STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III
Case No. 2020AP1580

In the matter of the mental commitment of A.A.:

RUSK COUNTY

Petitioner-Respondent,

v.

A.A.,

Respondent-Appellant.

Appeal from an Order of Extension of Commitment and an Order for Involuntary Medication or Treatment Entered by the Rusk County Circuit Court, the Hon. Steven P. Anderson Presiding

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BRIEF AND APPENDIX OF RESPONDENT-APPELLANT

COLLEEN D. BALL
Assistant State Public Defender
State Bar No. 1000729

Office of the State Public Defender
735 N. Water Street - Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
ballc@opd.wi.gov

Attorney for Respondent-Appellant

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ISSUES PRESENTED

1. Whether the 14th Amendment and the Wisconsin Statutes require a county to allege facts in support of a petition for recommitment.

The circuit court held that the Rules of Civil Procedure govern the contents of a petition for recommitment, and they do not require a complainant to allege facts in support of a claim for relief.

2. Whether the subject of a petition for recommitment must make a motion to dismiss the petition for failure to state claim before the final commitment hearing.

The circuit court answered "yes."

3. Whether an expert's reliance on hearsay evidence to form the basis of his opinion transforms the hearsay into admissible evidence.

The circuit court answered "yes."

POSITION ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not necessary because the parties' briefs can fully present the issues for review. Wis. Stat. §809.22(2)(b). However, this appeal presents issues of first impression that merit a published decision. Wis. Stat. §809.23(1) and (5).

The Wisconsin Supreme Court's decision in *Waukesha County v. S.L.L.*, 2019 WI 66, ¶¶24-27, 387 Wis. 2d 333, 929 N.W.2d 140 upended Wisconsin recommitment pleading and procedure.[1] The circuit court tried to address the problem by applying the Rules of Civil Procedure, even though they conflict with §51.20. If the Rules of Civil Procedure are to govern petitions for recommitment, then the court of appeals should establish that point in a published decision so that the bench and the bar know how to proceed. On the other hand, if the court of appeals agrees that *S.L.L.* conflicts with due process and the plain language and history of §51.20, then it should certify this case to the Wisconsin Supreme Court so it may modify the decision.[2]

STATEMENT OF CASE AND FACTS

On January 9, 2020, Rusk County filed a petition to recommit Andy,[3] which alleged in full:

> Rusk County, by its Corporation Counsel, Richard J. Summerfield, for the reasons set forth in the attached Affidavit of Chris Soltis, Behavioral Health Coordinator, moves the court for a 12 month extension of the involuntary

[1] In some places the legislature uses the term "extension of commitment," and in other places it uses the term "recommitment." This brief uses the term "recommitment."

[2] Counsel filed a §809.41 motion for a three-judge panel so that the court of appeals could publish its decision. The motion identifies issues that are different from the ones raised in this brief. However, the briefed issues still merit publication.

[3] Pursuant to §809.19(1)(g), this brief refers to A.A. with the pseudonym "Andy."

> commitment ordered by this court on August 2, 2019. (R.37).

The attached Affidavit of Chris Soltis states in full:

> 1. That your affiant is the Behavioral Health coordinator of Rusk County Health and Human Services Board and a resident of Rusk County, State of Wisconsin.
>
> 2. That [Andy] was found to be mentally ill on August 02, 2019 by the Rusk County Circuit Court and was involuntarily committed to the Rusk County Health and Human Services Board for treatment.
>
> 3. That [Andy] remains under commitment in the community and is receiving treatment on a regularly prescribed basis, monitored by Rusk County Health and Human Services.
>
> 4. That if treatment were withdrawn there is a substantial likelihood based on [Andy's] treatment record that he/she would be a proper subject for ***treatment*** under Sec. 51.20(1)(a). Wis. Stats.[4]
>
> 5. That your affiant's knowledge of Andy's continued need for treatment is based on the following current diagnosis of Psychotic Disorder, Schizophrenia (Paranoid Type).

