STATE OF WISCONSIN
IN SUPREME COURT
Case No. 2023AP533
Circuit Court Case No. 2021ME204

In the Matter of the Mental Commitment of M.A.C.

WAUKESHA COUNTY,
Petitioner-Respondent,

v.

M.A.C.,
Respondent-Appellant-Petitioner.

Response to Petition for Review

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ISSUES PRESENTED

1. **This court should decline review as the circuit court exercised appropriate discretion when it granted default judgment against Melissa[1] at the extension hearing.**

Melissa did not appear at the extension hearing. (R.81:2)(App.19) The circuit court "found Melissa to be in default as a result of her non-appearance." *Id.*

The court of appeals held that the circuit court did not err when it granted default judgment under "the same factual scenario present[ed] in *S.L.L.*, where our supreme court approved a default judgment." *Waukesha Cnty. v. M.A.C.*, No. 2023AP533, unpublished slip op., ¶¶15-16 (WI App July 28, 2023) (App.11-12).

2. **This court should decline review as Wis. Stat. § 51.20(10)(a) does not require Waukesha County to personally serve Melissa with notice of the extension hearing.**

Waukesha County served Melissa's counsel with notice of the extension hearing. (R.73). The circuit court found that Waukesha County "properly noticed" Melissa for the extension hearing. (R.104:4)(App.25).

[1] For ease of reading, pursuant to Wis. Stat. § 809.19(1)(g), the County refers to M.A.C. by the pseudonym Melissa.

The court of appeals held that it "is bound by *S.L.L.*, where substantially similar arguments—that Melissa now raises—were made and rejected by our supreme court" regarding personal service of notice to the subject at an extension hearing. *M.A.C.*, No. 2023AP533, unpublished slip op., ¶¶12-13 (App.9-10).

3. This court should decline review as a subject's right to an examination of their competency to refuse medication is not at issue in this case.

The circuit court found that Waukesha County presented clear and convincing evidence to support an Order of Extension of Commitment and Order for involuntary Medication and Treatment. (R.104:4-7) (App.25-28). Melissa did not challenge *any* of Waukesha County's proof at the extension hearing—either as to dangerousness or proper communication on the medications. (R.104:2-7)(App.23-28).

The court of appeals held that Melissa forfeited her right to raise sufficiency disputes on appeal since the "objections were not made in the circuit court" and thus, "both the County and the circuit court operated as if Melissa was not contesting that she was dangerous, that she could not understand the advantages/disadvantages of the medications, and that the circuit court could rely on the filed doctors' reports." *M.A.C.*, No. 2023AP533, unpublished slip op., ¶¶20-23 (App.13-16).

CRITERIA FOR REVIEW

This court should decline review when, as here, criteria under Wis. Stat. § 809.62(1r) are not met. Melissa argues review is warranted in two ways. First, under Wis. Stat. § 809.62(1r)(a), she argues this case involves real and significant questions of constitutional law. Pet. for Review at 6. Second, under Wis. Stat. § 809.62(1r)(c)3., she argues this case involves issues with legal questions that are likely to recur. *Id.* at 7. This court does not review the application of well-settled principles to factual situations. *See* Wis. Stat. § 809.62(1r)(c)1. Importantly, in *Waukesha Cnty. v. S.L.L.*, 2019 WI 66, ¶¶26-38, 387 Wis. 2d 333, 929 N.W.2d 140, this court addressed identical legal questions. It held: (1) service of notice upon the subject's counsel is sufficient at an extension hearing; and (2) circuit courts may enter default judgment upon a subject's failure to appear at an extension hearing. *Id.*

Melissa further argues review is warranted to clarify whether an individual can forfeit their constitutional right to an examination of their competency to refuse medication. Pet. for Review at 9-10. Melissa misstates the court of appeals' decision: it did not "determine[] that Melissa forfeited her right to an examination." *Id.* Rather, the court of appeals held that Melissa "forfeited her right to raise [sufficiency] challenges on appeal." *M.A.C.*, No. 2023AP533, unpublished slip op., ¶¶17-23 (App.12-16). In fact, it emphatically found that "[r]eversal in

this appeal on issues that were uncontested in the circuit court would be the quintessential example of sandbagging." *Id.*, ¶23 (emphasis added) (App.15-16) (citing *see, e.g.*, *State v. Counihan*, 2020 WI 12, ¶¶26-27, 390 Wis. 2d 172, 938 N.W.2d 530). Under these circumstances, this court should decline review.

