STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2018AP2142

In re the commitment of Tavodess Matthews:

STATE OF WISCONSIN,

Petitioner-Respondent,

v.

TAVODESS MATTHEWS,

Respondent-Appellant-Petitioner.

APPEAL FROM A DECISION OF THE COURT OF APPEALS AFFIRMING A NONFINAL ORDER DENYING JUDICIAL SUBSTITUTION, ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE MICHELLE A. HAVAS AND MAXINE A. WHITE, PRESIDING

BRIEF OF PETITIONER-RESPONDENT

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ISSUE PRESENTED

At a probable cause hearing concerning the State's petition to have Tavodess Matthews committed under Chapter 980, Matthews' attorney requested an adjournment because he was not prepared. The State objected, but the court granted the adjournment.

Two weeks later, Matthews moved for a judicial substitution. The State objected, and the trial court denied Matthews' request, concluding that it was not timely filed. Matthews sought review by the chief judge, who also concluded it was not timely filed.

Matthews then appealed to the court of appeals. That court affirmed the lower courts' decisions. It recognized that under the plain language of the judicial-substitution statute, Wis. Stat. § 801.58(1), a request for substitution "shall be filed preceding the hearing of any preliminary contested matters."

Was Matthews' request for a judicial substitution, which indisputably did not *precede* the probable cause hearing, untimely under Wis. Stat. § 801.58(1)?

All lower courts held that Matthews' request was untimely.

This Court should affirm.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Both oral argument and publication are requested.

STATEMENT OF THE CASE

Matthews' Request for Adjournment During the Probable Cause Hearing

On August 15, 2018, the circuit court held a probable cause hearing regarding the State's petition to have

Matthews committed under Chapter 980. (R. 13.) At the beginning of the hearing, Matthews' counsel informed the court that he was not "prepared to do an effective cross." (R. 13:3.) He informed the court that Matthews did not object "to waiving the 10-day limit,"[1] and he requested an adjournment. (R. 13:3.) The State objected, and it noted that "[t]he entire basis of this hearing and whether or not the Court finds probable cause is based on Mr. Matthews' certified criminal record, which all parties have, as well as the special purpose evaluation." (R. 13:4.) The State asked that the court schedule the hearing "as soon as possible." (R. 13:4.)

The court expressed its frustration that the hearing was "unable to go forward." (R. 13:5.) It recognized that Matthews' family members were present, who had been "waiting all afternoon." (*Id*.) It had no idea an adjournment would be requested:

> [I] was asked to help out another court this morning; and I did not. I turned that down because we had what would amount to at least an hour's worth of testimony, probably more once cross-examination is done. I was set to do that.
>
> It is rare that this Court has a couple of hours to dedicate to a case, and we did, and we were all set. And I didn't hear a word about this until [the State's attorney] reached out this morning right before noon to say that she had received a text from [defense counsel] that said, We're going to request an adjournment today. We're not ready to go.

(R. 13:5.) The court opined that it "is a waste of the [c]ourt's time. It's a waste of the parties' times. It's a waste of the

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[1] Wisconsin Stat. § 980.04(2)(b)2. provides in relevant part that if a person is held in custody, a probable cause hearing "shall be held no later than 10 days after the person's scheduled release or discharge date . . . unless that time is extended by . . . the motion of any party."

family members' time." (R. 13:5.) The court understood that defense counsel was out of town, but expressed that he should have "at least [had] the respect to say we're back and not ready to go today would have freed a lot of people up, including the witness who was ready to come down to be at this hearing." (R. 13:6.) The court asked Matthews if he was "waiving" the time limits on the probable cause hearing[2], and Matthews responded, "[y]es." (R. 13:6.)

The court granted Matthews' request and adjourned. (R. 13:6.)