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[4] The County has filed the identical affidavit in at least 4 proceedings to commit Andy. (R.135-141). They all contain the same error. The correct standard for recommitment is: if treatment were withdrawn, the individual would become a proper subject for "commitment," not treatment. Wis. Stat. §51.20(1)(am).

> 6. That this Affidavit is made in support of the Petition for Extension of Involuntary Commitment. (R.38). (Emphasis supplied).

As the County's petition for recommitment and affidavit failed to allege any facts suggesting probable cause to believe that if treatment were withdrawn Andy would become a proper subject for commitment, defense counsel moved to dismiss the County's petition for failure to set forth a factual basis for recommitment. (R.59:3).

The County responded:

> Judge, I don't know that under [§51.20(13)(g)3] that that's necessary. In any event, I believe that meets the statutory requirements because it just says ***application*** of—***for extension of commitment*** by DHS or the county having custody and that's exactly what was done here. (R.59:4). (Emphasis supplied).

Referring to §51.20(13)(g)3, the County explained: "I don't believe that the statutes simply outlines [sic] what that ***application*** needs to state. (R.59:5). (Emphasis supplied).

Then defense counsel countered that basic rules of civil procedure should apply, and those would require the County to state a basis for believing that it has a claim. (R.59:5). Neither the petition nor the Soltis Affidavit satisfied this requirement. (R.59:5-6).

The circuit court did not explicitly say which statute governs the contents of a petition for recommitment. It stated: "First of all, Mr. Summerfield is right that it's notice pleading in the

State of Wisconsin ***if we're using rules of civil procedure***." (R.59:7). (Emphasis supplied). It then held that the Soltis Affidavit provided sufficient notice by alleging the legal or medical conclusion that "if treatment were withdrawn there is substantial likelihood based on Andy's treatment record that he or she would be a proper subject for treatment and that there's a current diagnosis." (R.59:7).

The court also denied defense counsel's motion to dismiss because it was made at the time of the final hearing.

> . . . I think the timing of the motion is, you know, not appropriate. This was filed back on January 9th, 22 days ago. And I understand that it's an accelerated process in these cases, but it's been 22 days. A motion to dismiss based upon deficiencies or defects in the petition should have been filed before today where we're all here assembled ready to do the final hearing in this case. So we'll deny the motion to dismiss. (R.59:8).

At this point, the County called Dr. Helfenbein, the medical director of Sacred Heart Hospital's psychiatric unit, as its sole witness. He spent about 30 minutes evaluating Andy for the recommitment. (R.59:20).

Dr. Helfenbein testified that Andy has schizophrenia and that this is a substantial disorder of thought, which includes delusions, hallucinations, and disorganized thoughts. (R.59:12). Allegedly Andy hears voices telling him to do such things as commit suicide. (R.59:13). The disorder grossly impairs Andy's judgment, behavior, capacity to recognize

reality and ability to meet the ordinary demands of life. (R.59:12). However, it does not impair his ability to eat, drink, dress himself and so forth. (R.59:14).

Dr. Helfenbein opined that Andy is a proper subject for treatment because atypical antipsychotics would cause his delusions and hallucinations to dissipate and his judgment and behavior would improve. (R.59:14-15).

He further testified that if treatment were withdrawn Andy would become a proper subject of commitment. Without medication an excessive amount of dopamine would develop in the brain and an "excessive amount of dopamine in the brain will cause psychosis." (R.59:16).

The County asked Dr. Helfenbein for examples from Andy's treatment record where this led him to be dangerous to himself and others. Defense counsel objected:

> Attorney Stephanie Thomas: Objection, Judge. The doctor can testify as—can testify as to his professional opinion and his professional opinion can be based on hearsay
>
> The Court: Uh-hum.
>
> Attorney Stephanie Thomas: But he is not to be a conduit for hearsay either otherwise—otherwise inadmissible hearsay. And so I don't think he can testify without having personal knowledge or some other hearsay exception as to what he's been told or what he's read as to these prior events.