STATEMENT OF THE CASE AND FACTS

On June 3, 2020, Waukesha County detained Melissa pursuant to Wis. Stat. § 51.15 after she asked jail staff to kill her and expressed a desire to kill her boyfriend and son. (R.69:3)(App.32). On June 16, 2020, the circuit court entered an Order of Commitment against Melissa. *Id*. The circuit court entered extension orders twice more thereafter, which then led to the Order of Extension of Commitment at issue here. (R.69:4-8)(App.33-37).

On July 19, 2022, Waukesha County filed a Petition for Recommitment. (R.69:1)(App.30). Attached to the petition was an Evaluation and Recommendation Regarding Recommitment authored by Mrs. Danielle Weber, a licensed clinical social worker and Waukesha County 51.42 Board Representative. (R.69:2-8)(App.31-37). Mrs. Weber's report stated Melissa suffered from schizoaffective disorder, and that she was prescribed an intramuscular injection of Abilify Maintena, as well as two oral medications: Depakote and Gabapentin. (R.69:2)(App.31). It stated that recommitment was necessary to "ensure Melissa remain[s] stable in the

community and does not become a threat to herself or others." (R.69:8)(App.37). The report provided examples of dangerous behavior that came to fruition after medication noncompliance, including Melissa's homicidal and suicidal behaviors in June 2020. (R.69:2-8)(App.31-37).

The petition stated Melissa was homeless, and that Melissa had no mailing address. (R.69:1) (App.30).

On July 19, 2022, the Honorable Laura F. Lau issued a Notice of Hearing and scheduled the matter for an extension hearing on August 16, 2022, at 1:30 p.m. (R.70). In the notice, the circuit court ordered Melissa to be examined by two court appointed examiners prior to the extension hearing. (R.70). The circuit court appointed Dr. Cary Kohlenberg, psychiatrist, and Dr. Peder Piering, psychologist, to examine Melissa. (R.71).

On July 21, 2022, the State Public Defender appointed Attorney McMahon to represent Melissa. (R.72).

On August 9, 2022, Waukesha County served Melissa's counsel with notice of the extension hearing. (R.73). Waukesha County then emailed the notice to Mrs. Weber on behalf of Melissa. (R.73).

On August 10, 2022, Dr. Kohlenberg filed a Report of Examination stating that "I have by

personal examination and inquiry satisfied myself as to the mental condition of Melissa and the results of the examination are contained herein." (R.74:1).

Dr. Kohlenberg personally examined Melissa in June 2020. (R.74:2)(App.39). He also examined Melissa in August 2021. *Id*. Since Melissa did not avail herself for examination prior to the extension hearing, Dr. Kohlenberg relied on his previous examinations, his recent discussion with Mrs. Weber, and the Evaluation and Recommendation Regarding Recommitment authored by Mrs. Weber. (R.74.1-2) (App.38-39).

Dr. Kohlenberg opined Melissa was mentally ill, a proper subject for treatment, and dangerous under the recommitment standard:

> Due to the subject's well documented history, and recent and ongoing treatment noncompliance, she is at very high risk of full treatment noncompliance if off of commitment. If that were to occur, she would likely again become a proper subject for treatment due to standards a and e, as above.

(R.74:3-5)(App.40-42). Dr. Kohlenberg stated Melissa had a mental health history dating back to 2005. (R.74:2)(App.39). He stated that she was hospitalized in 2020 for delusional thoughts and suicidality, after having been off medication for some time. *Id*. He further stated that after the original commitment,

Melissa had periods of treatment noncompliance and time inpatient. *Id*.

Dr. Kohlenberg then opined Melissa was "substantially incapable of applying an understanding of the advantages, disadvantages and alternatives in order to make an informed choice as to whether to accept or refuse psychotropic medication." (R.74:6)(App.43).

On August 12, 2022, Dr. Piering filed a Report of Examination stating that "I have by personal examination and inquiry satisfied myself as to the mental condition of Melissa and the results of the examination are contained herein." (R.75:1)(App.44).

Dr. Piering previously examined Melissa in August 2021, November 2020, and June 2020. *Id*. Melissa did not avail herself for examination prior to the extension hearing. *Id*.

Dr. Piering opined Melissa was mentally ill, a proper subject for treatment, and dangerous under the recommitment standard; he linked dangerousness to the first, second, third and fourth standards. (R.75:3-6)(App.46-49). He opined Melissa currently suffered from schizoaffective disorder. (R.75:3)(App.46). Dr. Piering then showed dangerous behavior that resulted from Melissa's medication noncompliance: asking jail staff to kill her; expressing a desire to kill her boyfriend and son; and

presenting with bruises and a black eye. (R.75:1-2) (App.44-45).