Matthews' Request for Judicial Substitution and the Trial Court's Denial

Two weeks later, on August 29, 2018, Matthews filed a request for a judicial substitution. (R. 4.) The court held a hearing on the same day, and the State objected. (R. 14:2.) The court recognized that at the August 15, 2018 probable cause hearing, the State was ready to proceed[3], but Matthews' counsel was not. (R. 14:3.) The court determined that at the hearing, "I took from Mr. Matthews a waiver of time limits. That is a substantive decision that I made; therefore, I don't believe that this is timely filed." (R. 14:3.) The court continued: "[J]ust as it is not for me to keep cases that are not

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[2] *See* fn 1, *supra*.

[3] In his brief, Matthews represents that the State "conceded it would have been unable to proceed with the hearing had the court denied the requested adjournment" (Matthews' Br. 16), and that "neither party was prepared for [the probable cause hearing]." (Matthews' Br 19.) But the record reflects that the State was prepared. As the trial court acknowledged, "the State called off their witness after receiving a text at 11:45 from the defense." (R. 13:2.) And, "the State was ready to proceed -- I believe they had -- they had their witness here or told their witness they didn't need to appear based on the representations made by [Matthews'] counsel late that morning." (R. 14:3.)

assigned here, it's not fair for me to reject them and send them to my colleagues to be handled simply because someone does this." (R. 14:3.) The court opined that "the timeliness of the rules needs to be followed. So I'm going to reject this request for substitution of judge for those reasons."[4] (R. 14:3.)

The Chief Judge's Decision Denying Substitution

Matthews sought review by the chief judge of the first judicial district. (R. 6.) At issue was whether his request for substitution was "filed preceding the hearing of any preliminary contested matters" within the meaning of Wis. Stat. § 801.58(1). (R. 7:1.) The chief judge noted that the phrase "preliminary contested matter" is not defined in the statutes. (R. 7:2.) But the chief judge discussed two cases that addressed Wis. Stat. § 801.58: *DeWitt Ross & Steven, S.C. v. Galaxy Gaming and Racing Ltd., P'ship,* 2003 WI App 190, 267 Wis. 2d 233, 670 N.W.2d 74, *overruled on other grounds,* 2004 WI 92, 273 Wis. 2d 577, 682 N.W.2d 839, and *State ex rel. Sielen v. Circuit Court for Milwaukee Cty*., 176 Wis. 2d 101, 499 N.W.2d 657 (1993). (R.7:2.)

The chief judge noted that in *Galaxy Gaming*, 267 Wis. 2d 233, ¶¶ 36–38, the court of appeals held that a hearing on a motion to compel discovery and for a protective order constituted a "preliminary contested matter" under Wis. Stat. § 801.58(1). (R. 7:2.) The chief judge also noted that in *Sielen,* 176 Wis. 2d at 113, this Court held that a hearing on a motion to compel discovery constituted a "preliminary

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[4] The court added that it had performed "an *Arends* review when the petition was originally filed and signed findings and orders," which the court believed "is also a substantive issue that has been raised." (R. 14:7.) *See State v. Arends*, 2010 WI 46, 325 Wis. 2d 1, 784 N.W.2d 513. As the parties agreed at the court of appeals, the circuit court's review was not actually an "*Arends* review," as such review occurs only in *discharge* proceedings. This case, however, concerns a proceeding for initial commitment.

contested matter" because "the outcome of the motion could have directly affected the presentation of the case." (R. 7:2.)

The chief judge concluded that in granting Matthews' request for an adjournment and receiving a waiver of his statutory right to a probable cause hearing, the circuit court "addressed and decided the substantive issue of whether [Matthews] could waive his statutory right to a timely hearing, and the outcome of the court's decision directly affected the presentation of Mr. Matthews' case within the meaning of Wis. Stat. § 801.58(1)." (R. 7:2.) The chief judge affirmed the trial court's denial of Matthews' request for judicial substitution.[5] (R. 7:3.)

The Court of Appeals' Decision

Matthews filed a petition for leave to review a non-final order, and the court of appeals granted his petition. (R. 10.) He argued that "the trial court was required to grant his substitution request because [his] request preceded any ruling by the trial court on a substantive issue in the case." (Pet-App. 106, ¶ 14.) In its published decision affirming the lower courts, the court of appeals disagreed. It concluded that Matthews' "judicial substitution request was properly denied as untimely." (Pet-App. 107, ¶ 16.)