> The Court: Unless it goes to the basis of his opinion.
>
> Attorney Richard Summerfield: Right. Which the statute specifically states based upon the treatment record.
>
> The Court: Okay all right. It's overruled on those grounds. I mean, with that understanding.
>
> Attorney Stephanie Thomas: I would just like to continue my objection for the record.
>
> The Court: Okay. (R.59:16-17).

The County again asked Dr. Helfenbein what events from the treatment record led him to believe that Andy would be dangerous if treatment were withdrawn. Dr. Helfenbein said that Andy had run away from the group home because he felt he was not safe there. He was disorganized and psychotic and told police to kill him and that he wanted or was trying to get their gun. (R.59:17).

Dr. Helfenbein testified that he explained the advantages, disadvantages, and alternatives to medication to Andy and that he was in fact able to understand them. (R.46:4, ¶12; R.59:19). However, he was not able to apply this understanding to his condition. When asked why, Dr. Helfenbein replied:

> Because he just didn't understand it. He needed the medication to prevent psychosis. He was able to tell me that the medicines had the advantages and disadvantages, but he just didn't think he needed them. (R.59:19).

According to Dr. Helfenbein, Andy "implied" that he does not have a mental illness and that his delusions are due to reality. (R.59:22).

On cross-examination, Dr. Helfenbein admitted that he had no personal knowledge of the other residents at Andy's group home or whether they have a history of violent or dangerous behavior. Nor did he know how the other residents interact with Andy or anything beyond what he read in a statement of emergency detention. (R.59:23-24).

The circuit court ordered a 12-month recommitment and involuntary medication. (R.101-103). It noted Dr. Helfenbein's testimony that Andy has schizophrenia, which affects his thoughts and creates delusions. "Particular concern with [Andy] is that he feels that he is in some kind of danger at the group home or the group home is not safe for him. And so he has run away from the group home and he has threatened to get a gun and shoot himself. He has told people that." (R.59:27)

The court also noted that with appropriate medication Andy would not experience hallucinations. Thus, he is a proper subject for treatment. The court added: "As the doctor indicated if he is left untreated or if the commitment is terminated if he's taken out of the commitment, it is the doctor's opinion that he would again become a proper subject for mental commitment, based upon his review of the record in the case." (R.59:28).

Regarding the County's request for an involuntary medication order, the court held: "The doctor testified fairly extensively and made very clear

that Andy is not capable of applying his understanding of the need for medications in his particular case. He does not believe he suffers from schizophrenia. He does not believe he needs the medications." (R.59:28).

ARGUMENT

I. Overview: The due process and statutory rights at issue.

A "civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protections." *Addington v. Texas*, 441 U.S. 418, 425 (1979). In 1972, Chapter 51 was declared unconstitutional partly because it failed to protect two 14th Amendment due process rights. One is the individual's right to notice of both the legal standard and the basis for his commitment stated with particularity. *Lessard v. Schmidt* 349 F. Supp. 1078, 1092 (E.D. Wis. 1972).[5] Another is the individual's right to confront and cross-examine witnesses, which is defeated when a court admits hearsay evidence. *Id.,* at 1102-1103. When the Wisconsin legislature repealed and recreated Chapter

[5] The full cite is *Lessard v. Schmidt*, 349 F. Supp. 1078 (E.D. Wis. 1972), *vacated and remanded on procedural grounds*, 414 U.S. 473 (1974), (E.D. Wis. 1974), *judgment reentered*, 379 F. Supp. 1376 (E.D. Wis. 1974), *vacated and remanded on procedural grounds*, 421 U.S. 957 (1975), *judgment reentered*, 413 F. Supp. 1318 (E.D. Wis. 1976). According to *Outagamie County v. Michael H.,* 2014 WI 127, ¶¶ 25 n.19, 27, 359 Wis. 2d 272, 856 N.W.2d 603, despite *Lessard*'s unusual procedural history, its requirements have withstood the test of time.

51, it codified these rights in §51.20(1)(a), (am), and (c)(right to notice of standard and basis for commitment) and §51.20(5)(a)(right to due process and to cross-examine witnesses).

