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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REPLY BRIEF AND APPENDIX OF RESPONDENT-APPELLANT

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ARGUMENT

I. The court of appeals should hold that the County has confessed error.

Andy filed an initial brief presenting three issues supported by citations to statutes and federal and state case law. The County responds with a 6-page "reply brief" that fails to refute most of Andy's arguments. Given these circumstances, three principles of appellate law compel this court to reverse the circuit court's recommitment and involuntary medication and treatment orders. First, "[r]espondents on appeal cannot complain if propositions of appellants are taken as confessed which they do not undertake to refute." *Charolais Breeding Ranches, Ltd. v. FPC Securities Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979). Second, the court of appeals does not abandon its neutrality to develop arguments for a party to an appeal. Third, the court of appeals does not consider arguments unsupported by legal authority. *Industrial Risk Insurers v. American Engineering Testing, Inc.*, 2009 WI App 62, ¶25, 318 Wis. 2d. 148, 769 N.W.2d 82.

While the court of appeals makes exceptions to these rules for pro se litigants, the County is represented by counsel. The County is aware of these rules because Andy also asserted them in his Motion for Rule 809.83(2) Relief and his Reply Brief for *Rusk County v. A.A.*, Appeal No. 2019AP839, which is still pending in the court of appeals. Because the County has ignored the substance of Andy's arguments,

failed to support its own arguments with legal citations, and in places misstates the law, the court of appeals should deem the County to have conceded error on all three issues for review.

Furthermore, the court of appeals should publish its decision. On October 22, 2020, the County filed another petition to recommit Andy, which is identical to the defective petition at issue in this appeal and the defective petition at issue in Appeal No. 2019AP839. (Reply App.101-102). The County will continue filing the same deficient petition, and the circuit court will continue allowing it to do so, until the court of appeals instructs them to stop in a binding decision.

II. The circuit court erred in holding that a county is not required to allege facts in support of a petition for recommitment.

Andy contends that due process and §51.20(1), (2), (4) and (13), when read as a whole, require a petition for recommitment to allege facts constituting probable cause for a recommitment. (Initial Brief at 9-17)(citing *Lessard v. Schmidt*, 349 F. Supp. 1078, 1092 (E.D. Wis. 1972) and §51.20(1)(c)). He has shown that *Waukesha County v. S.L.L.*, 2019 WI 66, 387 Wis. 2d 333, 929 N.W.2d 140 conflicts with the plain language of §51.20 and due process. And he has argued that the County's petition failed to allege facts showing probable cause for recommitment—in particular, facts to support the conclusion that if treatment were withdrawn, he would become a proper subject for commitment.

The County responds that *S.L.L.* does not require it to allege facts in support of the elements for a recommitment. (Response Brief 3). If so, this does not refute the argument that *S.L.L.* conflicts with the plain language of §51.20 and due process. If the court of appeals agrees that §51.20 controls the contents of a petition for recommitment, it should either reverse the circuit court's decision denying Andy's motion to dismiss or certify this case to the supreme court so that it can address the discrepancy between *S.L.L.*, due process, and the plain language of §51.20.

Alternatively, Andy argued that §801.02(1)(a) requires a petition for recommitment to allege a short and plain statement of its claim for relief. This means that the plaintiff or petitioner must plead facts, which if true, show that the pleader is entitled to relief. *Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶21, 356 Wis. 2d 665, 849 N.W.2d 693.

"While courts must accept all well-pleaded facts as true, courts cannot add facts to a complaint, and do not accept as true conclusions that are stated in the complaint . . . For this reason, 'a formulaic recitation of the elements of a cause of action' is not enough to state a claim upon which relief may be granted." *Cattau v. National Insurance Services of Wisconsin, Inc.*, 2019 WI 46, ¶5, 386 Wis. 2d 515, 926 N.W. 756 (citing *Data Key Partners*, ¶¶19, 25).

If §802.02(1)(a) governs the contents of a petition for recommitment, the circuit court should have dismissed the County's petition because it alleged only the legal conclusion that Andy was dangerous enough for recommitment, but no facts at

all to support that conclusion. In addition, it alleged no facts or legal conclusions regarding the need for involuntary medication or treatment.

The County responds that this argument fails because *Data Key Partners* is a protective placement case and "mental commitments are different than protective placement hearings." (Response Brief 3). This is a misstatement of *Data Key Partners*. It has nothing to do with protective placements. The County's argument is nonresponsive and should be deemed a concession of Andy's argument under *Charolais Breeding*.

