STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2023AP681

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

OZAUKEE CT'Y DEP'T OF HUM. SERV.,

Petitioner-Respondent,

v.

M.A.G.,

Respondent-Appellant-Petitioner.

PETITION FOR REVIEW

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ISSUES PRESENTED

1. This Court should accept review to determine that the County must present a competency opinion by a *licensed physician* in order to meet its burden of proof obtain an involuntary medication order under Wis. Stat. §§ 51.61(1)(g)3. and 3m.

The circuit court entered the involuntary medication order even though the County did not present evidence from a licensed physician.

The court of appeals affirmed. *Ozaukee Cty. Dept. of Hum. Serv. v. M.A.G.*, No. 2023AP681, unpublished slip op. (Nov. 29, 2023). (App.3-25). It held that the issue was forfeited and underdeveloped, but also, lacked apparent merit.[1] *Id.*, ¶¶33-36. (App.17-20).

2. This Court should grant review to determine that an explanation of the advantages, disadvantages, and alternatives to medication—as required by Wis. Stat. § 51.61(1)(g)4.—must be timely, and an explanation occurring four months prior to the final hearing is not timely.

[1] Forfeiture is a rule of judicial administration, and this Court can review the issue despite forfeiture. *State ex rel. Universal Processing Servs. of Wis., LLC v. Cir. Ct. of Milwaukee Cty.*, 2017 WI 26, ¶53, 374 Wis. 2d 26, 892 N.W.2d 267.

The circuit court entered the medication order.

The court of appeals affirmed, finding that the explanation was timely and M.A.G. was not competent to refuse medication. *M.A.G.*, No. 2023AP681, unpublished slip op., ¶¶37-42. (App. 20-22).

3. If the Court grants review it should determine that the evidence failed to prove that M.A.G. was dangerous to herself or others as required to involuntarily commit her.

The circuit court entered the commitment order.

The court of appeals affirmed. *M.A.G.*, No. 2023AP681, unpublished slip op., ¶¶23-31. (App.13-17).

CRITERIA FOR REVIEW

Review is warranted under Wis. Stat. § 809.62(1r)(c)3. The issues presented are legal questions that are likely to recur. Review is also warranted under Wis. Stat. § 809.62(1r)(a). The case involves issues "real and significant question[s] of constitutional law." "[C]ivil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." *Addington v. Texas*, 441 U.S. 418, 425 (1979). Due process also protects individuals from forced medication. *Outagamie County v. Melanie L.*, 2013 WI 67, ¶43, 349 Wis. 2d 148, 833 N.W.2d 607.

First issue. This Court should grant review to clarify and hold that in order to meet its burden of proof to obtain an involuntary medication order under Wis. Stat. §§ 51.61(1)(g)3. and 3m., the County must present evidence from a licensed physician. *See* Wis. Stat. § 51.61(1)(g)3. (referencing a "licensed physician"). In M.A.G.'s case, the County did not have a licensed physician examine M.A.G. or opine that she was incompetent. Instead, the County presented testimony from an advanced psychiatric nurse prescriber.

The court of appeals held that the issue was forfeited and underdeveloped, but also, lacked apparent merit.[2] *Id*., ¶¶33-35. (App.17-19). However, it also opined on the merits, and its analysis can be read to suggest that the County is not required to provide evidence from a licensed physician to meet its burden to obtain an involuntary medication order under Wis. Stat. § 51.61(1)(g)3. *See id*., ¶36 (App.19-20). This issue is an important question of law and the lower courts would benefit from a ruling on it.

Second issue. The Court should grant review and provide guidance on what constitutes the reasonable and timely medication explanation required by Wis. Stat. § 51.61(1)(g)4. At the hearing, M.A.G.'s medication prescriber testified the last time

[2] Forfeiture is a rule of judicial administration, and this Court can review the issue despite forfeiture. *State ex rel. Universal Processing Servs. of Wis., LLC v. Cir. Ct. of Milwaukee Cty*., 2017 WI 26, ¶53, 374 Wis. 2d 26, 892 N.W.2d 267.

she discussed the advantages, disadvantages, and alternatives to medication with M.A.G. was four months prior to the hearing. The court of appeals held that M.A.G. failed to prove this was untimely. *M.A.G.*, No. 2023AP681, unpublished slip op., ¶37. (App.20). This Court has held that a medication explanation of "should be timely, and, ideally, it should be periodically repeated and reinforced." *Melanie L.*, 349 Wis. 2d 148, ¶67. Whether or not the explanation given to Melanie L. herself was timely was not at issue. Therefore, the Court has not given guidance on what constitutes a timely explanation, and should take this case as an opportunity to do so.

Third issue. The court of appeals rejected M.A.G.'s argument that the evidence of dangerousness was insufficient to support her involuntary commitment. *M.A.G.*, No. 2023AP681, unpublished slip op., ¶23-30. (App.13-17). This fact-specific question does not on its own meet an enumerated criterion for review; however, if the Court grants review, M.A.G. requests that the Court decide it.