In Andy's case, the County first violated his due process and statutory rights when it filed a petition for recommitment without identifying any facts to indicate that Andy currently satisfies §51.20(1)(am). It violated his due process and statutory rights again at trial when it failed to offer a fact witness to establish the truth of the hearsay that Dr. Helfenbein relied upon to form his opinion that Andy was dangerous. This prevented Andy from confronting and cross-examining the witnesses who reportedly observed his behavior.

II. The circuit court erred in holding that Wisconsin law does not require a county to allege facts in support of a petition for recommitment.

A. The standard of review and principles of statutory construction.

Whether Wisconsin law requires a county to alleged facts to support a petition for recommitment poses a question of statutory interpretation, which the court of appeals reviews de novo. *Duncan v. Asset Recovery Specialists, Inc.*, 2020 WI App 54, ¶10, 393 Wis. 2d 814, 948 N.W.2d 419.

Statutory interpretation begins with the plain language of the statute. A court must give statutory language its "common, ordinary, accepted meaning" unless it uses technical or specially-defined words or

phrases. *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110. It must construe the statute to give reasonable effect to every word. It must avoid creating surplusage and absurd or unreasonable results. *Id.*, ¶46. Also, when construing a statute, the court must consider its structure and interpret its language in context, not in isolation, but as part of a whole in relation to surrounding or closely-related statutes. *Id.*

B. The plain language and structure of §51.20 indicate that a petition for recommitment must comply with §51.20(1), which requires a county to allege facts showing probable cause for commitment.

1. The meaning of §51.20(13)(g)3.

While it is not clear, the circuit court and the parties appear to have proceeded on the assumption that due to §51.20(13)(g)3, §51.20 does not prescribe the contents of an "application" for recommitment, therefore the Rules of Civil Procedure apply. (R.59-5-7). The elephant in the courtroom was *S.L.L.*, which held that recommitment proceedings are "governed by §51.20(10) through (13), not §51.20(1*)." S.L.L.*, ¶24. By this logic, a petition for recommitment need not allege "a clear and concise statement of the facts that constitute probable cause to believe the allegations of the petition." *Id.*

S.L.L. misunderstood §51.20's recommitment procedure.[6] Section 51.20(13)(g)3 provides in part:

> Upon application for extension of commitment by the department or the county department having custody of the subject, the court shall proceed under subs. (10) to (13).

The common, ordinary meaning of "upon" in this context is "immediately or very soon after."[7] The common, ordinary meaning of "application" is "the act of requesting."[8] And the common, ordinary meaning of "shall" is "must."[9] Accordingly, §51.20(13)(g)3 does not speak to the contents of an application for recommitment. Nor does it exempt recommitment proceedings from §51.20(1) through (9). It simply provides that after a county applies for recommitment, the court must comply with §51.20(10)(hearing requirements), §51.20(11)(jury trials), §51.20(12)(open hearings), and §51.20(13)(dispositions). In other words, the court cannot recommit a person without a hearing or trial and without disposing of the case as provided in (10) through (13).

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[6] Andy does not ask the court of appeals to overrule *S.L.L.* He notes that *S.L.L.* construed §51.20(13)(g)3 and §51.20(1)(c) without considering points noted throughout this brief. Also, Andy is preserving the correct interpretation of Chapter 51's recommitment scheme for further review, if necessary.

[7] *See* https://www.dictionary.com/browse/upon?s=t (last visited 11/25/20).

[8] *See* https://www.dictionary.com/ browse/application?s=t (last visited 11/25/20).

[9] *See* https://www.dictionary.com/browse/shall?s=t (last visited 11/25/20).

If §51.20(13)(g)3 is construed to mean that only (10) through (13) apply to recommitment proceedings, then §51.20(1)(am), the alternate standard of dangerousness for a recommitment would not apply to a recommitment proceeding.[10] That is an absurd result.

2. Section 51.20(1) governs a petition for examination for recommitment and requires a county to allege a clear and concise statement of facts constituting probable cause to believe the petition's allegations.