Dr. Piering then opined Melissa was "substantially incapable of applying an understanding of the advantages, disadvantages and alternatives in order to make an informed choice as to whether to accept or refuse psychotropic medication." (R.75:5-6)(App.48-49).

On August 16, 2022, the circuit court held the extension hearing. (R.104:1)(App.22). Melissa failed to appear despite regular and recent outreach efforts by her counsel and Mrs. Weber. (R.104:2)(App.23). The circuit court "found Melissa to be in default as a result of her non-appearance after having been properly noticed for the hearing." (R.81:2)(App.19). Waukesha County requested that the circuit court rely on—that is, receive—the reports in the circuit court's file as is common practice when subjects are "in a no contest posture". (R.104:4-5)(App.25-26). Melissa's counsel did not object to *any* of Waukesha County's requests during the extension hearing. (R.104:2-7)(App.23-28). The circuit court based its findings and conclusions on the doctors' reports and entered an Order of Extension of Commitment and an Order for Involuntary Medication and Treatment, including several attachments. (R.79;80;81;82;104:5-7)(App.18-21,26-28).

On appeal, Melissa argued that Waukesha County violated the 14th Amendment and Wis. Stat.

§ 51.20(10)(a) when it failed to personally serve her with notice of the extension hearing. Br. of Resp't-Appellant at 17-23. Melissa then argued that the circuit court erroneously entered default judgment against Melissa since she appeared by counsel at the extension hearing. *Id.* at 27-29. Finally, Melissa argued that Waukesha County provided insufficient evidence to support the circuit court's extension order and medication order. *Id.* at 30-37.

The court of appeals affirmed the circuit court's extension order and medication order. *M.A.C.*, No. 2023AP533, unpublished slip op., ¶¶11-23 (App.9-16). First, the court of appeals rejected Melissa's argument that she was entitled to personal notice of the extension hearing. *Id.*, ¶¶12-14 (App.9-11). Since the same facts apply to Melissa as did to Ms. L., it held that it was "bound by *S.L.L.*", where "our supreme court determined that service of the recommitment hearing notice on the subject's lawyer complied with the statutes and that using indirect service methods did not violate due process when the subject was homeless and had failed to adhere to required condition of keeping the County informed of her current address." *Id.*, ¶13 (App.10) (citing *S.L.L.*, 2019 WI 66, ¶¶26-30 & n.18).

The court of appeals also rejected Melissa's argument that she could not be defaulted since she appeared by counsel. *Id.*, ¶¶15-16 (App.11-12). While Melissa presented "the issue a bit differently" than Ms. L., the court of appeals found that her arguments

did "not eliminate the controlling determination in *S.L.L.*" *Id.*, ¶16 (App.11-12).

> [A]lthough Melissa's lawyer "appeared" in the sense that she attended the hearing (just as S.L.L.'s lawyer had), Melissa's lawyer told the circuit court that she had not spoken with Melissa, she had not been able to locate Melissa, she could not inform the court as to Melissa's position on the recommitment, and she had "no direction from Melissa as to how she[] wish[ed] to proceed on this." This is the same factual scenario present in *S.L.L.*, where our supreme court approved a default judgment. Accordingly under these circumstances, this court cannot say that Melissa's lawyer's presence at the hearing prohibited the circuit court from granting default judgment.

Id.

Finally, the court of appeals forbid Melissa's argument that the evidence was insufficient to support the circuit court's orders. *Id.*, ¶¶17-23 (App.12-16). It held that Melissa forfeited her right to raise sufficiency disputes on appeal since the "objections were not made in the circuit court," and "both the County and the circuit court operated as if Melissa was not contesting that she was dangerous, that she could not understand the advantages/disadvantages of the medications, and that the circuit court could rely on the filed doctors'

reports." *Id.*, ¶¶20-22 (App.13-15). The court of appeals further held that "[r]eversal in this appeal on issues that were uncontested in the circuit court would be the quintessential example of sandbagging." *Id.*, ¶23 (emphasis added) (App.15-16).

> Had [Melissa's] lawyer asserted a contest posture, the County could have called the doctors and the case manager—who were either present or available at the recommitment hearing—to testify. The reports could have been formally introduced into evidence. The witnesses could have been asked about the dangerousness standards they relied upon in preparing their reports, and they could have testified about the repeated instances in the past in which they had explained or attempted to explain the advantages, disadvantages, and alternatives to the recommended medications.