STATEMENT OF FACTS

Ozaukee County filed a petition to recommit M.A.G. for a period of twelve months. (R.94). Attached to the petition was a report written by Sarah Miller, a case manager with the Department of Human Services. (R.95). The report requested an involuntary medication order. (R.95:3). The report did not contain a statement by a licensed physician regarding medication. *See* Wis. Stat. § 51.61(1)(g)3. ("a report, if

any, on which the motion is based shall … include a statement signed by a licensed physician…based on an examination of the individual by a licensed physician"). The County did not thereafter request a court-appointed examiner or otherwise obtain an evaluation by a licensed physician.

The circuit court held a hearing on the petition. (R.116; App.31-94). The County called Samantha Dagenhardt. Ms. Dagenhardt testified that she was an "APNP," employed as the psychiatric administrator for the County. (R.116:5; App.35). She had master's degrees in psychology and "psych nursing." (R.116:6; App.36). She worked with M.A.G., prescribing her psychiatric medication for a schizoaffective disorder. (R.116:6-7, 12-13; App.36-37, 42-43).

Ms. Dagenhardt testified that M.A.G. was prescribed two antipsychotics: Aristrada, a long-acting injectable antipsychotic medication; and Abilify, an oral antipsychotic medication. (R.116:7; App.37). Ms. Dagenhardt met with M.A.G. every other month or every three months to discuss the medications. Their most recent meeting was in July. Ms. Dagenhardt testified that she went over the advantages and disadvantages of the medication. (R.116:7-9; App.37-39). As to alternatives, she discussed other medication from the past; however, Ms. Dagenhardt believed that Aristrada was the most effective medication. She did not discuss other forms of treatment apart from medication. (R.116:9; App.39). She had in the past offered psychotherapy to M.A.G., and M.A.G. had declined it. (R.116:28-29; App. 58-59).

Ms. Dagenhardt testified that she believed that M.A.G. understood the information relating to her prescribed medication. (R.116:9-10; App. 39-40). However, Ms. Dagenhardt did not believe that M.A.G. could make an informed choice whether to accept or refuse the medication because she did not believe that she had a mental illness, or that she needed medication. (R.116:10; App. 40).

Ms. Dagenhardt testified that M.A.G. had longstanding, fixed delusions, which could not be changed with medication. (R.116:12; App. 42). M.A.G. believed that her neighbors were shooting lasers at her; that she was part of the government; and that she was a physician. (R.116:11; App. 41). According to Ms. Dagenhardt, in 2016, M.A.G. was living in her car because she feared her neighbors. (R.116:11; App.41). M.A.G. developed cellulitis in her leg (which she referred to as elephantiasis), and had attributed it to her medication. (R.116:26; App.56). M.A.G.'s daughter brought her to have it addressed, but she took some convincing. (R.116:35; App.65). Ms. Dagenhardt also read in the report that M.A.G. allegedly called Washington, D.C. in 2015 "indicating something about about killing someone" and the president. (R.116:26; App.56). M.A.G. had also called in a prescription for amoxicillin for a neighbor. (R.116:24; App.54).

Ms. Dagenhardt testified that she did not believe M.A.G. would take medication voluntarily. (R.116:14; App.44). She testified that M.A.G. initially refused her injection in April when a nurse went to administer it. This prompted Ms. Dagenhardt to go see

M.A.G. in person. However, after they discussed the injection, M.A.G. agreed to take it, and she had been consistent since then. (R.116:15; App.45).

Ms. Dagenhardt acknowledged that M.A.G. had family support and could receive County support even if she was not on commitment. (R.116:19-20; App.49-50). She also testified that M.A.G. had a good relationship with her case manager and may accept services. Alternatively, M.A.G. might prefer her family to play that role. (R.116:20; App.50).

Ms. Dagenhardt testified about what would happen if M.A.G. stopped medication. The County read the statutory language from Wis. Stat. § 51.20(1)a.2.e.: "do you have any opinion as to whether or not she would suffer either severe mental harm, severe emotional harm, or severe physical harm?" and Ms. Dagenhardt answered affirmatively, for reasons including: worries about diet; drinking fluids; going to appointments; hygiene; and living in her vehicle again. (R.116:16-17; App.46-47). Ms. Dagenhardt testified that if M.A.G. had a period of time without medication, it could be hard to return her to a baseline of stability if medication resumed. (R.116:17; App.47). The County read again from the statute, "and would that be evidence, then, of a loss of cognitive or volitional control over her thoughts and actions?" Ms. Dagenhardt answered "correct." (R.116:18; App.48).

M.A.G.'s case manager, Sarah Miller, also testified. (R.116:32-33; App.62-63). She testified that

half of M.A.G.'s services were provided by County staff and funds, but M.A.G. also had Family Care, a community-based service that manages tasks such as laundry, grocery shopping, and meal preparation. (R.116:38; App.68). M.A.G. was voluntarily cooperating with all of those in-home services, although at times she became paranoid with County staff. (R.116:39; App.69).

The final witness was M.A.G. She testified that she was not living in her car in 2016. (R.116:42; App.72). She was keeping her belongings in the car because her neighbors were stealing from her. (R.116:42-43; App.72-73). She testified that the Aristrada shots were causing leg pain. (R.116:43; App.73). She testified that she did not know if the medication was the cause of her leg infection, but acknowledged that she had an infection. As to calling in the prescription antibiotic, she testified that her neighbor wanted the prescription and she felt sorry for him. (R.116:43-44; App.73-74). She said she would not do it again. (R.116:43-44; App.73-74).