An "application" for a recommitment begins when "the department, or the county department to which an individual is committed" files an evaluation of the individual and the recommendation regarding the individual's recommitment with the commitment court. Wis. Stat. §51.20(13)(g)2r.

Then, if corporation counsel believes that an involuntary commitment is appropriate, he or she must draft the petition and represent the public's interest in all proceedings. *See* Wis. Stat. §51.20(13)(g)2r (providing for a "petition for recommitment" as distinct from the department's or county department's "evaluation and recommendation.") *See also*, Wis. Stat. §51.20(4)(a) and (b)(requiring corporation counsel to "draft all

[10] It also would mean that §51.20(1m), (2)(a) and (2)(c) do not apply at the recommitment stage even though these provisions explicitly incorporate §51.20(1)(am). *S.L.L.* did not consider these points.

necessary papers related to" a commitment action, including any "petition.")

Corporation counsel's petition must be filed "under subd. (1)," which refers to §51.20(1). *See* Wis. Stat. §51.20(4)(b).

Section 51.20(1)(a) provides:

> **51.20** Involuntary commitment for treatment. ***(1) Petition for Examination.*** (a) ***Except as provided in*** pars. (ab), ***(am)***, and (ar), ***every written petition for examination shall allege*** that all of the following apply to the subject individual to be examined:
>
> 1. The individual is mentally ill . . . and is a proper subject for treatment.
>
> 2. The individual is dangerous because he or she does any of the following: (Emphasis supplied).

Subsection 2(a)-(e) then list 5 different standards of dangerousness that a county may choose to allege in a petition for examination at the initial commitment stage. If the county is seeking a recommitment, then its petition for examination may instead allege dangerousness under the standard in §51.20(1)(am).

Any petition filed under §51.20(1)must comply with §51.20(1)(c), which provides in part:

> . . . ***The petition shall contain a clear and concise statement of the facts which constitute probable cause to believe the allegations of the petition.*** The petition shall be sworn to be true. If a petitioner is not a petitioner having personal knowledge as

> provided in par. (b), the petition shall contain a statement providing the basis of his or her belief. (Emphasis supplied).

The plain language of §51.20(2)(a) makes clear that §51.20(1)(c) applies to a petition for recommitment. Section 51.20(2)(a) provides:

> (2)(a) Notice of Hearing and Detention. (a) Upon the filing of a petition for examination, ***the court shall review the petition*** within 24 hours after the petition is filed, excluding Saturdays, Sundays, and legal holidays, to determine whether an order of detention should be issued. The subject individual shall be detained only if ***there is cause to believe that the individual*** is mentally ill, drug dependent or developmentally disabled, and the individual ***is eligible for commitment under subd***. (1)(a) or ***(1)(am)*** based upon specific recent overt acts, attempts or threats to act or on a pattern of recent acts or omissions by the individual. Wis. Stat. §51.20(2)(a)(Emphasis supplied).[11]

If §51.20(1)(c)'s "clear and concise statement of the facts constituting probable cause" requirement does not apply to a petition for recommitment, it yields an absurd result. The circuit court is unable to fulfill its statutory mandate under §51.20(2)(a)—

[11] Originally, §51.20(2)(a) through (d) were all one paragraph. *See* 1975 Wis. Act 430 §11. In 1999, the legislature broke §51.20(2) into 4 subparts "for improved readability." *See* Note to 1999 Wis. Act. 83, §110. Thus, before 1999 the entirety of §51.20(2) applied to proceedings for recommitment under (1)(am). The legislature did not exempt recommitments from §51.20(2) when it divided the subsection into four parts. *S.L.L.* did not consider this point.

reviewing the petition for probable cause that the individual is eligible for commitment under "(1)(am)," the alternate standard of dangerousness for a recommitment proceeding.[12]

To summarize, a recommitment proceeding begins when DHS or the county department files an evaluation and recommendation regarding recommitment and corporation counsel drafts and files a petition for examination under §51.20(1). The petition must allege that the individual is mentally ill, a proper subject for treatment, and dangerous as required by §51.20(1)(a). Except as provided by (am), corporation counsel may allege that the person is dangerous under the alternate standard of dangerousness available for a recommitment proceeding. The circuit court reviews the petition for probable cause for a recommitment and possible detention and issues a notice of hearing and, if necessary, an order for detention. Wis. Stat. §51.20(2)(a). Whether the individual is to be detained or not, he must be served with a copy of the notice of hearing, a copy of the petition and detention order (if any), and a notice of his rights. Wis. Stat. §51.20(2)(b).

