEMBER 8, 2020

9:45 a.m.	20AP1419-OA /	Sara Lindsey James v. Janel Heinrich
	20AP1420-OA /	WCRIS v. Janel Heinrich
	20AP1446-OA	St. Ambrose Academy, Inc. v. Joseph T. Parisi

WEDNESDAY, DECEMBER 9, 2020

9:45 a.m.	18AP1880 / 18AP2371	David Stroede v. Society Insurance, A Mutual Company
10:45 a.m.	18AP2220-CR	State v. Adam W. Vice

THURSDAY, DECEMBER 10, 2020

9:45 a.m.	19AP2033	Portage County v. E. R. R.

THURSDAY, DECEMBER 17, 2020

9:45 a.m.	20AP1742	Tavern League of Wisconsin, Inc. v. Andrea Palm

In addition to the cases listed above, the following case is assigned for decision by the Court on the last date of oral argument based upon the submission of briefs without oral argument:

18AP1832-D	Office of Lawyer Regulation v. James C. Ritland

Note: The Supreme Court calendar may change between the time you receive these synopses and when a case is heard. It is suggested that you confirm the time and date of any case you are interested in by calling the Clerk of the Supreme Court at (608) 266-1880. The synopses provided are not complete analyses of the issues.

WISCONSIN SUPREME COURT
December 8, 2020
9:45 a.m.

No. 2020AP1419-OA	Sara Lindsey James v. Janel Heinrich
No. 2020AP1420-OA	WCRIS v. Janel Heinrich
No. 2020AP1446-OA	St. Ambrose Academy, Inc. v. Joseph T. Parisi

The Supreme Court accepted jurisdiction over three separate original action petitions, each of which challenged sections of Emergency Order #9 issued by Public Health Madison & Dane County on August 21, 2020, as amended September 1, 2020.

On August 21, 2020, in response to the COVID-19 pandemic, Public Health Madison-Dane County[1] issued Emergency Order #9, citing Wis. Stat. § 252.03(1), (2), and (4). As relevant here, certain sections of Emergency Order #9 forbid public and private Dane County schools from offering in-person instruction in grades 3 through 12 until certain COVID-19 benchmarks are met. Three separate original action petitions were filed on behalf of Dane County private and parochial schools and families whose children attend them, challenging those sections of Emergency Order #9, specifically:

> (1) On August 25, 2020, Sara Lindsey James filed James v. Heinrich, No. 2020AP1419-OA. James is the parent of children who attend Our Redeemer Lutheran School in Madison;
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> (2) On August 26, 2020, the Wisconsin Council of Religious and Independent Schools, et al., (WCRIS) filed WCRIS v. Janel Heinrich, No. 2020AP1420-OA. The WCRIS petitioners are a group of Dane County Christian schools; eight families whose children attend those and other private schools; and two school membership associations. In addition to asking the court to assume original jurisdiction, they also requested an order immediately and permanently enjoining enforcement of the provisions of Emergency Order #9 that prohibit in-person instruction to pupils in grades 3-12; and
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> (3) On August 28, 2020, St. Ambrose Academy, et al., (St. Ambrose) filed St. Ambrose v. Joseph T. Parisi, No. 2020AP1446-OA. The St. Ambrose petition was brought by eight Catholic schools located in Dane County, as well as a collection of parents of students who attend those schools. The St. Ambrose petitioners also asked for "an immediate order enjoining the School-Closure Provisions of Public Health Madison & Dane County Emergency Order #9."

[1] Janel Heinrich, in her capacity as Director of Dane County public health and the local public health officer for Madison and Dane County, is the named respondent in all three petitions. WCRIS also named Public Health Madison and Dane County as a respondent. St Ambrose Academy also named Joseph T. Parisi, in his official capacity as County Executive of Dane County as a respondent.