Id.

ARGUMENT

This case does not call for the application of new doctrine. Melissa asks this court to overturn its decision in *S.L.L.*, a recent decision that clarified the law harmoniously. While indirect service of notice and default judgment at extension hearings are likely to recur, *S.L.L.* governs both questions of law and therefore, Melissa's disputes are factual in nature. Further, Melissa forfeited her disputes, including her

right to contest the evidence, when she failed to raise *any* disputes in the circuit court. While this court has judicial authority to address forfeited disputes, this case presents the quintessential example of sandbagging. Under these circumstances, this court should decline review.

I. This court should decline review since Melissa requests an application of identical facts to *S.L.L.*—a case that governs both of her main disputes.

In *S.L.L.*, 2019 WI 66, ¶¶26-38, this court addressed both indirect service of notice and default judgment at extension hearings. The facts are identical to Melissa's facts. There, prior to an extension hearing, Ms. L. failed to keep Waukesha County updated on her current address. *Id.*, ¶5. Ms. L's counsel had not communicated with Ms. L and did not know Ms. L's whereabouts. *Id.*, ¶7 n.7. Waukesha County did not know Ms. L's whereabouts and thus, while Waukesha County mailed notice to Ms. L's last known address, the notice was returned as undeliverable. *Id.*, ¶6-7 n.7. Waukesha County sent notice to Ms. L's counsel. *Id.*, ¶6. Thereafter, the extension hearing "commenced as scheduled, with Ms. L. in absentia but represented by appointed counsel." *Id.*, ¶7.

Here, Melissa "failed to keep the County informed of her current address." *M.A.C.*, No. 2023AP533, unpublished slip op., ¶13 (App.10). She

was homeless and had no mailing address. (R.69:1) (App.30). While Waukesha County was unaware of her specific whereabouts, it narrowed her location to somewhere in its County. (R.69:8;104:3) (App.24,37). It emailed notice to Mrs. Weber, on behalf of Melissa, since the 51.42 Board had care and custody of Melissa at the time. (R.73). Waukesha County sent notice to Melissa's counsel. (R.73). Melissa's counsel had not communicated with Melissa and did not know her whereabouts at the time of the extension hearing. (R.104:2)(App.23). Melissa failed to appear at the extension hearing despite regular and recent outreach efforts by her counsel and Mrs. Weber. *Id.* Thus, Melissa's facts are identical to the facts applied by this court in *S.L.L.*

A. This court should decline review since *S.L.L.* held that circuit courts may enter default judgment upon a subject's failure to appear, even if their counsel appears.

i. Standard of review.

A circuit court's grant of default judgment is reviewed for an erroneous exercise of discretion. *Shirk v. Bowling, Inc.*, 2001 WI 36, ¶15, 242 Wis. 2d 153, 624 N.W.2d 375. "An erroneous exercise of discretion may arise from an error of law or from the failure of the circuit court to base its decisions on the facts in the record." *State v. Ford*, 2007 WI 138, ¶28, 306 Wis. 2d 1, 742 N.W.2d 61.

ii. S.L.L. is sound precedent.

S.L.L., 2019 WI 66, ¶¶6-7, 31-38, affirmed a circuit court's grant of default judgment in an extension hearing when only Ms. L's counsel appeared at the recommitment hearing—and when Ms. L., who was homeless, had not received notice of the hearing.

Despite this court's established precedent when counsel appeared in *S.L.L.*, Melissa claims the default provision in Wis. Stat. § 806.02(5) cannot apply when the individual appears by counsel at the extension hearing. Pet. for Review at 9-10. She cites *Sherman v. Heiser*, 85 Wis. 2d 246, 270 N.W.2d 397 (1978). *Id.* at 5, 18, 19. That case is distinguishable, and existed decades prior to this court's *S.L.L.* decision.

First, in *Sherman*, both parties conceded the matter "was not a true case of 'default'". 85 Wis. 2d at 253-54. Second, unlike here, "the [circuit] court was not left powerless" in *Sherman*, as Sherman's counsel knew his client's position and later testified "he had told his client that he felt he had a substantial and meritorious defense", and that he was "prepared to defend the action had [his] client been present." *Id.* at 254. Contrarily, Melissa's counsel "[had] no direction from [her] client as to how [Melissa wished] to proceed". (R.104:3)(App.24). Further, while