In Andy's case, the County's petition for recommitment violated §51.20(1)(c) because it did not allege a "clear and concise statement of the facts which constitute probable cause to believe the allegations of the petition." The circuit court erred when it held that the County was not required to

[12] *S.L.L.* did not consider this point.

allege a factual basis for recommitting Andy under §51.20(1)(am).

C. If the Rules of Civil Procedure apply to a petition for recommitment, they require a county to allege facts to support its claim.

Section 51.20(10)(c) provides in part: "Except as otherwise provided in this chapter, the rules of evidence in civil actions and s. 801.01(2) apply to any judicial proceeding or hearing under this chapter." Next, §801.01(2) provides in part: "Chapters 801 to 847 govern procedure and practice in circuit courts in this state in all civil actions and special proceedings whether cognizable as cases at law, in equity, or of statutory origin except where a different procedure is prescribed by statute or rule." If §51.20(13)(g)3 is construed to preclude §51.20(1)'s application to a petition for recommitment, then in theory §802.02(1)(a)'s "general rules of pleading" applies.

However, §802.02(1)(a) conflicts with the structure, purpose and plain language of §51.20 Section 802.02(1)(a) operates on the assumption that a party is "setting forth a claim for relief" against another party, that a "transaction" or "occurrence" has arisen between the two, and that one party is demanding a "judgment for relief" against the other party.

In contrast, §51.20 contemplates a government entity petitioning a probate court for an examination and possible detention of an individual based on his alleged mental illness, suitability for treatment, and dangerous behavior. It requires the probate court to review the government's pleading for probable cause

before it may proceed. If the county ultimately proves its case, the probate court enters an order for involuntary commitment, medication and treatment, thereby allowing the government to override the individual's liberty interests. The probate court does not enter a "judgment for relief" in favor of the county and against the individual.

If §802.02(1)(a) nevertheless applies, it requires the county to allege facts to support its pleading. Section 802.02(1) provides in part:

> A pleading that sets forth a claim for relief . . . shall contain all of the following:
>
> (a) A short and plain statement of the claim, identifying the transaction or occurrence or series of transactions or occurrences out of which the claim arises and showing that the pleader is entitled to relief.

The Wisconsin Supreme Court recently explained that this provision requires the pleader to allege facts:

> In order to satisfy Wis. Stat. §802.02(1)(a), a complaint ***must plead facts, which if true, would entitle the plaintiff to relief***. *Strid*, 111 Wis. 2d at 422-23, 331 N.W.2d 350 ("It is the sufficiency of the facts alleged that control[s] the determination of whether a claim for relief is properly [pled].") ***Bare legal conclusions set out in a complaint provide no assistance in warding off a motion to dismiss.*** *See John Doe 67C*, 284 Wis. 2d 307, ¶19, 700 N.W.2d 180. Plaintiffs must allege facts, that if true, plausibly suggest a violation of applicable law.

Data Key Partners v. Permira Advisers LLC, 2014 WI 86, ¶21, 849 N.W.2d 693. (Emphasis supplied)(dismissing a complaint for failure to allege facts suggesting that the complainant was entitled to relief). Clearly, even under §802.02(1)(a) a complainant many not simply allege a legal conclusion. It must allege facts in support of the legal conclusion.

In Andy's case, the County's petition, signed by corporation counsel, alleged nothing. (R.37). It merely attached a form affidavit by social worker Chris Soltis, which alleged a bare legal conclusion that if treatment were withdrawn, there is substantial likelihood that Andy would be a "proper subject for treatment under Sec. 51.20(1)(a)." (R.38, ¶4). Aside from his diagnosis of schizophrenia, it did not allege a single fact to support this legal conclusion. Under the Rules of Civil Procedure and *Data Key Partners*, the circuit court erred in holding that the County was not required to allege a factual basis in support of its petition for recommitment.