The three sets of petitioners advance many of the same arguments, so their arguments are summarized collectively. Generally, the petitioners challenge the Dane County order on statutory and constitutional grounds. They argue the order is unauthorized under Wis. Stat. § 252.03 ("Duties of local health officers"). Wis. Stat. § 252.03 provides, as relevant:

> (1) Every local health officer, upon the appearance of any communicable disease in his or her territory, shall immediately investigate all the circumstances and make a full report to the appropriate governing body and also to the department. The local health officer shall promptly take all measures necessary to prevent, suppress and control communicable diseases, and shall report to the appropriate governing body the progress of the communicable diseases and the measures used against them, as needed to keep the appropriate governing body fully informed, or at such intervals as the secretary may direct. The local health officer may inspect schools and other public buildings within his or her jurisdiction as needed to determine whether the buildings are kept in a sanitary condition."
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> (2) Local health officers may do what is reasonable and necessary for the prevention and suppression of disease; may forbid public gatherings when deemed necessary to control outbreaks or epidemics and shall advise the department of measures taken.
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> . . .
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> (4) No person may interfere with the investigation under this chapter of any place or its occupants by local health officers or their assistants.

The petitioners contend that Wis. Stat. § 252.03(1) only permits local health officers to "inspect schools" and they reason that because Wis. Stat. § 252.03(1) does not explicitly list as an enumerated power the ability to "close" schools, but rather confers that power on the Department of Health Services (DHS) in § 252.02(3), only DHS can close schools. They also dispute whether the terms of Emergency Order #9 are "reasonable and necessary for the prevention and suppression" of COVID-19 and/or "necessary to prevent, suppress and control" COVID-19." They also contend that Emergency Order #9 violates parents' constitutional rights to direct their child's education, and inhibits their constitutional right to the free exercise of religion. They contend that the school closure provisions in Emergency Order #9 are not narrowly tailored to advance the County's interest in preventing the spread of COVID-19, given that many other entities remain open, such as gyms, child care centers, and salons.

The respondents defend their authority to issue Emergency Order #9. They note that Wis. Stat. § 252.03 empowers the local health official to "promptly take all measures necessary to prevent, suppress and control communicable diseases" and to "do what is reasonable and necessary for the prevention and suppression of disease." Wis. Stat. § 252.03(2), (3). They argue that in light of this broad grant of authority, the fact that DHS is entitled to impose a statewide school shutdown does not mean that local officials are prohibited from taking local school measures. In addition, the respondents argue that the Order does not "close" schools. Rather, it limits who will be educated in-person to slow the spread of the COVID-19 virus.

With respect to the constitutional challenges, the respondents argue that the restrictions imposed on in-person schooling are dictated by a compelling interest - limiting the spread of COVID-19 - and have been carefully designed to protect that interest. They say that Emergency

Order #9 does not prohibit any religious instruction or worship and they defend, as evidence based, the limitations placed on schools as compared with other facilities such as child care centers, salons, gyms, etc.

On September 10, 2020, this court granted the all three petitions for leave to commence an original action and consolidated the three cases for briefing and oral argument. The court also temporarily enjoined the provisions of the Order that prohibit schools throughout Dane County from providing in-person instructions to students.

James's petition presents the following issues:

1. Whether a local health officer in this state has the power to limit the rights of children from attending school in-person, and to "order" parents that their children must "stay home" from school, regardless of whether those children are sick.
2. Whether a local health officer in this state has the power to limit private gatherings of children, families and other adults in private schools, on private property, for religious purposes.
3. Whether this Court should enjoin Officer Heinrich's "Emergency" Order No. 9, and any other subsequent order based on the same material claim to power, as outside the scope of a local health officer's authority under Chapter 252 of the Wisconsin Statutes, and violative of the principles set forth by this court in Wisconsin Legislature v. Palm, 2020 WI42, 391 Wis. 2d 497, 942 N.W.2d 900.

The WCRIS petition presents the following issues:

1. Whether Wis. Stat. § 252.03 empowers a local health officer to issue an order closing schools for in-person instruction for select grade levels?
2. Whether indefinitely closing all public and private schools buildings to in-person student instruction for grades 3 through 12 is "reasonable and necessary for the prevention and suppression" of COVID-19 and/or "necessary to prevent, suppress and control" COVID-19 where, among other things, less than 10% of all COVID cases in Dane County were among children aged 0-17 and no deaths have occurred among those children testing positive in the County?
3. Whether Emergency Order #9 unconstitutionally infringes upon the state constitutional rights of parents to direct the education and upbringing of their children? See Wis. Const. art. I, § 1.
4. Whether Emergency Order #9 unconstitutionally infringes upon the state constitutional rights of parents to the free exercise of religion? See Wis. Const. art. I, § 18.