The County argued that it had met its burden of proof under the fifth commitment standard based on "Dr. [sic] Dagenhardt's testimony." (R.116:44; App.74). *See* Wis. Stat. § 51.20(1)(a)2.e. The County also argued that the third and fourth standards were met based on the situations regarding the prescription and M.A.G.'s leg infection. (R.116:48-49; App.78-79). *See* Wis. Stat. §§ 51.20(1)(a)2.c. and 2.d. The County requested an involuntary medication order during the commitment period. (R.116:50; App.80).

The court found that M.A.G. met the criteria for commitment. The court was concerned about supportive services being withdrawn. The court was also concerned that there was a substantial probability of harm to others due to bad judgment, citing the instance of procuring medication for a neighbor. (R.116:53; App.83). The court also cited M.A.G.'s testimony that she had kept her property in her car because she was concerned about people stealing it. (R.116:54; App.84). The court found that M.A.G. was "getting older, and winter is coming." (R.116:54; App.84).

The court found M.A.G. dangerous under the third, fourth, and fifth standards. (R.116:59; App.89). The court also found grounds for an involuntary medication order, finding that M.A.G. understood the information about her medications, but did not see a need for them because she did not believe that she was mentally ill. (R.116:58; App.88).

The court entered written orders of commitment and involuntary medication. (R.110:1-2; App.26-27) (App.91:1-2, App.28-29) (R.108; App.30).

M.A.G. appealed both orders. She argued that the commitment was invalid because the evidence of dangerousness was insufficient. She also argued that County failed to prove that she was incompetent to provide informed consent to administration of psychotropic medication because it failed to present an

opinion from a licensed physician[3] that she was incompetent. In addition, the competency evaluation was untimely and lacked specificity.[4]

The court of appeals affirmed. First, it determined that M.A.G. was dangerous under the third standard because M.A.G. "[e]vidences such impaired judgment, manifested by evidence of a pattern of recent acts or omissions, that there is a substantial probability of physical impairment or injury to … herself or other individuals." *M.A.G.*, No. 2023AP681, unpublished slip op. ¶24 (quoting Wis. Stat. § 51.20(1)(a)2.c). (App.14-15). The court of appeals relied on M.A.G. sleeping in the car; her swollen leg; and the prescription incident. Finally, it determined that there was not a reasonable probability that she would avail herself of services if not under commitment. *Id.,* ¶¶25-27. (App.15-16).

Next, the court of appeals addressed the medication order challenges. It determined that M.A.G. improperly framed her argument as a sufficiency of the evidence claim, and said this "issue really is one of statutory interpretation and application." *Id.*, ¶33 (App.17-18).[5] As such, it found

[3] In the court of appeals, M.A.G. used the term "psychiatrist," but herein uses the statutory term, "licensed physician."

[4] M.A.G. also argued that the circuit court applied an incorrect competency standard in its ruling, but does not petition for review on this claim.

[5] Sufficiency of the evidence claims may be raised directly on appeal. Wis. Stat. § 809.30(2)(h).

that M.A.G. forfeited the claim by not raising it at the commitment hearing.[6] *Id*., ¶33. (App.17). The court of appeals then indicated that, despite forfeiture, "we nonetheless state the following":

> [M.A.G.]'s assertion on appeal is not that the County's petition for the involuntary administration of medication to M.A.G. was itself invalid due to the lack of a statement signed by a licensed physician, but that the evidence presented at the hearing was insufficient because a physician did not testify. This is a different matter than what is addressed in WIS. STAT. § 51.61(1)(g)3., which addresses the submission of a report with the motion. Moreover, although a report was submitted with the "motion" (here a petition) and was lacking a physician statement and signature, there is reason to question if a report is required at all under this statutory provision in light of the legislature's inclusion of the words "if any." And without this provision in any way specifically addressing a requirement for physician testimony at the hearing on the petition, there is even more reason to question

[6] The court of appeals said M.A.G. should have: asked that the petition be dismissed prior to the hearing due to the lack of the physician endorsement; moved for dismissal at the close of the County's case-in-chief; or object to Ms. Dagenhardt's "credentials to testify." *M.A.G.*, No. 2023AP681, unpublished slip op., ¶35. (App.18-19). In any sufficiency challenge a defendant may choose to move to "dismiss" for lack of evidence, but that step is not required prior to appeal. In addition, M.A.G. does not argue that Ms. Dagenhardt did not have the credentials to testify as an expert. The County could have called her as a witness, but it also had to call a licensed physician.

> whether the failure to include such a report—or physician testimony— means the County did not meet its burden of proof with regard to the medication order. [M.A.G.] insufficiently develops this issue in part because she makes no attempt whatsoever to explain how the language of this provision means evidence presented by the County at the hearing on the medication petition is, by law, insufficient if no physician testifies.

M.A.G., No. 2023AP681, unpublished slip op., ¶36. (App.19-20). Finally, the court of appeals rejected M.A.G.'s argument that the medication discussion was untimely and unreasonable. It stated that M.A.G. did not provide "legal support" for the examination being too dated. *Id.,* ¶37. (App.20). Instead, because there was "no evidence" that "the nature of the medications or their impact on [M.A.G.] had changed" in those four months, it was timely. *Id.*

ARGUMENT

I. In order to meet its burden of proof to obtain an involuntary medication order under Wis. Stat. §§ 51.61(1)(g)3. and 3m., the County must prove that a *licensed physician* has examined the person and opined on competency.