III. The circuit court erred in holding that Andy's motion for dismissal was late.

Section 51.20 does not prescribe any deadline for moving to dismiss a petition for commitment or recommitment. Assuming that the absence of a motion deadline in §51.20 means that §51.20(1)(c), and hence the Rules of Civil Procedure control motion practice, then the circuit court erred in holding that those rules barred Andy from moving to dismiss at the start of his recommitment hearing.

Section 802.06 governs defenses and objections. Under §802.06(2), Andy could assert the "failure to state a claim upon which relief can be granted" either in response to a pleading, if a response was required, or by motion. However:

> If a pleading sets forth a claim for relief to which the adverse party ***is not required to serve a responsive pleading, the adverse party may assert at trial any defense in law or fact to that claim for relief***.

Wis. Stat. §802.06(2)(b)(emphasis supplied).

Section 51.20 does not require the individual to serve a responsive pleading to a county's petition for recommitment. Therefore, Andy was entitled to assert his defense that the County failed to allege sufficient facts to state a claim upon which relief could be granted at the time of his recommitment trial. Under the Rules of Civil Procedure, the circuit court should have granted Andy's motion and dismissed the County's petition for recommitment.

IV. The circuit court erred in admitting hearsay evidence of Andy's alleged dangerousness, and the error was harmful.

A. The circuit court erred in admitting hearsay evidence of dangerousness.

Hearsay is an out of court statement offered to prove the truth of the matter asserted. It is not admissible into evidence unless an exception applies. *See* Wis. Stat. §908.02, §908.03. Under the Rules of Evidence as applied to an involuntary commitment

proceeding, an examining doctor is permitted to rely on inadmissible hearsay in forming his opinion, but the underlying hearsay is still inadmissible. *See* Wis. Stat. §907.03; *S.Y. v. Eau Claire County*, 156 Wis. 2d 317, 327-328, 457 N.W.2d 326 (Ct. App. 1990), *aff'd*, 162 Wis. 2d 320, 338, 469 N.W.2d 836 (1991).

In *S.Y.*, an expert who had limited personal contact with the subject of a commitment proceeding testified that medical reports indicated he had committed an unprovoked assault on another person. S.Y.'s medical records were neither authenticated at the commitment proceeding nor offered into evidence. The court of appeals held that the admission of the doctor's testimony about the assault was erroneous.

> [Dr.] Caillier had only limited personal contact with S.Y. His testimony was based almost completely on S.Y.'s medical records. However, the medical records were not authenticated at trial or offered into evidence. *See Chapnitsky v. McClone*, 20 Wis. 2d 453, 461, 122 N.W.2d 400, 404 (1963). Callier's position as an expert witness does not allow him to introduce inadmissible hearsay evidence. While experts may rely on inadmissible evidence in forming opinions, sec. 907.03, Stats., the underlying evidence is still inadmissible. *See State v. Coogan*, 154 Wis. 2d 387, 399-401, 453 N.W.2d 186, 190-91 (Ct. App. 1990).

S.Y., 162 Wis. 2d at 328.

In Andy's case, the County asked Dr. Helfenbein to give examples of Andy's dangerousness, and he replied that Andy ran away from his group home because he felt unsafe there. He was

disorganized and psychotic, told police to kill him, and/or tried to get their gun. (R.59:17). Dr. Helfenbein admitted that he had no personal knowledge of this information. (R.59:23-24). The County did not call a fact witness to testify to any hearsay evidence referenced by Dr. Helfenbein. Nor did it authenticate and offer records noting these alleged facts. Pursuant to *S.Y.*, the circuit court erred in admitting hearsay about Andy's alleged dangerous behavior at his group home into evidence.

