STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

CASE NO. 2023AP001263

In the Matter of the Mental Commitment of: C.J.H.:
WINNEBAGO COUNTY,
Petitioner-Respondent,

v.

C.J.H.,
Respondent-Appellant.

On Appeal from the Orders for Commitment and Involuntary Medication and Treatment, Entered in the Winnebago County Circuit Court, the Honorable Bryan Keberlein, Presiding

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BRIEF OF RESPONDENT-APPELLANT

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ISSUES PRESENTED

1. Did the circuit court commit reversible error by admitting hearsay evidence about Carly's[1] alleged dangerousness over counsel's objection at the original commitment hearing?

The circuit court admitted the hearsay evidence and found the county presented sufficient evidence to prove dangerousness. (62:17, 42-43; App. 22, 47-48)

2. Did the county meet its burden to show by clear and convincing evidence that Carly is incompetent to refuse medication?

The circuit court answered yes. (62:43; App. 48).

POSITION ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not requested. It is anticipated that the issues will be sufficiently addressed in the briefs. Publication is not warranted because the issues raised involved the application of established legal principles to the facts of this case.

[1] C.J.H. will be referred to as a pseudonym, "Carly," pursuant to Wis. Stat. § 809.19(1)(g).

STATEMENT OF THE CASE AND FACTS

On January 13, 2023, Carly was being held at the Winnebago County Jail. While there, the county filed a statement of emergency detention after Carly began "exhibiting behavior that cause[d] a danger to herself and the jail staff." (1).

Prior to the commitment hearing, Dr. Marshall Bales and Dr. Megan Thumann submitted examination reports. (17; 20; App. 51-56). Bales stated in his report that he believed Carly was dangerous. To support his opinion, Bales described incidents involving Carly that had allegedly occurred at the Winnebago County Jail. (17:1, 3; App. 51, 53).

At the commitment hearing, Bales testified that he believed, based on a review of Carly's records and a "15 to 20 minute" examination, that Carly was manic and psychotic. (62:5-6; App. 10-11). When asked why he found Carly dangerous in his examination report, Bales referenced incidents and "problems within the jail" that were described in "records from the jail report." (62:7-8; App. 12-13). Bales noted that he learned of these incidents through the "jail report." (62:8; App. 13). None of these records were offered or admitted into evidence.

Bales then testified that he believed Carly was a proper subject for treatment. (62:9-10; App. 12-15). Bales also opined that Carly "could neither express nor apply my attempt at reviewing medications with her." (62:10-11; App. 15-16). When asked if he believed Carly was incompetent to refuse medication, Bales

responded "incompetent." (62:11; App. 16). Bales stated he had explained to Carly the advantages, disadvantages, and alternatives to accepting medication. (62:11; App. 16).

After Bales' testimony, the county moved to admit his examination report into evidence. Carly objected to the report's admission, stating there were "multiple levels of hearsay within the report of the examination." (62:17; App. 22). The court overruled the objection and admitted Bales' report. (62:17; App. 17).

Afterwards, Dr. Thuman testified that she had spent 30 minutes with Carly and reviewed her mental health records (62:20; App. 25). In regards to the alleged incident that prompted the emergency detention, Thumann said Carly "described that the jail staff was upset with her for telling people how to harm themselves, and she said, I found the perfect way to do it. And there was some sort of metal protrusion in the cell that she said she could hit her head against to kill herself." (62:21; App. 26). Thuman diagnosed Carly with Bipolar 1 Disorder and believed Carly was a proper subject for treatment. (62:22; App. 27). On cross examination, Thumann stated she was not aware of any incidences of self-harm and testified that Carly was currently taking her medications. (62:23-24; App. 28-29).

Next, Sergeant Emmrich of the Winnebago County Jail testified that, while in jail, Carly was "making comments about self-harm" using

a one-inch hook on the side of the toilet. (62:26-27; App. 31-32). While these comments prompted the emergency detention, Emmrich repeatedly clarified that Carly had never attempted to harm herself. (62:26-27; App. 31-32).

Finally, Carly clarified that she had never threatened to harm herself, stating:

> I never said I was going to harm myself ever. Never, in my entire life, have I said I was going to harm myself. When I made the statement about that protrusion out of the sink/toilet at the jail, I said, I am not going to do this myself; I figured out how you can kill yourself in jail. And I yelled out, if you want to know, this is how you do it; all you have to do is put that spike thing out straight and ram your temple into it.