Sherman's counsel requested to withdraw the day of trial, Melissa's counsel told the circuit court on the day of trial, "I'm not in a position to object." *Sherman*, 85 Wis. 2d at 252-53; (R.104:5)(App.25). Melissa's case is not like *Sherman*, where defense counsel knew his client's position and was prepared to proceed to trial, but instead withdrew. In fact, had the circuit court, here, allowed Melissa to appear through counsel to avoid default judgment, the circuit court would have forced Melissa's counsel to guess her client's position. From a policy perspective, a rule that promotes unethical considerations should not be upheld. Third, while Melissa argues to the contrary, Pet. for Review at 18, a provision in ch. 51 conflicts with the rule that an individual may appear by counsel in a civil proceeding. This is a critical distinction since Wis. Stat. § 51.20(10)(c) incorporates the rules of civil procedure to the extent they do not conflict with ch. 51. *S.L.L.*, 2019 WI 66, ¶27. Wis. Stat. § 51.20(10)(d) reads: "[i]n the event that the subject individual is not detained and ***fails to appear*** for the final hearing the court may issue an order for the subject individual's detention." (emphasis added). In effect, the Legislature unambiguously acknowledged a circumstance in which a subject's attorney could be present and yet, the subject still fails to appear. Fourth, while the circuit court may have ordered Melissa's detention instead of default judgment, it considered Melissa's counsel's assertion, "I would agree with Mr. Martin that I don't believe Melissa would want to be taken into custody." (R.104:3-4)(App.24-25). When we also

consider the fact that Wis. Stat. § 51.20(10)(e) *only* allows defense to request an adjournment—and defense did not request an adjournment—the circuit court, here, was left powerless without default judgment.[2] *See* Wis. Stat. § 51.20(10)(e) ("[a]t the request of the subject individual or his or her counsel the final hearing under par. (c) may be postponed".). Finally, in *R.G.K.*, the court of appeals held that "we are bound by the court's conclusion in *S.L.L.* that [she] 'failed to appear for trial,' despite her attorney's appearance, and '[t]hat [and other facts] satisf[y] the prerequisites for entry of default." *Outagamie Cnty. v. R.G.K.*, No. 2019AP2134, unpublished slip op., ¶ 22 n.7 (WI App Sept. 20, 2022) (App.60-61).

Therefore, the circuit court exercised appropriate discretion when it granted default judgment against Melissa.

B. This court should decline review since *S.L.L.* held that indirect service

[2] Melissa also argues the circuit court could have let the commitment expire "and when contact is re-established, the County can consider the person's current condition and file a new commitment petition, if warranted." Pet. for Review at 20. Or, if necessary, she argues, "the person can be emergently detained." *Id.* at 20-21. She ignores public safety concerns that are substantially probable in such circumstance. The legislature created the recommitment standard to avoid the "'revolving door' phenomena": "a vicious circle of treatment, release, overt act, recommitment". *State v. W.R.B.*, 140 Wis. 2d 347, 351, 411 N.W.2d 142 (Ct. App. 1987).

methods did not violate Wis. Stat. § 51.20(10)(a) or due process.

i. Standard of review.

Statutory interpretation is a question of law, reviewed de novo. *State v. Gramza*, 2020 WI App 81, ¶15, 395 Wis. 2d 215, 952 N.W.2d 836. Due process determinations are questions of law, reviewed de novo. *S.L.L.*, 2019 WI 66, ¶10.

***ii. S.L.L.* is sound precedent.**

S.L.L. held that serving notice on the subject's counsel is sufficient at an extension hearing. *Id.*, ¶¶26-30. The court of appeals utilized *S.L.L.*—and decided the same issue—in *Marathon Cnty. v. R.J.O.*, 2020 WI App 20, ¶17, 392 Wis. 2d 157, 943 N.W.2d 898 (overruled on other grounds), where it held a subject is properly noticed for an extension hearing when requisite notice is served upon the subject's counsel.

Melissa argues that *S.L.L.* did not address Wis. Stat. § 51.20(10)(a), which—she argues— mandated Waukesha County to personally serve Melissa with the time and place of the extension hearing. Pet. for Review at 5, 8 24-27. In *S.L.L.*, the majority held that, pursuant to Wis. Stat. § 51.20(10)(c), the rules of civil procedure are incorporated into ch. 51 to the extent they do not pose conflict. *S.L.L.*, 2019 WI 66, ¶27. It further held that Wis. Stat. § 51.20(10)(a) and