B. The admission of hearsay evidence prejudiced Andy.

Section 51.20(10)(c) provides in part: "The court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings that does not affect the substantial rights of either party." Accordingly, *S.Y.* held that while the circuit court erroneously admitted hearsay that the doctor relied upon to form his opinion, the error was harmless because S.Y., who was pro se, raised the hearsay assault himself when questioning another witness. *S.Y.,* 156 Wis. 2d at 328.

In Andy's case, corporation counsel elicited hearsay evidence regarding Andy's alleged dangerous behavior from Dr. Helfenbein. Defense counsel established that he had no personal knowledge of those allegations. (R.59:23-24). No other witness testified. Yet the circuit court relied on that hearsay when ordering a 12-month recommitment for Andy. The circuit court stated:

> Particular concern with Andy is that he feels that he is in some kind of danger at the group

> home or the group home is not safe for him. And so he runs away from the group home and he has threatened to get a gun and shoot himself. He has told people that. (R.59:27).

Without that hearsay evidence, the County only established that Andy was mentally ill. It did not establish that without treatment Andy would become dangerous enough for a commitment under §51.20(1)(a)2 a through e. Thus, one reason the admission of hearsay evidence through Dr. Helfenbein's testimony was prejudicial is that without it there was insufficient evidence to support Andy's recommitment. *O'Connor v. Donaldson*, 422 U.S. 563, 575(1975)(a finding of mental illness alone cannot justify a commitment; the person must also be dangerous).

In addition, without the hearsay admitted through Dr. Helfenbein, the County failed to offer sufficient evidence to support an order for involuntary medication or treatment. An individual's incompetence to make treatment decisions is insufficient to support an order for involuntary medication or treatment. The individual must also be dangerous. *Winnebago County v. C.S.*, 2020 WI 33, ¶¶31-33, 391 Wis. 2d 35, 940 N.W.2d 875 (citing *Lenz v. L.E. Phillips Career Development Center*, 167 Wis. 2d 53, 74, 482 N.W.2d 60 (1992), *Washington v. Harper*, 494 U.S. 210 (1990), *Riggins v. Nevada*, 504 U.S. 127 (1992*), Sell v. United States*, 539 U.S. 166 (2003), and *State v. Fitzgerald*, 2019 WI 69, 387 Wis. 2d 384, 929 N.W.2d 165)).[13]

[13] *C.S.* did not establish this point. It reaffirmed a longstanding constitutional principle.

A person is dangerous enough for involuntary medication or treatment only when "a situation exists in which medication or treatment is necessary to prevent serious physical harm to the individual or to others." Wis. Stat. §51.61(1)(g)3. Apart from hearsay, the County offered no evidence to satisfy this standard.

Finally, the admission of hearsay testimony regarding Andy's dangerousness was also prejudicial because, contrary to due process and §51.20(5), it prevented him from confronting and cross-examining the individuals who reportedly claimed that he ran away from his group home and made alarming statements about getting a gun.

Involuntary commitment proceedings are not about rubber stamping a county's allegations as quickly as possible. The court, the County, and defense counsel all have an interest in reaching a fair and accurate result before depriving a person of his freedom and his right to refuse medication or treatment. When a court admits hearsay evidence, it prevents the individual from challenging a county's evidence and casts doubt on the accuracy of the result.

CONCLUSION

For the reasons stated above, the court of appeals should reverse the circuit court's orders for recommitment and involuntary medication or treatment.

Respectfully submitted,

Electronically signed by Colleen D. Ball
COLLEEN D. BALL
Assistant State Public Defender
State Bar No. 1000729

Office of the State Public Defender
735 N. Water Street - Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
ballc@opd.wi.gov

Attorney for Respondent-Appellant

CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 5,001 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, including the appendix, if any, which complies with the requirements of the Interim Rule for Wisconsin's Appellate Electronic Filing Project, Order No. 19-02.

I further certify that a copy of this certificate has been served with this brief filed with the court and served on all parties either by electronic filing or by paper copy.

Dated this 30th day of November, 2020.

Signed:

Electronically signed by Colleen D. Ball
COLLEEN D. BALL
Assistant State Public Defender