(62:28-29; App. 33-34).

Carly then testified to her medication and treatment history. Carly stated she had previously worked with a psychiatrist, Dr. Shopbell, but that she now met with a counselor after Shopbell left the clinic. (62:30; App. 35). Carly also stated that her medications were previously prescribed by Shopbell, but that these medications were now being prescribed by her internist since Shopbell's departure. (62:30; App. 35). Carly testified that she has always taken her medications. (62:31; App. 36).

When asked about her medications, Carly stated she takes "trazadone for sleeping at night, and I take venlafaxine, which is a mood stabilizer, and I have

medication for seizures, blood pressure medication." (62:31; App. 36). When asked if these medications had any side effects, Carly responded "No. In fact, they don't work. They don't put me to sleep." (62:31; App. 36).

After arguments from the parties, the court found Carly suffered from a mental illness and was a proper subject for treatment. (62:41-42; App. 46-47). The court then held the elements of dangerousness had been met. (62:42-43; App. 47-48). The court did not, however, make any factual findings to support its dangerousness determination. (62:42-43; App. 47-48). Instead, the court merely summarized Emmrich's testimony regarding Carly discussing self-harm. (62:42; App. 47). Finally, the court ruled that "a medication order is appropriate" because there was medical testimony "to support that the elements of the statute [had] been met." (62:43; App. 48). While the court referenced Bales' testimony, it again made no factual findings to support the medication order. (62:37, 43; App. 42).

The next day, the trial court entered an order of commitment finding Carly dangerous under Wis. Stat. § 51.20(1)(a)2.a, which states the individual is dangerous because they evidence "a substantial probability of physical harm to himself or herself as manifested by evidence of recent threats of or attempts at suicide or serious bodily harm." (42:1; App. 3). The court also ordered that, pursuant to federal law, Carly is "prohibited from possessing any firearm…[and that the] expiration of the mental commitment proceeding

does not terminate this restriction." (42:2; App. 4). Finally, the court also entered an order of involuntary medication, where it ruled Carly was substantially incapable of applying an understanding of her medications in order to make an informed choice as to whether to accept or refuse medication. (41:1; App. 5). Carly timely filed a notice of appeal and this brief follows.

ARGUMENT

I. The circuit court erroneously admitted hearsay evidence and without that improper hearsay, the county failed to prove Carly was dangerous.

A. Introduction and Standard of Review.

The circuit court erroneously overruled Carly's hearsay objection to the admission of Bales' report into evidence. As a result, extensive and descriptive hearsay statements were admitted despite Bales conceding his only knowledge of these incidences came from out-of-court statements made by unknown third parties. The circuit court's error in admitting this hearsay evidence was not harmless because, without the improper hearsay evidence, there was not clear and convincing evidence to show Carly was dangerous.

An involuntary commitment is a "significant deprivation of liberty that requires due process protection." *Portage Cty. v. J.W.K.*, 386 Wis. 2d 672, ¶16, 927 N.W.2d 509 (citing *Jones v. United States*,

463 U.S. 354 (1983)). As such, before the government can commit someone – and deprive that person of their liberty – the county must prove (1) that the subject is mentally ill; (2) that they are a proper subject for treatment; and (3) that they are dangerous. Wis. Stats. §§ 51.20(1)(a)1.-2.

Given the essential liberty interests at stake, due process requires the government to prove its case by clear and convincing evidence. *Addington v. Texas*, 441 U.S. 418, 433 (1979); *J.W.K.*, 386 Wis. 2d 672, ¶16; Wis. Stat. § 51.20(13)(e). Whether the county has met its burden is a mixed question of law and fact. *K.N.K. v. Buhler*, 139 Wis. 2d 190, 198, 407 N.W.2d 281 (Ct. App. 1987). The circuit court's factual findings will not be overturned unless they are clearly erroneous. *Waukesha Cty. v. J.W.J.*, 2017 WI 57, ¶15, 375 Wis. 2d 542, 895 N.W.2d 783. However, the court reviews independently whether the admissible evidence is sufficient to meet the applicable legal standard. *Id.*; *Buhler*, 139 Wis. 2d 190, 198.