Wis. Stat. § 801.14(2) are not at odds with one another since Wis. Stat. § 51.20(10)(a) provides "no specific directions with respect to the *notification method*." *S.L.L.*, 2019 WI 66, ¶27 (emphasis added). Therefore, pursuant to Wis. Stat. § 801.14(2), and as incorporated into ch. 51 by Wis. Stat. § 51.20(10)(c), service on a party represented by an attorney may be accomplished by serving the attorney. *S.L.L.*, 2019 WI 66, ¶27. The majority then addressed Melissa's dispute in further detail:

> Perhaps she did not make the dissent's argument because reading a personal-service mandate into the phrase "petitioner's counsel shall notify the subject individual and his or her counsel of the time and place of final hearing" would be a difficult task.
>
> The legislature is familiar with language that requires personal service of a document, as demonstrated by the mandate in § 51.20(2)(b), which requires that "a law enforcement officer shall present the subject individual with a notice of hearing ...."
>
> There are many ways one may provide "notice." But to "present" something to an individual, one must be (as the word implies) in the person's presence.
>
> The dissent would have us read the two provisions as requiring the same thing. Apparently, not even

> Ms. L. was willing to attempt that equation.

S.L.L., 2019 WI 66, ¶27 n.18 (citation omitted).

Melissa then argues that *S.L.L.* did not address *Vitek v. Jones*, 445 U.S. 480, 481, 100 S. Ct. 1254, 63 L. Ed. 2d 552 (1980). Pet. for Review at 9, 24-27. However, *Vitek* does not apply since *Vitek* required written notice to prisoners "that a transfer to a mental hospital is being considered" prior to commitment. *Id.* at 294. First, it is far easier for the government to find a prisoner. More importantly, the service requirements for Wisconsin commitments afford the same protections to subjects prior to the commitment. The service provisions in Wis. Stat. § 51.20(2)(b) instruct:

> If the subject [] is to be detained, a law enforcement officer shall present the subject [] with a notice of hearing, a copy of the petition and detention order and a written statement of the [subject's] right to an attorney, a jury trial if requested more than 48 hours prior to the final hearing, the standard upon which he or she may be committed under this section and the right to a hearing to determine probable cause for commitment within 72 hours after the individual is taken into custody under s. 51.15, excluding Saturdays, Sundays and legal holidays. The officer shall

> orally inform the [subject] that he or she is being detained as the result of a petition and detention order issued under this chapter.

However, the service provisions in Wis. Stat. § 51.20(2)(b) do not apply to extension hearings. *S.L.L.*, 2019 WI 66, ¶27. Like here, once the circuit court has established jurisdiction over the subject, personal service of notice on the subject is not a constitutional requisite. *See Id.*, ¶29 (quoting *Gangler v. Wisconsin Elec. Power Co.*, 110 Wis. 2d 649, 657, 329 N.W.2d 186 (1983) ("the black-letter law is that once an action has begun and the attorney has appeared in the action on behalf of a party, service of papers may be upon the attorney").

Melissa, in bringing a Petition for Review before this court, fails to provide special justification for departure from existing case law. The doctrine of stare decisis weighs heavily in favor of denying Melissa's petition. This court has declared that it "follows the doctrine of stare decisis scrupulously because of its abiding respect for the rule of law." *Johnson Controls, Inc. v Employers Insurance of Wausau*, 2003 WI 108, ¶94, 264 Wis. 2d 60, 665 N.W.2d 257 (citation omitted).

> We understand that respect for prior decisions is fundamental to the rule of law. We recently summarized this court's adherence to the doctrine, stating:

> Fidelity to precedent ensures that existing law will not be abandoned lightly. When existing law "is open to revision in every case, `deciding cases becomes a mere exercise of judicial will, with arbitrary and unpredictable results.'" Consequently, this court has held that "any departure from the doctrine of stare decisis demands special justification."

Id. (quoting *Schultz v. Natwick*, 2002 WI 125, ¶37, 257 Wis. 2d 19, 653 N.W.2d 266).

The rationales for following the doctrine of stare decisis are familiar. *Id.*, ¶95. They include: (1) the desirability that the law furnish a clear guide for conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise; (2) the importance of furthering fair and expeditious adjudication by eliminating the need to relitigate every relevant proposition in every case; and (3) the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments. *Id.* Further, the decision to overturn a prior case must not be undertaken merely because the composition of the court has changed. *Id.*

In the case at hand, Melissa does not articulate special justification for departing from the precedent of *S.L.L.* or argue any of the standards by which this court would depart from its own precedent.

Therefore, the County urges this court to rely on the doctrine of stare decisis to deny the Petition for Review.