The St. Ambrose petitioners presents the following issues:

1. Whether Dane County's School-Closure Order violates Petitioners' fundamental rights to the free exercise of religion and the liberty right to guide the upbringing of their children, as protected by the Wisconsin Constitution.
2. Whether the School-Closure Order exceeds Dane County's statutory authority.

WISCONSIN SUPREME COURT
December 9, 2020
9:45 a.m.

2018AP1880 David Stroede v. Society Insurance

This is a review of a decision of the Wisconsin Court of Appeals, District I that: (1) affirmed the order of Milwaukee County Circuit Court, Ellen Brostrom, presiding, granting summary judgment to the defendants, and (2) reversing the order denying the summary judgment motion filed by the person who allegedly caused Stroede's injuries and his insurer, West Bend Mutual.

In September 2014, Stroede became intoxicated and disruptive while drinking at the Railroad Station Bar (Railroad). Railroad staff ordered Stroede out of the bar. Jacob Tetting, an employee of Railroad, was at the bar that night with his family. Tetting witnessed Stroede reenter the bar after bar staff had ordered Stroede to leave. Stroede, still intoxicated, knocked over a table and glasses after he reentered. Tetting approached Stroede, grabbed Stroede by the shoulders, and began walking Stroede backwards towards the stairway in front of the bar's exit. Stroede fell down the stairs and hit his head. Tetting then picked Stoede up and took him outside of the bar, placing him on the grass. Railroad staff called the police. Stroede sustained head injuries as a result of the incident.

Stroede filed suit against Tetting and West Bend Mutual (Tetting's homeowner's insurer) and against Railroad and Society Insurance (the bar's liability insurer). Stroede alleged that Tetting was negligent in the manner in which he removed Stroede from the bar and that he used excessive force, resulting in Stroede's injuries. He alleged further that Railroad, as Tetting's employer, was negligent in allowing Stroede to be removed with excessive force. All the defendants filed motions for summary judgment.

In its summary judgment motion Railroad argued that Stroede was a trespasser at the time of the incident. As such, Railroad argued that there was no basis for Stroede's negligence claim because the only duty Railroad (and its insurer) owed Stroede was to refrain from willful, wanton, or reckless conduct, based on Wis. Stat. § 895.529(3)(a), which provides, in part, "[a] possessor of real property may be liable for injury or death to a trespasser under the following circumstances: (a) The possessor of real property willfully, wantonly, or recklessly caused the injury or death." Railroad's insurer argued further that Tetting was not acting as an employee of Railroad at the time of the incident, therefore, Society was not liable for any of Tetting's actions.

In his motion for summary judgment, Tetting argued that he was entitled to immunity pursuant to Wis. Stat. § 895.529 because as a patron of Railroad, he did not owe a duty of care to a trespasser. West Bend joined Tetting's motion, but opposed Society Insurance's argument that Tetting was not acting as a Railroad employee at the time of the incident.

In his motion for summary judgment, Stroede, argued that even if he was a trespasser, Tetting nonetheless engaged in "reckless conduct" that refuted Railroad and Society Insurance's trespasser defense. He argued that the "reckless conduct" was the equivalent of the willful, wanton, or reckless conduct necessary to preclude a trespasser defense.

The circuit court concluded that Stroede was a trespasser at the time of the incident and granted Railroad and Society Insurance's summary judgment motion. The circuit court rejected Stroede's alternative argument, stating that Stroede's complaints only pled negligence, not willful, wanton, or reckless conduct. The circuit court then denied Tetting's motion, finding that

pursuant to Wis. Stat. § 895.529, Tetting was not entitled to immunity as a "lawful occupant" of Railroad. The circuit court concluded that a "lawful occupant" is one with "power to consent or revoke permission to enter," thereby excluding patrons. The circuit court identified the key term in this matter as "possessor of real property" and reasoned that a "possessor of real property" is someone who possesses real property in a manner in which that person has some control over the property to provide or withdraw consent for someone else to be on that property. The circuit court concluded this did not encompass Tetting as a patron of the Railroad bar.