The standard for reviewing the admission of hearsay is whether the circuit court appropriately exercised its discretion. *S.Y. v. Eau Claire County*, 156 Wis. 2d 317, 327, 457 N.W.2d 326 (Ct. App. 1990). An appellate court must reverse an evidentiary ruling unless the circuit court examined the relevant facts, applied a proper standard of law, and, using a demonstrative rational process, reached a conclusion that a reasonable judge could reach. *Id.* Importantly, exercising "discretion is not the equivalent of unfettered decision making." *State v. Daniels*, 160 Wis.

2d 85, 100, 465 N.W.2d 633 (1991). Rather, a discretionary decision by the circuit court must result from "reasoned application of the appropriate legal standard to the relevant facts in the case." *Id*.

B. The circuit court erroneously exercised its discretion by admitting Bales' examination report despite it containing multiple layers of inadmissible hearsay.

A civil commitment for any purpose "requires due process protection." *Addington*, 441 U.S. at 425; *see also* Wis. Stat. § 51.20(5)(a) (Chapter 51 hearings must "conform to the essentials of due process"). Due process, in turn, requires strict adherence to the rules of evidence in commitment proceedings. Wis. Stat. § 51.20(10)(c) (the rules of evidence apply to Chapter 51 hearings). For example, due process dictates that hearsay must be excluded unless an exception applies. Wis. Stat. §§ 908.02 and 908.03; *Lessard v. Schmidt*, 349 F.Supp. 1078, 1103 (E.D. Wis. 1972) (subsequent case history omitted). Hearsay is an out of court statement offered to prove the truth of the matter asserted.

Here, the circuit court improperly admitted Bales' examination report despite the report containing multiple levels of hearsay where no exception applied. In his examination report, Bales describes a number of alleged incidents involving Carly that served as the basis for his dangerousness finding. (17:1, 3; App. 51, 53). For example, Bales' describes learning about incidences where Carly

allegedly spread feces and urine around her cell, made suicidal comments, and discussed killing her sister (17:1; App. 51). Despite describing these alleged incidents in detail, Bales' report makes no mention of the source of these statements nor does it identify who had personal knowledge of these events. (17; App. 51-56).

At the final hearing, Bales makes clear that he learned of these noted incidents from documentation in "the jail report" and not from personal knowledge. (62:8; App. 13). Thus, Bales' examination report contains prejudicial descriptions of alleged incidents documented by unknown third parties outside of the courtroom.

All told, Bales' examination report documenting the contents of a second report, which was never offered or admitted into evidence, contains at least two levels of hearsay: (1) the written report which records the (2) oral statements made by Carly and/or law enforcement in the jail report. Citing these "multiple layers of hearsay," Carly made a timely hearsay objection to the admission of Bales' examination report. (62:17; App. 22). Despite the ample hearsay evidence present in Bales' report, the circuit court erroneously overruled this objection. (62:17; App. 22).

While an expert may rely on inadmissible hearsay to form opinions, the hearsay itself cannot be admitted. *S.Y.*, 156 Wis. 2d at 327-38 (expert's testimony that, according to medical reports,

a patient had committed an unprovoked assault on a student prior to commitment was inadmissible hearsay at the involuntary commitment proceeding). Therefore, while Bales was permitted to base his opinion of dangerousness on incidents described in the jail report, the county was not allowed to rely on his report or testimony as proof the incidents actually occurred. *See id*. As a result, the court erred when it overruled Carly's hearsay objections and admitted Bales' examination report. (62:17; App. 22).

C. The admission of Bales' report was not harmless because, without the excluded hearsay, the county failed to prove that Carly was dangerous.

Without Bales' examination report, the county did not prove by clear and convincing evidence that Carly is dangerous. Therefore, the admission of Bales' report was not harmless.

To prove dangerousness in an original commitment, 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. These standards require proof of recent acts or omissions demonstrating that the individual poses a risk of serious physical harm to self or others. *See J.W.K.*, 386 Wis. 2d 672, ¶17. The circuit court here found Carly was dangerous under the first standard. Wis. Stat. § 51.20(a)2.a; (42; App. 3-4). Because the circuit court identified the first standard of dangerousness, this Court should avoid "guesswork" by limiting review of the sufficiency of the

evidence to the specific provisions identified by the circuit court. *Langlade County v. D.J.W.*, 2020 WI 41, ¶45, 391 Wis. 2d 231, 942 N.W.2d 277.