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[5] Since the chief judge's decision denying substitution, the trial judge in Matthews' case, Judge Michelle A. Havas, has twice been reassigned during Milwaukee County's Judicial Rotation. As of June 11, 2020, Judge Havas is currently presiding over "Felony Division (Homicide/Sexual Assault Calendars)." https://county.milwaukee.gov/files/county/courts/Chief-Judge/Directives/Directive20-15-2020JudicialRotation-CourtroomandCalendarAssignments.pdf.

In so holding, the court looked to the plain language of Wis. Stat. § 801.58(1). (Pet-App. 105–07, ¶¶ 12, 15, 17.) It noted that the statute provides that a judicial substitution request must be filed "preceding the hearing of any preliminary contested matters[.]" (Pet-App. 107, ¶ 17.) The court concluded that, contrary to Matthews' argument, "the plain language of the statute itself does not require a trial court ruling on a substantive issue." (*Id*.)

The court of appeals also discussed the cases that support its decision that a "preliminary contested matter" does not require that the trial court rule on a substantive issue: *Sielen* and *Galaxy Gaming*. (Pet-App. 107–09, ¶¶ 18–23.) And under those cases, a trial court's ruling "must merely implicate the merits of the case." (Pet-App. 108, ¶ 19.) In Matthews' case, "the record supports our determination that Matthews' request for judicial substitution was untimely under WIS. STAT. § 801.58(1) because it was filed after the trial court heard a 'preliminary contested matter'—the request for adjournment at the probable cause hearing which had implications for the merits of the case." (Pet-App. 110, ¶ 25.)

This Court granted Matthews' petition for review.

ARGUMENT

Matthews' judicial substitution request was untimely under Wis. Stat. § 801.58(1).

Matthews argues that the trial court was required to grant his substitution request because his request was timely. But the denial of Matthews' request was proper because the request did not *precede* the probable cause hearing, which is a "preliminary contested matter" under Wis. Stat. § 801.58(1).

A. Standard of review

Whether a party is entitled to a substitution of judge under Wis. Stat. § 801.58 presents an issue of statutory interpretation, which this Court reviews *de novo*. *Galaxy Gaming*, 267 Wis. 2d 233, ¶ 33.

"[W]hen the language of a statute is unambiguous, 'statutory interpretation . . . is confined to the language of the statute.'" *Columbus Park Hous. Corp. v. City of Kenosha*, 2003 WI 143, ¶ 10, 267 Wis. 2d 59, 671 N.W.2d 633 (citations omitted) (three set of brackets omitted; one set of brackets added).

B. The plain language of Wis. Stat. § 801.58(1) requires a substitution request to be filed preceding the hearing of a contested matter.

Wisconsin Stat. § 801.58(1) sets forth the procedure for requesting substitution of a new circuit court judge in a civil action, including the time for filing the request. The statute provides in relevant part:

> Any party to a civil action or proceeding may file a written request . . . with the clerk of courts for a substitution of a new judge for the judge assigned to the case. The written request *shall be filed preceding the hearing of any preliminary contested matters.*

Wis. Stat. § 801.58(1) (emphasis added).

In *In re Commitment of Brown*, 215 Wis. 2d 716, 721–22, 573 N.W.2d 884 (Ct. App. 1997), the question presented was whether Wis. Stat. § 801.58 operated in a Chapter 980 proceeding. The *Brown* Court determined that under Wis. Stat. § 801.01(2), chapters 801 to 847, including § 801.58, apply to all civil proceedings. 215 Wis. 2d at 721. And, "proceedings under Chapter 980, STATS., are civil commitment proceedings." *Id.* at 721–22.

C. Matthews did not file his request before the probable cause hearing, which he does not dispute is a "preliminary contested matter" under Wis. Stat. § 801.58(1).