Stroede, Tetting, and West Bend Mutual all appealed. Stroede argued in the Court of Appeals that his complaint adequately raised a claim of wanton, willful, or reckless conduct, or, alternatively, that the circuit court should have allowed him to amend his pleadings. The Court of Appeals agreed that Stroede's complaint did not allege a claim of wanton, willful, or reckless conduct, and determined that the circuit court did not erroneously exercise its discretion in refusing to allow Stroede to amend his complaint. Tetting and West Bend Mutual argued that because Tetting was lawfully present as a patron or as an employee of the bar, he was, therefore, a "lawful occupant" at the time of the incident, thus owing a lesser duty of care to Stroede as a trespasser. The Court of Appeals concluded that a "possessor of real property" can be someone who is merely physically present on property, and thus, Tetting was entitled to the benefit of the trespasser defense whether he was a patron of the bar or an employee at the time of the incident.

Stroede now presents the following issue for Supreme Court review:

> [W]hether defendant Jacob Tetting qualifies as a "Possessor of Real Property" as that term is defined and used in Wis. Stat. § 895.529, *Civil liability limitation; duty of care owed to trespassers.*

WISCONSIN SUPREME COURT
December 9, 2020
9:45 a.m.

2018AP2220 State v. Adam W. Vice

This is a review of a decision of the Wisconsin Court of Appeals, District III, that affirmed a Washburn County Circuit Court, Judge John P. Anderson, presiding, order finding that Adam Vice's confession to child sexual assault, which occurred during an interview conducted after he failed a polygraph examination, was not voluntary.

This case concerns the admissibility of statements made during interviews conducted after the administration of a polygraph examination. In State v. Davis, 2008 WI 71, 310 Wis. 2d 583, 751 N.W.2d 332, the Wisconsin Supreme Court established a two-part test to determine the admissibility of statements made following a polygraph exam. The first step asks whether the post-polygraph statements are so closely associated with the polygraph exam that the exam and the statements occurred during one event, not two discrete events. If the statements and the polygraph examination were two discrete events, the court must then consider whether the statements were made voluntarily.

In December 2014, police received a report that Adam Vice had sexually assaulted a child. On December 11, 2014, Vice voluntarily underwent a polygraph examination, which the Eau Claire Police Department investigator conducting the examination concluded he failed. During the examination, Vice denied any sexual misconduct involving the victim. After the examination was completed, Vice signed the polygraph examination consent form, which stated the examination "was concluded at 11:40 a.m." A Washburn County detective and the investigator then conducted a post-polygraph interview. Initially, Vice consistently said he did not remember assaulting the victim. The detectives repeatedly said Vice's performance on the polygraph exam showed that he did remember the assault. Approximately eight minutes after the interview began and after the officers had referenced the failed polygraph several times, Vice made his first admission to the sexual assault. In spite of admitting he had sexually assaulted the victim, Vice continued to deny having any memory of the assault. The detectives continued to insist that Vice did remember assaulting the victim and that he needed to explain what had happened. The detectives then proceeded to ask Vice direct questions about what he had done, and Vice provided details about the assault. Vice was never informed, either before or during the post-polygraph interview, that the results of a polygraph examination are inadmissible in court.

Vice later moved to suppress the confession, arguing it was involuntary because the detectives repeatedly told him he had failed the polygraph exam before getting the statement they wanted. The circuit court granted Vice's suppression motion, saying the record was clear that the State made a number of references to a failed polygraph and created a coercive environment. The State appealed. The Court of Appeals reversed and remanded for additional fact finding on whether Vice's confession was voluntary. Because the issue was raised for the first time on appeal and Vice had conceded that the polygraph and exam and post-polygraph interview were discrete events, the appellate court declined to address Vice's argument that suppression of the confession was warranted because the exam and interview were not two separate events. On remand, the circuit court again concluded that Vice's confession was not voluntary.

The State appealed. The Court of Appeals concluded that Vice's polygraph exam and the subsequent interview were two discrete events under Davis. However, the Court of Appeals then concluded the confession was involuntary based on a combination of factors: (1) the officers referred to the results of the polygraph examination at least eleven times during the 45 minute interview; (2) Vice was given Miranda warnings before the polygraph exam which expressly informed him that any statement he made could be used in court; (3) Vice was not told polygraph results were inadmissible; (4) Vice's overall impression was that the polygraph results proved he assaulted the victim and those results could be used against him in court; and (5) the fact that Vice asserted he did not remember the assaults did not give the officers free reign to exploit his lack of memory and his stated misunderstanding of the test results' import in order to coerce a confession. As a result, the Court of Appeals affirmed, with Judge Hruz dissenting in part. In his dissent, Judge Hruz opined that the tactics used by law enforcement in this case were not coercive and Vice's confession was voluntary.