A. Introduction and statute.

"Following a final hearing" in an involuntary commitment case, the County may move for an involuntary medication order. Wis. Stat.

§ 51.61(1)(g)3. In practice, the involuntary commitment and medication motions are commonly heard at the same hearing. While Wis. Stat. § 51.20 governs the mental commitment proceeding, Wis. Stat. § 51.61 governs the involuntary medication proceeding. Both Wis. Stat. §§ 51.61(1)(g)3. and 3m. provide the path to obtaining a medication order following a final commitment hearing. Whereas Wis. Stat. § 51.61(1)(g)3. governs involuntary medication orders entered following a final commitment hearing in general, Wis. Stat. § 51.61(1)(g)3m. applies specifically to commitments under the "fifth" standard of dangerousness. As will be demonstrated, both provisions should be read to require evidence from a licensed physician.

Section 51.61 is titled "Patients Rights." The relevant provisions here are Wis. Stat. §§ 51.61(1)(g)3., 3m., and 4.a.-b.

> 51.61 Patients rights.
>
> (1)...
>
> (g) Have the following rights, under the following procedures, to refuse medication and treatment:
>
> …
>
> 3. Following a final commitment order, other than for a subject individual who is determined to meet the commitment standard under s. 51.20 (1) (a) 2. e., have the right to exercise informed consent with regard to all medication and treatment unless the committing court or the court in the county in which the individual is located, within

10 days after the filing of the motion of any interested person and with notice of the motion to the individual's counsel, if any, the individual and the applicable counsel under s. 51.20 (4), makes a determination, following a hearing, that the individual is not competent to refuse medication or treatment or unless a situation exists in which the medication or treatment is necessary to prevent serious physical harm to the individual or others. A report, if any, on which the motion is based shall accompany the motion and notice of motion and shall include a statement signed by a licensed physician that asserts that the subject individual needs medication or treatment and that the individual is not competent to refuse medication or treatment, *based on an examination of the individual by a licensed physician*. The hearing under this subdivision shall meet the requirements of s. 51.20 (5), except for the right to a jury trial. At the request of the subject individual, the individual's counsel or applicable counsel under s. 51.20 (4), the hearing may be postponed, but in no case may the postponed hearing be held more than 20 days after a motion is filed.

3m. Following a final commitment order for a subject individual who is determined to meet the commitment standard under s. 51.20 (1) (a) 2. e., the court shall issue an order permitting medication or treatment to be administered to the individual regardless of his or her consent.

4. For purposes of a determination under subd. 2. or 3., an individual is not competent to refuse medication or treatment if, because of mental illness, developmental disability,

> alcoholism or drug dependence, and after the advantages and disadvantages of and alternatives to accepting the particular medication or treatment have been explained to the individual, one of the following is true:
>
> a. The individual is incapable of expressing an understanding of the advantages and disadvantages of accepting medication or treatment and the alternatives.
>
> b. The individual is substantially incapable of applying an understanding of the advantages, disadvantages and alternatives to his or her mental illness, developmental disability, alcoholism or drug dependence in order to make an informed choice as to whether to accept or refuse medication or treatment.

Wis. Stat. §§ 51.61(1)(g)3., 3m., and 4.a.-b. (emphasis added).

Statutory interpretation begins with the language of the statute. If the meaning of the statute is plain, the inquiry ordinarily stops and extrinsic sources are not considered. *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶44, 271 Wis. 2d 633, 681 N.W.2d 110. "Statutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning." *Id*. Language is "interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid

absurd or unreasonable results." *Id*., ¶46. Statutory history is an intrinsic source to interpreting a statute. *Brey v. State Farm Mut. Auto. Ins. Co*., 2022 WI 7, ¶21, 400 Wis. 2d 417, 970 N.W.2d 1.

B. The County must present a competency opinion from a licensed physician in order to meet its burden of proof under Wis. Stat. § 51.61(1)(g)3.

A plain meaning interpretation of Wis. Stat. § 51.61(1)(g)3. reveals that an involuntary medication order must be based on a competency examination and opinion by a licensed physician.

First, Wis. Stat. § 51.61(1)(g)3. sets forth the procedural requirements and pleading requirements. The County is required to file a motion. Within 10 days, the court must hold a hearing on the motion and determine competency. If the County submits a report with the motion, the report "shall" accompany the motion.

> A report, if any, on which the motion is based shall accompany the motion and notice of motion and shall include a statement signed by a *licensed physician* that asserts that the subject individual needs medication or treatment and that the individual is not competent to refuse medication or treatment, based on an examination of the individual by a *licensed physician*.

Wis. Stat. § 51.61(1)(g)3. (emphasis added). Here, although the County filed a report, by case manager

Sarah Miller, the report did *not* contain a statement by a licensed physician.

Then, Wis. Stat. § 51.61(1)(g)4.a. and b. outline the competency standard. This subdivision cross-references Wis. Stat. § 51.61(1)(g)3., clearly indicating that it is referencing the physician's competency opinion in Wis. Stat. § 51.61(1)(g)3.