II. This court should decline review as Melissa's disputes are subject to forfeiture.

Forfeiture occurs when a subject fails to make a timely assertion of a right. *State v. Ndina*, 2009 WI 21, ¶29, 315 Wis. 2d 653, 761 N.W.2d 612. Generally, if a right is forfeited, reviewing courts address the claim in the context of ineffective assistance of counsel. *Counihan*, 2020 WI 12, ¶28. Reviewing courts may ignore forfeiture in appropriate cases. *Id.*, ¶27. The forfeiture rule enables the circuit court to avoid or correct any error as it comes up, with minimal disruption of the judicial process and maximum efficiency. *Id.*, ¶26. The forfeiture rule encourages timely objections and lessens the need for appeal. *Id.* The forfeiture rule gives the parties and the circuit court notice of an issue and a fair opportunity to address the objection. *Id.*, ¶27. The forfeiture rule encourages attorneys to diligently prepare for and conduct trials and prevents attorneys from sandbagging opposing counsel by failing to object to an error for strategic reasons. *Id.*

A. Applying the forfeiture rule upholds the rule's values.

Melissa accepts that her counsel did not object during the extension hearing. Br. of Resp't-Appellant at 16. She did not object to default judgment. (R.104:2-7)(App.23-28). She did not raise issue with how Waukesha County served notice. *Id*. And she did not challenge *any* of Waukesha County's proof at the extension hearing. *Id*. Since Melissa did not object in the circuit court, she failed to give the circuit court a fair opportunity to address her disputes and avoid the appeal, and she disadvantaged Waukesha County by offering it no opportunity to respond or create a substantive record before the appeal.

It is true that Melissa's counsel went to great lengths to reach Melissa:

> I have been trying to reach [] her.
>
> …
>
> I've been reaching out, including to her significant other's hospital, and she seems to have been at various places and doing okay. One of those places is not the courthouse.

(R.104:2)(App.23). Similarly, the 51.42 Board took lengths of its own:

> I know [Mrs.] Weber has been trying as well.
>
> …
>
> [Mrs.] Weber has been trying [] hard to find her.

Id. Sadly, it appears that Melissa did not care about these proceedings until Waukesha County found her and detained her on October 28, 2022. (R.84:4). Then, only after her whereabouts were again unknown and she again absconded treatment—80 days after the extension hearing—did Melissa notify separate counsel that she wished to pursue this appeal. (R.84:2;92:2). Her actions and inactions disadvantaged Waukesha County on this appeal.

Therefore, this court should decline review since deciding Melissa's disputes "in this appeal on issues that were uncontested in the circuit court would be the quintessential example of sandbagging." *See M.A.C.*, No. 2023AP533, unpublished slip op., ¶23 (App.15-16) (emphasis added) (citing *see, e.g.*, *Counihan*, 2020 WI 12, ¶¶26-27).

B. The court of appeals held that Melissa forfeited her right to raise sufficiency disputes on appeal.

Melissa argues that the court of appeals "determined that Melissa forfeited her right to an examination by not making an appointment with the doctors, and that her trial attorney forfeited her right [to] challenge the lack of examination by not objecting." Pet. for Review at 30. Melissa misstates the decision.

The court of appeals held that Melissa forfeited her right to raise sufficiency disputes on appeal since the "objections were not made in the circuit court" and thus, "both the County and the circuit court operated as if Melissa was not contesting that she was dangerous, that she could not understand the advantages/disadvantages of the medications, and that the circuit court could rely on the filed doctors' reports." *M.A.C.*, No. 2023AP533, unpublished slip op., ¶¶20-23 (App.13-16). It did not find that Melissa forfeited her right to an examination by not making an appointment with the independent doctors.

It reiterated that Melissa's counsel "did not challenge *any* of the County's proof at the recommitment hearing—either as to dangerousness or proper communication on the medications. (*Id.*, ¶20)(App.13-14). It then responded to Melissa's dispute that forfeiture cannot apply to sufficiency of the medications order:

> Here, Melissa's appointed attorney did not object, did not contest, and took no position on the recommitment petition or the request for the medications order. This led the County and the circuit court to believe Melissa was not contesting the recommitment or the medications order. Melissa failed to provide her address, telephone number, or any other method to contact her. She did not contest the recommitment in the circuit court. Had she done so, it appears this case would be more like *Walworth*

> *County v. C.A.E.*, No. 2020AP834-FT, unpublished slip op., ¶17 (WI App Sept. 16, 2020) (App.75), where this court upheld the involuntary medication order when a doctor testified that C.A.E. had the advantages, disadvantages, and alternatives of the medication explained to her "over the years[.]"