Matthews does not dispute that he requested substitution *after* the probable cause hearing, where the adjournment was granted. Nor does Matthews dispute that a probable cause hearing is a "contested matter" under Wis. Stat. § 801.58(1). Rather, Matthews argues that when the trial court granted the *adjournment* during the probable cause hearing, the trial court did not rule on any contested matters. (Matthews' Br. 11, 16.) And, Matthews' argument follows, an adjournment is not a "preliminary contested matter." (Matthews' Br. 9–10.)

But as the court of appeals pointed out, "[i]n this case, the matter was set for a contested probable cause hearing—not a motion to adjourn the hearing." (Pet-App. 108, ¶ 19 (emphasis added).) And a probable cause hearing is a "contested matter" under Wis. Stat. § 801.58(1) because at that hearing, the court has the power to determine whether there is probable cause to believe that the person named in the petition is sexually violent. Wis. Stat. § 980.04(2). It is a hearing for the parties to "contest" that ultimate issue. *See id*. So Matthews' argument that "[t]here was no possibility that the merits of the case would come into play," (Matthews' Br. 15), is not true. As the court of appeals noted, while the trial court ultimately granted Matthews' request to adjourn over the State's objection, the trial court retained "the power to deny the request for adjournment and to proceed with the probable cause hearing." (Pet-App. 108, ¶ 19.)

The State recognizes that the court of appeals framed the issue as whether Matthews' request was untimely "because the *adjournment* of the probable cause hearing was a 'preliminary contested matter[ ]' under WIS. STAT.

§ 801.58(1)." (Pet-App. 107, ¶ 16 (emphasis added).) And, Matthews argues to this Court, "[n]o Wisconsin court has held that a ruling on a motion to *adjourn* . . . is a preliminary contested matter." (Matthews' Br. 14–15.) But the *ultimate* issue is whether Matthews' substitution request was timely under Wis. Stat. § 801.58(1). The State's primary response to this issue is that Matthews' request for substitution was untimely because it was not filed preceding the hearing of the preliminary contested matter of *probable cause*, not adjournment. In other words, did Matthews file his substitution request *preceding* the probable cause hearing? The answer is, No.

While Matthews argues that "[i]t is immaterial that the court had *scheduled* a probable cause hearing" (Matthews' Br. 19), the State agrees. It *is* material, however, that Matthews never filed a written request for substitution "preceding" it. Wis. Stat. § 801.58(1). Had Matthews requested judicial substitution *before* the probable cause hearing, the State concedes that his substitution request would have been timely under the plain language of Wis. Stat. § 801.58(1). That is because such a request would have "preceded" a hearing of a contested matter. But Matthews waited two weeks *after* the probable cause hearing. And because his request for substitution did not *precede* it, his request is untimely.

D. The plain language of Wis. Stat. § 801.58(1) does not require that a trial court first decide a substantive issue.

Matthews next argues that when the trial court granted his request for adjournment at the probable cause hearing, it "had not resolved any substantive contested matters." (Matthews' Br. 13–14.) It was "solely a procedural matter." (Matthews' Br. 8.) Because of this, Matthews argues, his request for substitution two weeks after the probable cause

hearing was timely under Wis. Stat. § 801.58(1). (Matthews' Br. 23.) Matthews is mistaken; the plain language of the statue provides otherwise.

Wisconsin Stat. § 801.58(1) does not provide that a judicial substitution request shall be filed "before the court "reache[s] any substantive issues in the case." (Matthews' Br. 7, 10, 11, 13, 15–17, 21.) Rather, the unambiguous language of Wis. Stat. § 801.58(1) provides that a "written request [for a judicial substitution] shall be filed preceding the hearing of any preliminary contested matters." The probable cause hearing was a "preliminary contested matter" in this case. As the court of appeals aptly concluded, "the plain language of the statute itself does not require a trial court ruling on a substantive issue." (Pet-App. 107, ¶ 17.)