> 4. *For purposes of a determination under subd. 2. or 3., an individual is not competent to refuse medication or treatment if,* because of mental illness, developmental disability, alcoholism or drug dependence, and after the advantages and disadvantages of and alternatives to accepting the particular medication or treatment have been explained to the individual, one of the following is true:
>
> a. The individual is incapable of expressing an understanding of the advantages and disadvantages of accepting medication or treatment and the alternatives.
>
> b. The individual is substantially incapable of applying an understanding of the advantages, disadvantages and alternatives to his or her mental illness, developmental disability, alcoholism or drug dependence in order to make an informed choice as to whether to accept or refuse medication or treatment.

Wis. Stat. § 51.61(1)(g)4.a.-b.

In the court of appeals, the County did not disagree with M.A.G.'s assertion that Wis. Stat.

§ 51.61(1)(g)3. requires a competency opinion by a licensed physician. Instead, it argued that the statute only applies to "original" medication orders, not "extension" medication orders. (Resp. Br. at 13). M.A.G. countered that the law does not provide for "extension" of a medication order.[7] Instead, a commitment may be extended, and the Legislature enacted specific provisions that govern the process, but each new commitment order requires a new involuntary medication review.[8]

The court of appeals did not accept either parties' arguments. Instead, it found M.A.G.'s claim was forfeited and underdeveloped, but nonetheless made statements that can be read to suggest that evidence from a licensed physician is not required in any involuntary medication proceeding under Wis.

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[7] M.A.G. also argued that the County's interpretation would violate equal protection because individuals committed under original commitments and recommitments are similarly situated. A classification between similarly situated individuals runs afoul of the Equal Protection Clause if there is no "rational relationship between the disparity of treatment and some legitimate governmental purpose." *Heller v. Doe*, 509 U.S. 312, 320 (1993). M.A.G. does not discuss this claim further herein because the court of appeals did not reach it. She gives notice that if the Court grants review and the County continues to argue this position, she will reassert the equal protection claim.

[8] A medication order is tied to a commitment order. *See* Wis. Stat. § 51.61(1)(g)3. ("[f]ollowing a final commitment order…"). Therefore, when a commitment order expires, the medication order also expires.

Stat. § 51.61(1)(g)3. *See M.A.G.*, No. 2023AP681, unpublished slip op., ¶36. (App.16-20).

First, the court of appeals determined that what is required in evidence at the hearing "is a different matter than what is addressed in WIS. STAT. § 51.61(1)(g)3., which addresses the submission of a report with the motion." *Id.*, ¶36. (App.19). It further found that, "there is reason to question if a report is required at all under this statutory provision in light of the legislature's inclusion of the words "if any."' *Id*. Finally, "although a report was submitted with the "motion" (here a petition) and was lacking a physician statement and signature," this was not consequential because, again, there was "reason to question" if a report was required at all. *Id*.

The court of appeals was mistaken about the reach and application of Wis. Stat. § 51.61(1)g.3. Its decision overstates the impact of the words "if any," and overlooks the statutory cross-reference between Wis. Stat. § 51.61(1)g.3. and Wis. Stat. § 51.61(1)(g)4. Reasonably read, Wis. Stat. § 51.61(1)(g)3. is setting out a pleading requirement and Wis. Stat. § 51.61(1)(g)4. indicates what needs to be proven to have the court grant the motion. The County can provide an offer of proof in the form of a report. That report "shall" be signed by a licensed physician based on an examination by a licensed physician.

But whether or not the County submits a report with its motion does not change the fact that, ultimately, incompetency must be proven by the

standard set forth in Wis. Stat. § 51.61(1)(g)4., which cross-references Wis. Stat. § 51.61(1)(g)3. The only reasonable conclusion is that a licensed physician must be the one to provide the competency examination and opinion. Otherwise, the County could lower its burden of proof by simply choosing not to file a report. It would not make sense to allow the County's decision on whether or not to file a report dictate the qualifications of the person who evaluates the individual's competency. *See Kalal*, 271 Wis. 2d 633, *Id.*, ¶46 (statutes are read "reasonably, to avoid absurd or unreasonable results.")

And even if the County does file a report and fails to include a physician statement, like it did in M.A.G.'s case, the court of appeals determined that too, appeared to be permissible, because a report is not required. Yet, the statute uses the word "shall," which is presumed mandatory. *Karow v. Milwaukee Cty Serv. Comm.*, 82 Wis. 2d 565, 570, 263 N.W.2d 214 (1978) (cited source omitted). Wis. Stat. § 51.61(1)(g)3. (a report, if any, on which the motion is based shall … include a statement signed by a licensed physician . . . based on an examination of the individual by a licensed physician").

Statutory history suggests that the Legislature intended the "licensed physician" language to create a substantive change in the County's burden of proof, not a procedural technicality. Prior to 1987 a person did not have a presumption of competency to exercise informed consent. *See* Wis. Stat. § 51.61(1)(g) (1985-1986) ("following a final commitment order, the

subject individual does not have the right to refuse medication and treatment except as provided by this section …").[9] In the 1987 revision, the (1)(g)3. provision changed to provide that an individual, "following a final commitment order, have the right to exercise informed consent with regard to all medication and treatment unless the committing court or the court in the county in which the individual is located makes a determination, following a hearing, that the person is not competent…" Wis. Stat. § 51.61(1)(g)3. (1987-1988). *See* 1987 a. 366, s. 18. This revision also created Wis. Stat. § 51.61(1)(g)4., which contains the competency standard. The statute still did not discuss a report or what type of medical professional should opine on competency.