The State now asks the Supreme Court to review the following issue:

> Neither Vice's personal characteristics nor the circumstances surrounding his post-polygraph interview led the Court of Appeals to conclude that his confession to assaulting a four-year-old girl was involuntary. Rather, a combination of two factors regarding police's use of Vice's polygraph results tipped the scales in Vice's favor: (1) police repeatedly referenced the results, and (2) police did not inform Vice that the results would be inadmissible in court.
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> Did the Court of Appeals err by giving undue weight to these factor's in assessing the voluntariness of Vice's confession? Stated otherwise, under the totality of the circumstances, was Vice's confession voluntary?

WISCONSIN SUPREME COURT
December 10, 2020
9:45 a.m.

2019AP2033 Portage County v. E.R.R.

This is a review of a decision of the Wisconsin Court of Appeals, District IV, that dismissed E.R.R.'s appeal of orders issued by the Portage County Circuit Court, Thomas B. Eagon, presiding, that extended E.R.R.'s involuntary commitment and required E.R.R. to undergo involuntary treatment and medication.

E.R.R. was involuntarily committed by an order dated January 31, 2018. In December 2018, Portage County filed an Application for Extension of Commitment seeking to extend E.R.R.'s involuntary commitment. At the recommitment hearing, the circuit court found that E.R.R. was mentally ill, was a proper subject for treatment, and that there was a substantial likelihood that E.R.R. would be a proper subject for commitment if treatment is withdrawn. On January 22, 2019, the court issued an order extending E.R.R.'s involuntary commitment for a period of twelve months and ordering involuntary treatment and medication during the period of involuntary recommitment.

E.R.R. appealed, arguing that the County had failed to show by clear and convincing evidence that E.R.R. was dangerous under Wis. Stat. § 51.20(1)(am). The County responded, effectively acknowledging an error with respect to dangerousness, but arguing that the appeal was moot because E.R.R. was no longer subject to the January 2019 orders at issue in this appeal because, after the notice of appeal was filed, E.R.R.'s involuntary commitment was extended by a new order dated January 13, 2020. The court observed that in Portage County v. J.W.K., 2019 WI 54, 386 Wis. 2d 672, ¶14, 927 N.W.2d 509, the Wisconsin Supreme Court had stated that "[a]n appeal of an expired commitment order is moot." The Court of Appeals then noted that if an issue is moot, an appellate court will not reach the merits of an appellant's arguments and will dismiss the appeal unless the circumstances are "exceptional or compelling." E.R.R. asserted that there were collateral consequences to the expired order, such as stigma, financial costs, and use of commitment records in future proceedings. The Court of Appeals was not persuaded, and determined that the issues presented by this case were not likely to occur again, and that this appeal did not present excepting or compelling circumstances that would merit an exception to the mootness doctrine. As a result, the Court of Appeals affirmed the circuit court.

E.R.R. now raises the following issues for Supreme Court review:

1. Whether an appeal from a Wis. Stat. § 51.20(1)(am) commitment order may properly be dismissed as moot.
2. Whether the County met its burden to prove by clear and convincing evidence that [E.R.R.] was currently dangerous as required by Wis. Stat. § 51.20(1)(am).

WISCONSIN SUPREME COURT
December 17, 2020
9:45 a.m.

2020AP1742-OA Tavern League of Wisconsin v. Andrea Palm

This is a review of a decision of the Wisconsin Court of Appeals, District III that: reversed the order of Sawyer County Circuit Court, James C. Babler, presiding, which denied the motion for a temporary injunction filed by 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.

On October 6, 2020, the Wisconsin Department of Health Services (DHS) issued Emergency Order #3 (EO #3) on behalf of its Secretary-designee, Andrea Palm. The order stated it was issued "in fulfilling my [i.e., Secretary-designee Palm's] constitutional duty under Article I, Section I, as part of the government instituted by the people to secure the rights of all people to life, liberty, and the pursuit of happiness, the Laws of this State including Section 252.02(3) of the Wisconsin Statutes, and consistent with Wisconsin Legislature v. Palm."[2] Section 252.02(3) provides, in pertinent part: "The department may close schools and forbid public gatherings in schools, churches, and other places to control outbreaks and epidemics."