Matthews does not argue that Wis. Stat. § 801.58(1) is ambiguous. Rather, Matthews requests that this Court consider the statute's legislative intent (Matthews' Br. 10–11, 21), as opposed to the statute's plain language in deciding that his request was timely. But as this Court has held, "resort to legislative history is not appropriate in the absence of a finding of ambiguity." *State v. Setagord,* 211 Wis. 2d 397, 406, 565 N.W.2d 506 (1997). Because neither party argues that the statute is ambiguous, nor has any court held, "statutory interpretation . . . is confined to the language of the statute." *Columbus Park Hous.*, 267 Wis. 2d 59, ¶ 10 (citation omitted) (brackets omitted).

Regardless, even if this Court considers Matthews' legislative-intent argument, the court of appeals was correct: it fails. (Pet-App. 109–10, ¶ 23.)

E. The legislative intent of Wis. Stat. § 801.58(1) shows that Matthews is not entitled to judicial substitution. This is the classic case of testing the waters.

Matthews relies on *State ex rel. v. Tarney v. McCormack*, 99 Wis. 2d 220, 298 N.W.2d 552 (1980), and *Serocki v. Circuit Court for Clark Cty.,* 163 Wis. 2d 152, 471 N.W.2d 49 (1991) to argue that the legislative intent of Wis. Stat. § 801.58(1) favors substitution in his case. (Matthews' Br. 10–11.) The State disagrees.

In *Tarney*, the petitioner filed her request for substitution on the date she was notified of the assignment of the judge. 99 Wis. 2d at 236. This Court concluded that her request was timely because it "was filed preceding the hearing of any contested matter, and second, the request for substitution was filed promptly and without delay after the petition had notice of the judge assigned to the action." *Id*. at 234. Neither of those factors is present here. Further, in *Tarney*, this Court provided that "[t]he statutory provisions on substitution require that the request be filed before the judge has *heard* any contested matter." *Id*. (emphasis added). And, "[t]he reason for the statutory requirement is that a litigant who does not like the way a judge is handling a matter should not be able to substitute a second judge simply because the litigant believes things are going badly before the first judge and hopes to obtain a more favorable tribunal." *Id.* (*See also* Matthews' Br. 9.)

That's what happened in this case. At a preliminary contested hearing to address the merits of the case, the trial court expressed its frustration at the way Matthews' case was proceeding. As the transcript of the probable cause hearing reveals, things were "going badly" for Matthews. *See Tarney*, 99 Wis. 2d at 234. After the State objected to the extension of Wis. Stat. § 980.04(2)(b)2. 10-day deadline and the

adjournment, the trial court expressed that it was upset with Matthews' counsel that the case was "unable to go forward." (R. 13:5.) It stated:

- "I was asked to help out another court this morning; and I did not. I turned that down because we had what would amount to at least an hour's worth of testimony, probably more once cross-examination is done." (R. 13:5.)
- "I didn't hear a word about this until [the State's attorney] reached out this morning right before noon to say that she had received a text from [defense counsel] that said, We're going to request an adjournment today. We're not ready to go." (R. 13:5.)
- This "is a waste of the [c]ourt's time. It's a waste of the parties' times. It's a waste of the family members' time." (R. 13:5.)
- Defense counsel should have "at least [had] the respect to say we're back and not ready to go today would have freed a lot of people up, including the witness who was ready to come down to be at this hearing." (R. 13:6.)

Not *preceding* this hearing, but two weeks after it, Matthews requested judicial substitution. Under the legislative intent that Matthews relies on, he is not entitled to a judicial substitution because he requested it after things had started going badly.[6]

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[6] The State does not argue, as Matthews suggests (Matthews' Br. 22), that the trial court's displeasure with his motion to adjourn transformed the hearing into a preliminary contested matter. As the State explained above, its primary

Matthews' reliance on *Serocki* is also misplaced. There, on the day of the petitioner's recommitment hearing, the petitioner filed a judicial substitution request, which the court denied. 163 Wis. 2d at 156. This Court held that the original commitment proceeding is a preliminary contested matter, and therefore the petitioner's request for substitution at the recommitment hearing (before the same judge who presided over the original commitment proceeding) was not timely. *Id*. at 161. In so doing, this Court determined that "[a] party may not 'test the waters' with a particular circuit judge before requesting substitution." *Serocki*, 163 Wis. 2d at 156. But that's what happened here. Matthews "tested the waters" with the trial judge before he requested substitution.