Then, in the 1989 revision, the Legislature enacted the language at issue here, in Wis. Stat. § 51.61(1)(g)3. (1989-1990) ("A report, if any, on which the motion is based shall accompany the motion and notice of motion and shall include a statement signed by a licensed physician …"). *See* 1989 a. 31, s1615g. This history shows that the Legislature has progressively increased protections afforded to individuals when faced with involuntary medication, including by defining incompetency and designating the type of medical professional that shall give an opinion regarding competency.

[9] Exceptions including right to be free from excessive medication, right to have medication be ordered by a licensed physician, and freedom from medication used as punishment. Wis. Stat. § 51.61(1)(h).

Finally, Ms. Dagenhardt was not a licensed physician and, therefore, her testimony was not sufficient to meet the County's burden to prove that M.A.G. was incompetent. Under Wis. Stat. § 448.01(5), "[p]hysician" means "an individual possessing the degree of doctor of medicine or doctor of osteopathy or an equivalent degree as determined by the medical examining board, and holding a license granted by the medical examining board." Ms. Dagenhardt testified that she had master's degrees in psychology and "psych nursing." (R.116:6; App.36). She is not a licensed physician. This is not to say that she necessarily lacks authority to prescribe medication. *See* Wis. Stat. § 441.16(2). However, prescribing authority is not the same as qualification to render a competency determination under Wis. Stat. § 51.61(1)(g)4.

If the Legislature wished to qualify other medical professionals to give the competency opinion, it would have said so. In other parts of the section, the Legislature used the term "licensed mental health professional." *E.g.*, Wis. Stat. § 51.61(1)(y). But, in Wis. Stat. § 51.61.(1)(g)3., it specifically chose "licensed physician." *See also*, Wis. Stat. § 51.61(1)h. ("[n]o medication may be administered to a patient except at the written order of a physician").

C. The County must obtain a competency opinion from a licensed physician in order to meet its burden of proof under Wis. Stat. § 51.61(1)(g)3m.

The County also argued that, because M.A.G. was committed under the "fifth" standard of dangerousness, evidence from a licensed physician was not required. Under Wis. Stat. § 51.61(1)(g)3m., the court "shall" enter a medication order if the individual is committed under the fifth standard. Wis. Stat. § 51.61(1)(g)3m. ("[i]f a final commitment order for a subject individual who is determined to meet the commitment standard under s. 51.20 (1) (a) 2. e., the court shall issue an order permitting medication or treatment to be administered to the individual regardless of his or her consent.").

Yet, the reason why the court shall issue an involuntary medication order in a fifth standard case is that the fifth standard contains its own competency provision that mirrors the standard in Wis. Stat. § 51.61(1)(g)4. *See Melanie L.*, 349 Wis. 2d 148, ¶62 ("[s]ubdivision 3m. is not governed by subd. 4. because the Fifth Standard . . . contains many of the same provisions found in Wis. Stat. § 51.61(1)(g) 4.b.; and to commit a person under the Fifth Standard, the government must prove these provisions by clear and convincing evidence"). Once there is a commitment under the fifth standard, the competency standard has already been met (by virtue of the parallel standard). For this reason, the court shall enter an involuntary medication order once a person is committed under this standard. Wis. Stat. § 51.61(1)(g)3m.

In an original commitment, at least one psychiatrist will have examined the person before they can be committed under any of the five standards,

including under the fifth standard. *See* Wis. Stat. § 51.20(9) (the court shall appoint two examiners, one of whom must be a psychiatrist). In *Waukesha Cty. v. S.L.L.*, 2019 WI 66, ¶27, 387 Wis. 2d 333, 929 N.W.2d 140, this Court stated "the procedures governing commitment extensions are located in Wis. Stat. §§ 51.20(10)-(13) not 51.20(2)." However, *S.L.L.* was interpreting sub.(2)(b), and did not discuss sub. (9). To the extent that *S.L.L.* allows a commitment under Wis. Stat. § 51.20 (1) (a) 2. e.—and also an involuntary medication order under Wis. Stat. § 51.61(1)(g)3m.—without an opinion by a licensed physician—it was wrongly decided. This Court has recently accepted review in W*aukesha County v. M.A.C.*, No. 2023AP533, in which the petitioner asked the Court to revisit *S.L.L.*[10]

[10] In addition, Wis. Stat. § 51.61(1)(g)3m. only applies to fifth standard commitments. Therefore, if this provision is the basis for finding that an involuntary mediation order may be entered in a fifth-standard commitment without evidence from a licensed physician, the implication is that such evidence *would* be required in a commitment under one of the other four standards, Wis. Stat. §§ 51.20(1)(a)2.a-d. This would violate equal protection. Individuals committed under section 51.20 are similarly situated and there is no reasonable basis to permit the government to involuntarily medicate individuals committed under the fifth standard with fewer protections than those committed under the first-through-fourth standards.

II. In order to meet its burden of proof to obtain an involuntary medication order under Wis. Stat. § 51.61(1)(g)3. and 3m., the County must prove that the advantages and disadvantages of and alternatives to accepting the particular medication or treatment have been explained to the individual in a timely manner, and four months prior to the hearing is not timely.