Lastly, the County argues that if it failed a requirement to allege facts in support of its petition for recommitment, then the error was harmless. (Response Brief 2). It cites no authority for the proposition that a party may file suit with a pleading lacking a factual basis, subject a person to an examination, conduct discovery, and force the defense and the court to expend time and resources with the hope of uncovering enough evidence to render its deficient pleading harmless at the time of trial. *See Data Key Partners*, ¶27 (noting that the "well-pleaded complaint" rule aims to prevent such abuses). Because the County fails to develop or support its harmless error argument, the court of appeals should reject it, pursuant to *Industrial Risk Insurers*, ¶25.

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

Section 51.20 does not impose a deadline for moving to dismiss a petition for recommitment. Thus, if §51.20(1)(c) governs the contents of a petition for

recommitment, the circuit court erred in holding that Andy's motion was untimely. Dismissal would have protected Andy's right to procedural due process with minimal inconvenience to the County. If it believed that Andy required commitment, it could have filed a petition for initial commitment that complied with due process.

If §802.02(1)(a) applies, the circuit court still erred because in the circumstances presented by a Chapter 51 case, where the subject individual is not required to serve a responsive pleading, he may assert any defense in law or fact at the time of trial. *See* Wis. Stat. §802.06(2)(b). In other words, Andy's motion to dismiss for failure to state a claim was not tardy. He was permitted to make it just before trial. (Initial Brief at 19-20).

The County responds that:

> [Andy] articulates an inaccurate reading of §802.06. Section 802.06(b) [sic] states:
>
> ***If on motion asserting the defense described in par. (a)6 to dismiss for failure of the pleading to state a claim upon which relief can be granted,*** or on a motion asserting the defenses described in par. (a)(8) or (9), ***matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in s. 802.08,*** and all parties shall be given reasonable opportunity to present all materials made pertinent to such motion by s. 802.02. (Response Brief 4)(emphasis supplied).

It is the County, not Andy, who has articulated an inaccurate reading of the statute. Defense counsel did not present "matters outside the pleadings" when she moved to dismiss, and the circuit court did not treat her motion as one for summary judgment. (App.106-109). Thus, the portion of §802.06(2)(b) that the County quotes does not apply to Andy's motion. Instead, the part of §802.06(2)(b) that Andy cited applies. (Initial Brief 19-20). It permitted him to assert his "failure to state a claim" defense at his recommitment trial. The circuit court therefore erred in denying his motion to dismiss on the theory that it was tardy.

IV. The circuit court erred in admitting hearsay evidence on dangerousness, and the error was harmful.

Andy argued that, pursuant to *S.Y. v. Eau Claire County*, 156 Wis. 2d 317, 457 N.W.2d 326 (Ct. App. 1990), the circuit court erroneously admitted Dr. Helfenbein's hearsay testimony on dangerousness. Further, the testimony prejudiced him because without it there was insufficient evidence of dangerousness to support the order for recommitment and the order for involuntary medication or treatment. (Initial Brief 20-24).

The County responds that "Dr. Helfenbein's testimony was based on his understanding of medical records but his interpretation of those records is not inadmissible hearsay. As an expert witness, Dr. Helfenbein's testimony is admissible and provides the court with a professional evaluation of A.A.'s

dangerousness based on accurate medical records." (Response Brief 6).

The County misses *S.Y.*'s point. While an expert/examiner may form an opinion that a person is dangerous based on information contained in medical records, the information itself is inadmissible hearsay unless the County offers admissible evidence that the information is true. *S.Y.*, 156 Wis. 2d at 327-328. The County does not deny that it failed to offer admissible evidence to establish the truth of the information that Dr. Helfenbein relied upon to form his opinion. The County therefore failed to offer sufficient evidence of dangerousness to support the circuit court's orders for recommitment and involuntary medication and treatment.

The County also claims that *S.Y.* held that the admission of hearsay evidence regarding dangerousness is harmless error. (Response Brief 5). *S.Y.* did not declare that the erroneous admission of hearsay evidence is harmless in all cases. Its harmless error holding was limited to the facts of that case. The County makes no attempt to refute Andy's arguments as to why the erroneous admission of hearsay evidence on dangerousness was harmful in this case. (Initial Brief 22-24). It thus concedes prejudice under *Charolais Breeding*.

CONCLUSION

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

Dated this 7th day of January, 2021.

Respectfully submitted,

Electronically signed by Colleen D. Ball
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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 1,687 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 7th day of January, 2021.

Signed:

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