To be sure, as Matthews points out, both *Tarney* and *Serocki* provide that the legislative intent of Wis. Stat. § 801.58(1) is that substitution be requested before a trial court reaches a "substantive issue." (*See* Matthews' Br. 7, 10, 14.) But this language does not mean that a party can *only* seek judicial substitution before the court reaches a substantive issue. In other words, when a trial court reaches a substantive decision, that is a *sufficient* condition, but not a *necessary* condition, for extinguishing the right to judicial substitution. And as explained below, caselaw also provides that the right to judicial substitution is extinguished if the circuit court *could have* ruled at the hearing in a way that implicated the merits of the case. (*See* Pet-App. 108, ¶ 19 (citing *Sielen*, 176 Wis. 2d at 113–14).)

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argument is that the probable cause hearing, which both parties attended, was the preliminary contested matter. The trial court's displeasure at the probable cause hearing is relevant only that it demonstrates that Matthews is attempting to accomplish that which Wis. Stat. § 801.58(1) was intended to prevent.

F. Case law supports the courts' decisions that Matthews' request for substitution was untimely.

As cited by both the chief judge and the court of appeals, *Sielen* and *Galaxy Gaming* support their decisions that Matthews' request was untimely. (R. 7:2; Pet-App. 107–10, ¶¶ 18–23.)

In *Sielen*, this Court denied a supervisory writ to compel officials of the circuit courts for Milwaukee County to honor Bernard and Cheryl Sielens' request for substitution of a judge in probate. 176 Wis. 2d at 103–04. The Sielens argued that a hearing on a motion to compel discovery was not a preliminary contested matter "because no evidence was received at the hearing." *Id.* at 113. Conversely, the estate argued "the dispositive question is whether the hearing concerned a substantive issue which went to the merits of the case." *Id.* The estate contended "that although no one testified at the motion to compel, the outcome of the motion could have directly affected the presentation of the case and thus was a 'preliminary contested matter.'" *Id.* This Court agreed with the estate. *Id.* It acknowledged that Wis. Stat. § 801.58(1) "provides that a request for substitution *must be filed before a hearing* on a preliminary contested matter." *Id.* at 109 (emphasis added). And, "because the Sielens did not file their request for substitution until after the hearing on their motion to compel discovery, their request for substitution was untimely." *Id.* at 114.

Similarly, in this case, the fact that no evidence was accepted at the probable cause hearing is not dispositive. (Matthews' Br. 16.) Rather, the probable cause hearing was a "contested matter" that similarly *could have* affected the presentation of Matthews' case. *See Sielen,* 176 Wis. 2d at 113. Specifically, the trial court could have denied Matthews' request for additional time and an adjournment and

compelled Matthews' attorney to participate in the hearing for which he was unprepared. The court could have found probable cause exists for commitment, which clearly would have "implicated the merits of the case." *See id.* at 114.

In *Galaxy Gaming*, a law firm sued former clients, including a partnership and a guarantor, to recover legal fees incurred in prior litigation. 267 Wis. 2d 233, ¶¶ 5–9. The partnership filed an answer to the complaint and a motion for an emergency protective order delaying depositions until the partnership had reviewed discovery materials. *See id.* ¶¶ 10, 36. The law firm then filed a motion to compel discovery. *Id.* ¶ 10. The trial court denied the partnership's motion for a protective order, granted the law firm's motion to compel, and imposed costs on the partnership. *Id.* After the guarantor was served with the complaint, the guarantor filed an answer and a request for judicial substitution. *Id.* The trial court denied the request for substitution as untimely, concluding that the hearing on the discovery motions was a hearing on a preliminary contested matter. *Id.* ¶ 36. The court of appeals affirmed. *Id.* ¶¶ 36–38. It recognized that *Sielen* controlled, and that the discovery motion hearing was a preliminary contested matter within the meaning of Wis. Stat. § 801.58(1). *Id.* ¶ 38.