An individual can only be deemed incompetent if the advantages and disadvantages of and alternatives to accepting the particular medication or treatment have been explained to them and, the individual is either incapable of expressing an understanding of this information or substantially incapable of applying this information in order to a make an informed choice as to whether or not to accept or refuse the medication. Wis. Stat. § 51.61(1)(g)4.a. and b. The medication explanation "should be timely, and, ideally, it should be periodically repeated and reinforced." *Melanie L.*, 349 Wis. 2d 148, ¶67.

Here, Ms. Dagenhardt testified that her last medication discussion with M.A.G. was approximately four months prior to the hearing. This is not reasonable or timely. "Timely" is not defined in Chapter 51. *See* Wis. Stat. § 51.01 (definitions). However, a dictionary definition of "timely" is

"appropriate or adapted to the times or the occasion."[11] A medication order must be based on current incompetency. An evaluation that occurred four months prior to the hearing was not completed at an appropriate time. Furthermore, statutory language "is interpreted in the context in which it is used." *Kalal,* 271 Wis. 2d 633, ¶46. The Legislature has signaled that frequent reviews are required to ensure that a commitment and medication order are based on a person's current condition. An original commitment order may only last six months, and recommitment order may only last a year. Wis. Stat. § 51.20(13)(g).

The medication discussion was also incomplete. Ms. Dagenhardt admitted that she did not discuss any alternatives to medication at the July appointment, despite also testifying that she believed psychotherapy would benefit M.A.G. (R.116:9, 29; App.39, 59). The County also failed to "make a detailed record of [M.A.G.]'s noncompliance in taking prescribed medication," as suggested in *Melanie L.*, 349 Wis. 2d 148, ¶51. M.A.G. was accepting the medication, apart from one instance where she did not accept it from a nurse but did accept it from Ms. Dagenhardt. (R.116:15; App.45).

Finally, the evidence does not show that M.A.G. was unable to apply an understanding of the advantages, disadvantages, and alternatives to

[11] *Merriam-Webster.com Dictionary*, Merriam-Webster, https://www.merriam-webster.com/dictionary/timely. (last accessed Dec. 26, 2023).

medication. It is not enough to say that M.A.G. does not believe she is mentally ill and does not want to take medication. Circuit courts "must maintain the distinction … between a patient's mental illness and his or her ability to exercise informed consent." *Melanie L.*, 349 Wis. 2d 148, ¶51. Courts "cannot allow the involuntary medication hearing to drift into an enforcement mechanism for a doctor's order that [a] competent patient disagrees with or ignores." *Id.*, ¶93.

III. The County failed to prove by clear and convincing evidence that M.A.G. was dangerous to herself or others.

The County failed to prove by clear and convincing evidence that M.A.G. was dangerous to herself or others, as required to involuntarily commit her. *See* Wis. Stat. § 51.20(13)(e). To prove dangerousness, the County must satisfy one or more of the five standards of dangerousness set forth in Wis. Stat. § 51.20(1)(a)2.a.-e. In a recommitment hearing, the County can take the alternative route under Wis. Stat. § 51.20(1)(am), "by a showing that there is a substantial likelihood, based on the subject individual's treatment record, that the individual would be a proper subject for commitment if treatment were withdrawn." This Court reviews a circuit court's findings of fact for clear error, but independently determines whether the facts satisfy the legal standard. *Waukesha Cty. v. J.W.J.*, 2017 WI 57, ¶15, 375 Wis. 2d 542, 895 N.W.2d 783.

The circuit court found that M.A.G. met the standards of dangerousness in Wis. Stat. § 51.20(1)(a)2.c. (third); 2.d. (fourth); and 2.-e. (fifth). The court of appeals concluded she met the third standard. *M.A.G.*, No. 2023AP681, unpublished slip op., ¶24. (App.14).

A. The County failed to prove M.A.G. dangerous under the Wis. Stat. § 51.20(1)(a)2.e. ("fifth") standard.

Under Wis. Stat. § 51.20(1)(a)2.e., the County must prove: (1) the person is mentally ill; (2) the person is incompetent to make medication or treatment decisions; (3) there is a "substantial probability" that the person "needs care or treatment to prevent further disability or deterioration" (as "demonstrated by both the individual's treatment history and his or her recent acts or omissions"); (4) there is a "substantial probability that he or she will, if left untreated, lack services necessary for his or her health or safety;" and (5) the person evidences "a substantial probability that he or she will, if left untreated, ... suffer severe mental, emotional, or physical harm that will result in the loss of the individual's ability to function independently in the community or the loss of cognitive or volitional control over his or her thoughts or actions." *See State v. Dennis H.*, 2002 WI 104, ¶¶18-24, 255 Wis. 2d 359, 647 N.W.2d 841.

"The probability of suffering severe mental, emotional or physical harm is not substantial … if

reasonable provision for the individual's care or treatment is available in the community and there is a reasonable probability that the individual will avail himself or herself of these services." *Id*.

As demonstrated *infra* Argument I, evidence from a licensed physician is required in order to meet the incompetency standard. That was missing here. Therefore, the evidence was insufficient. The evidence was also insufficient because the county failed to prove that there was a "threat to the individual's fundamental health or safety and a loss of the ability to function independently or control thoughts or actions. Mere emotional or mental harm is insufficient for commitment." *Dennis H*., 255 Wis. 2d 359, ¶30. The County must prove a vulnerability to "severely harmful deterioration." *Id*., ¶ 34.