The order, which was effective from October 8, 2020, to November 6, 2020, limited public gatherings, which were defined as an "indoor event, convening, or collection of individuals, whether planned or spontaneous, that is open to the public and brings together people who are not part of the same household in a single room." EO #3 provided that in a location where a total occupancy limit existed, gatherings were limited to no more than 25% of the total limit. Otherwise, public gatherings were limited to no more than ten people.

EO #3 exempted private residences, except in circumstances where an event occurred at a private residence that was open to the public. In those cases the order limited the gathering to ten people. EO #3 also provided other exemptions, including for childcare settings, schools and universities, health care and human services operations, Tribal nations, and government and public infrastructure operations. Places of religious worship, political rallies, and other speech protected by the First Amendment were also exempted.

On October 13, 2020, the Tavern League of Wisconsin, Inc., Sawyer County Tavern League, Inc., and Flambeau Forest Inn LLC (collectively, "Tavern League") filed a complaint in the Sawyer County circuit court seeking a declaration that EO #3 was invalid on the ground that it was a "rule" that had not been promulgated through the required rulemaking process, as discussed in Palm. The Tavern League also sought an ex parte temporary restraining order and a temporary injunction barring enforcement of EO #3 pending the final resolution of the case and a permanent injunction barring enforcement of EO #3.

On October 14, 2020, the circuit court, Hon. John M. Yackel presiding, granted the Tavern League's request for an ex parte temporary restraining order. DHS then filed a motion for judicial substitution. The Tavern League proceeded to file its own substitution motion, and Judge James C. Babler was ultimately assigned to the case.

On October 16, 2020, The Mix Up, Inc. (d/b/a Miki Jo's Mix Up) and Liz Sieben moved to intervene in the Sawyer County case. Pro-Life Wisconsin Education Task Force, Inc., Pro-

[2] Wisconsin Legislature v. Palm, 2020 WI 42, 391 Wis. 2d 497, 942 N.W.2d 900.

Life Wisconsin, Inc., and Dan Miller also sought intervention. All of these intervening parties will be referenced in this summary as the Intervenors. The Intervenors joined in the Tavern League's request for a temporary injunction.

On October 19, 2020, the circuit court held a hearing at which it initially granted the Intervenors' motion to intervene. After then hearing argument, the circuit court denied the Tavern League's and the Intervenors' motions for a temporary injunction, and it vacated the ex parte temporary restraining order issued by Judge Yackel on October 14th. The circuit court found that the movants had failed to show a likelihood of success on the merits. The court noted that the Palm decision had dealt primarily with subsections of Wis. Stat. § 252.02 that were not the basis for EO #3. It also said that Palm did not provide clarity on how its rulemaking analysis applied to Wis. Stat. § 252.02(3), and it noted that Palm specifically left in place the provision of the Safer at Home order that relied on § 252.02(3), the provision closing schools. The circuit court further found that the movants had failed to show that a temporary injunction was necessary to preserve the status quo or that they would suffer irreparable harm absent an injunction.

The Tavern League chose not to pursue an appeal of the October 19th order. On October 20, 2020, the Intervenors filed a petition for leave to appeal the non-final order denying the temporary injunction motion, along with an emergency motion for a temporary injunction pending appeal. On October 23, 2020, the court of appeals, District III, with one judge dissenting, granted the petition for leave to appeal and ordered the appeal expedited. The court of appeals further stated that the Intervenors had shown a sufficient likelihood of success on the merits of an appeal to warrant granting a stay pending appeal. It stayed that part of Judge Babler's order denying the motion for a temporary injunction and reinstated Judge Yackel's ex parte restraining order.

After the Supreme Court denied DHS's petition for bypass, the court of appeals issued a final decision on November 6, 2020, the last day on which EO #3 was in effect. Consistent with its prior order reinstating the temporary restraining order, the court of appeals held that the circuit court had erroneously exercised its discretion in denying the Intervenors' motion for a temporary injunction, and it directed the circuit court to grant a temporary injunction. It concluded that, as a matter of law based on the Supreme Court's decision in Palm, EO #3 was required to have been promulgated as an administrative rule. Court of Appeals Judge Lisa K. Stark dissented, stating, in part, that the majority had "over-read" the Palm decision.

DHS filed a petition for review, which the Supreme Court granted. The petition asked the Supreme Court to decide the following issue: Did the court of appeals err in concluding that Emergency Order 3 is invalid because it was not promulgated as a rule pursuant to Wis. Stat. ch. 227?