In this case, Matthews requested additional time and an adjournment, and the State objected. As the court of appeals noted, "[t]he trial court had to decide whether there was good cause to adjourn the hearing and whether to accept Matthews' waiver of the hearing deadline." (Pet-App. 109, ¶ 22.) The trial court's decisions "had implications for further proceedings on the merits of the State's petition to commit Matthews as a sexually violent person." (Pet-App. 109, ¶ 22 (citing *Sielen*, 176 Wis. 2d at 114).) This is because even if both parties had *agreed* to adjourn and extend the deadline, the trial court still could have proceeded with the probable

cause hearing, which would have had implications on the merits of whether probable cause exists to commit Matthews.

Additionally, as the trial judge, the chief judge, and the court of appeals concluded, Matthews' request for an extension of the 10-day statutory deadline for the probable cause hearing was *itself* a preliminary contested matter. (14:3; 7:2; Pet-App. 109, ¶ 22.) As Matthews notes (Matthews' Br. 3), under Wis. Stat. § 980.04(2)(b)2., a circuit court "shall" hold the probable cause hearing "no later than 10 days after the person's scheduled release or discharge date . . . unless that time is extended by the court *for good cause shown upon its own motion, the motion of any party, or the stipulation of the parties*." (Emphasis added). Here, "good cause" was not shown upon the court's "own motion," nor the "stipulation of the parties." Wis. Stat. § 980.04(2)(b)2. The court found "good cause" when it granted Matthews' an extension of the statutory deadline only upon Matthews' *contested* request. As the record shows, defense counsel argued at the probable cause hearing, "we're requesting additional time. We spoke with Mr. Matthews about a request for the delay, and he doesn't have any objection to waiving the 10-day limit." (R. 13:3.) When the court asked the State's response, it "object[ed] to not moving forward." (R. 13:4.) So the trial court's determination on whether "good cause" existed to extend the statutory deadline was, as all courts have held, a preliminary contested matter.

Matthews next relies on *Pure Milk Prod. Coop. v. Nat'l Farmer's Org.*, 64 Wis. 2d 241, 219 N.W.2d 564 (1974), to support his claim that because the trial court did not *rule* or *reach* any substantive issue, that it was required to grant his request for substitution. (Matthews' Br. 11–14.) Matthews is incorrect.

In *Pure Milk,* this Court noted that "the narrow question here is whether the fact that the case had not been

noticed for trial made [a] request [for judicial substitution] timely where there had already been preliminary proceedings on the preliminary injunction request." 64 Wis. 2d at 246. The defendants contended that their request for substitution was timely under the governing statute,[7] which allowed the request to be filed up to, and within, ten days after the case had been noticed for trial. *Id.* This Court disagreed. It held that the defendants' request was untimely because the parties had already participated in a hearing on a temporary injunction request. *Id.* at 247. This Court stated: "We conclude that the legislature could not have intended by the wording of [the statute] to allow a change [of judge] after the hearing of a contested motion which *implicates the merits* of the action." *Id.* at 249 (emphasis added).

While Matthews argues that *Pure Milk* "makes plain that Mr. Matthews' request was timely" because he sought substitution before the trial court "reached" a substantive issue or received any evidence (Matthews' Br. 11–13), his interpretation of *Pure Milk* is incorrect. Like in *Pure Milk,* before Matthews' request for substitution, the parties participated in a hearing regarding "preliminary contested matters"—the probable cause hearing—during which the State contested Matthews' extension (or "waiver") of Wis. Stat. § 980.04(2)(b)2.'s 10-day time limit and request for adjournment. The hearing clearly "implicate[d]the merits," *Pure Milk*, 64 Wis. 2d at 249, in Matthews' case: is there

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[7] That statute, Wis. Stat. § 261.08(1) (1971-72), provided:

> Any party to a civil action or proceeding may file a written request with the clerk of courts for a substitution of a new judge for the judge assigned to the trial of the case. The written request shall be filed . . . within [ten] days after the case is noticed for trial....

probable cause for him to be committed as a sexually violent person under Chapter 980?