The evidence showed that M.A.G. would not lack services without commitment. She could continue to receive services from the County as well as Family Care. She also had family support. This support network could continue even if she was not on commitment. (R.116:20, 38-38; App.27, 45-46). The County did not present any evidence that M.A.G. would lose cognitive or volitional control over her thoughts or actions without medication. M.A.G. had fixed delusions that would not be changed by medication. Ultimately, the County did not prove what, exactly, medication was actually doing to help M.A.G. apart from Ms. Dagenhardt's vague testimony that the medication was helping with mood, safety, and self-care. (R.116:12; App.42). There was no

evidence that M.A.G. would lose her ability to function and severe harm would befall her without medication.

The County asked Ms. Dagenhardt to parrot the statutory standard. (*E.g.* R.116:16-18; App.46-48). However, "reliance on assumptions concerning a recommitment at some unidentified point in the past, and conclusory opinions parroting the statutory language without actually discussing dangerousness, are insufficient to prove dangerousness in an extension hearing." *Winnebago Cty. v. S.H.*, 2020 WI App 46, ¶17, 393 Wis. 2d 511, 947 N.W.2d 761.

B. The County failed to prove M.A.G. dangerous under the Wis. Stat. § 51.20(1)(a)2.c. (third) and 2.d. (fourth) standards.

The court relied on the following facts: in 2015, M.A.G. made a phone call to Washington "indicating" about killing someone; in 2016, M.A.G. was living in her car (season of the year not specified); M.A.G. phoned in a prescription for a neighbor; M.A.G. had a leg infection; M.A.G. thought there was a chip in her head; and she might possibly move back into her car and winter was coming. (R.116:57-59; App.87-89).

The third standard, Wis. Stat. § 51.20(1)(a)2.c., requires proof that the individual is dangerous because he or she: "evidences such impaired judgment, manifested by evidence of a pattern of recent acts or omissions, that there is a substantial probability of physical impairment or injury to himself or herself or other individuals." Impaired judgment does not equate

to dangerousness without facts showing a substantial probability that serious physical harm will result. *See Langlade Cty. v. D.J.W.*, 2020 WI 41, 391 Wis. 2d 231, ¶57, 942 N.W.2d 277.

The County failed to prove that M.A.G. presented a substantial probability of physical impairment or injury to herself or other individuals. The 2015 call to Washington from eight years prior was not characterized as a threat. There is no evidence of a plan or action. There was no evidence that M.A.G. lived in her car during winter months or that she was harmed by living in her car. The prescription was for an antibiotic, and the neighbor accepted it from M.A.G. and ingested it voluntarily. It is worth noting that this occurred while M.A.G. was on commitment and medicated. Regardless, M.A.G. gave assurance that she was just trying to help, but would not do it again. (R.116:43-44; App.73-74).

There is no evidence that the leg infection reached a point of dangerousness. M.A.G.'s case worker pointed the problem out to M.A.G. (R.116:55; App.85). M.A.G. was appropriately concerned about it. She talked to her daughter. She went with her daughter to seek medical care. (R.116:55; App.85). M.A.G. was voluntarily cooperating with in-home services. (R.116:39; App.69). Even without the commitment, M.A.G. could continue to receive these in-home services. (R.116:20; App.50).

The fourth standard, Wis. Stat. § 51.20(1)(a)2.d. requires proof that: "due to mental illness, he or she is

unable to satisfy basic needs for nourishment, medical care, shelter or safety without prompt and adequate treatment so that a substantial probability exists that death, serious physical injury, serious physical debilitation, or serious physical disease will imminently ensue . . .” Wis. Stat. § 51.20(1)(a)2.d.

Ms. Dagenhardt testified that she was concerned because at some unspecified time in the past, M.A.G. had rotted food, and she would worry about M.A.G.’s diet, drinking adequate fluids, going to appointments with her physician, and hygiene. (R.116:16-18; App.46-48). There was no evidence M.A.G. had ever missed an appointment, had inadequate fluids, or had poor hygiene. Having rotted food at some unspecified time is not proof that death, serious physical debilitation, or serious disease will imminently ensue.

Finally, under both the third and fourth standards there is an exception based on whether the provision for the individual’s protection is available in the community and there is a reasonable probability that the individual will avail themselves of these services. *See* Wis. Stat. §§ 51.20(1)(a)2.c., and 2.d. (worded slightly differently). M.A.G. was cooperating with in-home services. (R.116:39; App.69). Even without the commitment, she could continue to receive these services, and also had family support. (*See* R.116:20; App.50). The County failed to prove that M.A.G. was dangerous to herself or others.

CONCLUSION

For the reasons stated above, M.A.G. respectfully asks the Court to grant her petition for review.

Dated this 29th day of December, 2023.

Respectfully submitted,

Electronically signed by Colleen Marion

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this petition conforms to the rules contained in s. 809.19(8)(b), (bm) and 809.62(4). The length of this petition is 7,271 words.

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this petition is an appendix that complies with s. 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 s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rules 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 or 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 29th day of December, 2023.

Signed:
Electronically signed by
Colleen Marion
COLLEEN MARION
Assistant State Public Defender