Id., ¶20 n.8 (App.11).

While Melisa argues this court should review whether an individual can forfeit their constitutional right to a competency examination, Pet. for Review at 31, she ignores the law: an individual is not entitled to *any* independent examination at an extension hearing. *See Dodge Cnty. v. L.A.S.*, No. 2017AP302, unpublished slip op., ¶12 (WI App Aug. 17, 2017) (holding that the requirements of Wis. Stat. § 51.20(9) do not apply at extension proceedings) (App.83-84). She further ignores that the record shows Mrs. Weber was present at the extension hearing and had Melissa challenged the evidence, Waukesha County positioned itself to call Mrs. Weber to testify to the medication discussions offered to Melissa by the 51.42 Board. (R.104:2)(App.23).

For example, as recently as April 27, 2022, the 51.42 Board explained Abilify Maintena to Melissa. (R.69:7)(App.36). There, she met with her prescriber, Ms. Mercy Mahaga, an advanced practice nurse prescriber and 51.42 Board Representative.[3] *Id*. The

[3] This was Melissa's last appointment with her prescriber prior to the extension hearing as Melissa failed to attend the next prescriber appointment on July 12, 2022. (R.69:7)(App.?).

two "discussed the risks, benefits[,] and alternatives to medications, particularly [Melissa's] Abilify Maintena injection." *Id*. On January 26, 2022, Melissa met with APNP Ms. Mahaga and refused to discuss "whether the medication was effective or not." *Id*. On November 17, 2020, Mrs. Weber attempted to talk with Melissa about the benefits of her medications but Melissa stated, "I just don't like to think about it." (R.69:5)(App.34). At previous injection appointments, 51.42 Board nursing staff reported similar behavior when they attempted to discuss benefits and side effects with Melissa: "I just don't want to talk about it." (R.69:4-5)(App.33-34).

Additionally, Melissa's repeated noncompliance showed an unambiguous demonstration that Melissa intentionally undertook means to prevent the 51.42 Board from having medication discussions with Melissa. In fact, she failed to attend prescriber appointments on:

1. August 21, 2020. (R.69:4)(App.33).
2. November 18, 2020. *Id*.
3. June 25, 2021. (R.69:5)(App.34).
4. November 24, 2021. (R.69:6)(App.35).
5. December 22, 2021. (R.69:7)(App.36).
6. February 18, 2022. *Id*.
7. July 12, 2022. *Id*.

Melissa even refused to schedule prescriber appointments on December 23, 2020, and January 6, 2021, since she did not want to meet with prescribers

that "call[] me schizophrenic." (R.69:5)(App.34). Outside of her failed attendance at prescriber appointments, she further demonstrated woeful disregard for her court ordered treatment.

1. Melissa's commitment began on June 16, 2020. (R.69:3)(App.32). By June 18, 2020, she stopped taking psychiatric medications with no intent to take them in the future. (R.69:4)(App.33)
2. On December 30, 2020, Melissa failed to take her monthly injectable. (R.69:5)(App.34).
3. On February 4, 2021, Melissa failed to take her monthly injectable, and forced the 51.42 Board to effect a (dm) order, but law enforcement could not find her. (R.69:5-6)(App.34-35).
4. Melissa's whereabouts remained unknown until May 27, 2021, when a criminal arrest finally initiated a revocation. (R.69:6)(App.35).
5. Melissa failed to take her monthly injectable in February 2022, and forced the 51.42 Board to effect a (dm) order. (R.69:7-8)(App.36-37).
6. Her whereabouts remained unknown until April 18, 2022. *Id*.
7. On May 16, 2022, Melissa failed to take her monthly injectable, and forced the 51.42 Board to effect a (dm) order. (R.69:8)(App.37).

8. On July 7, 2022, Melissa failed to take her monthly injectable, and forced the 51.42 Board to effect a (dm) order. *Id*.

Under these circumstances, this court should decline review.

CONCLUSION

Therefore, Waukesha County respectfully requests, based upon the record from the circuit court, the decision of the court of appeals, and the reasons set forth above in the arguments and legal authorities cited in this response, that this court deny the Petition for Review filed by Melissa as it does not warrant review under Wis. Stat. § 809.62(1r).

Dated this 7th day of September, 2023.

Respectfully submitted,

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CERTIFICATION AS TO FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b) (bm) and 808.62(4). The length of this Response to Petition for Review is 5,854 words.

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this Response to Petition for Review is an appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under Wis. Stat. § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 7th day of September, 2023.

Electronically signed by:
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