While Matthews next argues that the cases decided after *Pure Milk* "have reaffirmed that it only bars substitution after the court decides a *substantive* issue in the case" (Matthews' Br. 14 (emphasis added) (citing *Tarney*, *Serocki,* and *Siele,* and *State ex rel. Carkel v. Cir. Ct. for Lincoln Cty*))[8], again, that is not what *Pure Milk* held, and none of the subsequent cases provide that a party can "only" seek judicial substitution before the court decides a substantive issue. Deciding a substantive decision is a *sufficient* condition for extinguishing the right to substitution, but it is not a *required* condition.

G. A "reasonable interpretation" of Wis. Stat. § 801.58(1) does not provide that the trial court "lost competency to hear this case."

Finally, Matthews argues that Wis. Stat. § 801.58(1) must be interpreted reasonably. (Matthews' Br. 17.) The State agrees.

The State is not asking that this Court hold that a reasonable interpretation of the statute is that when a party seeks an adjournment, it extinguishes that party's right to substitution. (Matthews' Br. 18.) Nor is the State asking this Court to hold that if a trial court has "scheduled" a probable cause hearing, that a party cannot file a request for judicial substitution before that hearing. (Matthews' Br. 19.) Further, the State *agrees* with Matthews, as the State did in the court

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[8] In *State ex rel. Carkel v. Cir. Ct. for Lincoln Cty.,* 141 Wis. 2d 257, 265, 414 N.W.2d 640 (1987) (citation omitted), the Supreme Court determined that "a litigant who does not like the way a judge is handling a matter should not be able to substitute a second judge simply because the litigant believes things are going badly before the first judge and hopes to obtain a more favorable tribunal."

of appeals (Pet-App. 104, ¶ 8 n.2), that the trial court's initial *ex parte* finding of probable cause is irrelevant to the issue of whether Matthews' substitution request was timely. (*See* n.4, *supra*.)

But the State does *not* agree with Matthews that the statute should be interpreted to provide that the trial court "lost competency to hear the case" once Matthews filed his substitution request. (Matthews' Br. 21.) Rather, as Wis. Stat. § 801.58(2) provides, a trial court loses competency only "[i]f the request is found to be made timely." The trial court, appropriately in this case, found the opposite. When Matthews filed his request for substitution two weeks *after,* not *preceding,* a "hearing of any preliminary contested matters"—the probable cause hearing—it was untimely. Wis. Stat. § 801.58(1).

Finally, Matthews argues that the trial court's "dissatisfaction with the substitution request does not make it untimely." (Matthews' Br. 21.) The State is not suggesting that it does, and the trial court here made no such conclusion. The State is also not suggesting that the trial court's "displeasure with the adjournment" (Matthews' Br. 22) controls whether his request for judicial substitution was timely, and, again, the trial court made no such conclusion.

But the law (as well as the plain language of the statute) does *not* require that a trial court must reach a substantive matter before it can deny a request for substitution as untimely. (Matthews' Br. 23.) Wisconsin Stat. § 801.58(1) is unambiguous, and so this Court should apply its plain languge: a party to a civil action may file a written request for judicial substitution "preceding the hearing of any preliminary contested matters." Wis. Stat. § 801.58(1). Matthews did not do so.

The probable cause hearing is a hearing of a preliminary contested matter. Under Wis. Stat. § 801.58(1), Matthews' substitution request, filed two weeks after that hearing, was untimely.

CONCLUSION

The State respectfully requests that this Court affirm the court of appeals' decision that Matthews' request for judicial substitution was untimely.

Dated this 29th day of October 2020.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 5,449 words.

Dated this 29th day of October 2020.

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SARA LYNN SHAEFFER
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 29th day of October 2020.

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