Under the first standard of dangerousness, the county must prove that the individual is dangerous because he or she "[e]vidences a substantial probability of physical harm to himself or herself as manifested by evidence of recent threats of or attempts at suicide or serious bodily harm." Wis. Stat. § 51.20(1)(a)2.a. The term "substantial probability" is defined as "much more likely than not." *Marathon Cty v. D.K.*, 2020 WI 8, ¶72, 390 Wis. 2d 50, 937 N.W.2d 90. Although certainty is not required, "mere possibility and conjecture" are insufficient. *Id.* at ¶52. The county has the burden of proving each statutory standard by clear and convincing evidence. *J.W.K.*, 386 Wis. 2d 672, ¶16.

If the court properly excluded Bales' report, the only evidence that could show dangerousness was testimony that suggested Carly commented about how a hook in the cell could be used to injure one's head. (*See* 62:26, 42; App. 31, 47). Crucial details about Carly's comment, however, are unclear from the presented testimony, meaning the testimony cannot prove Carly poses a substantial probability of physical harm to herself under the first standard.

To start, there is no testimony clearly showing Carly actually threatened to injure herself with the hook in her cell. Instead, the offered testimony only suggests that Carly was identifying how someone

could hypothetically injure or kill themselves while in the county jail. For example, Thumann testified that Carly had told her that "the jail staff [were] upset with her for telling people how to harm themselves." (62:21; App. 26). Additionally, Emmrich never testified that Carly had threatened to harm herself and instead only stated Carly was "making comments about self-harm." (62:27; App. 32). On the other hand, Carly explicitly denies ever attempting self-harm or making threats to harm herself. (62:28-29; App. 33-34).[2]

Merely discussing a way one could harm themselves is not what § 51.20(a)2.a requires. Instead, the county must provide clear and convincing evidence showing Carly made "recent *threats of* or attempts at suicide or serious bodily harm." Wis. Stat. § 51.20(a)2.a (emphasis added). Because the testimony does not clearly show Carly made recent threats to self-harm, the county failed to prove by clear and convincing evidence that Carly is dangerous under the first standard. *Id.*

The upshot is that without Bales' examination report, the county fails to meet its burden to involuntarily commit Carly. Therefore, the erroneous admission of Bales' report, despite it containing multiple layers of impermissible hearsay, was not

[2]While Wis. Stat. § 51.20(a)2.a also permits a finding of dangerousness based on recent "attempts at suicide or serious bodily harm," there is no testimony showing Carly ever actually attempted suicide or cause serious bodily harm to herself. In fact, Emmrich, the only percipient witness at the jail, testified that she had never seen Carly harm herself. (26).

harmless. *See Martindale v. Ripp*, 2001 WI 113, ¶30, 246 Wis. 2d 67, 629 N.W.2d 698 (erroneous admission of evidence is not harmless if it "affected the substantial rights of the party"). As a result, the commitment order must be vacated.

II. The county failed to prove that Carly is incompetent to refuse medication.

As with involuntary commitments, the forced administration of medication "represents a substantial interference with that person's liberty." *Washington v. Harper*, 494 U.S. 210, 221 (1990). Therefore, individuals have a well-established "Fourteenth Amendment liberty interest in refusing unwanted medical treatment." *Outagamie County v. Melanie L.*, 2013 WI 67, ¶89, 349 Wis. 2d 148, 833 N.W.2d 607; *Lenz v. L.E. Phillips Career Dev. Ctr.*, 167 Wis. 2d 53, 68-69, 482 N.W.2d 60 (1992). All individuals, including those who are involuntarily committed, are presumed competent to refuse medication. *Melanie L.*, 2013 WI 67, ¶49; *State ex rel. Jones v. Gerhardstein*, 141 Wis. 2d 710, 416 N.W.2d 883 (1987).

Under Wis. Stat. § 51.61(1)(g)4.a. and b., the county may overcome the presumption of competency with proof – by clear and convincing evidence – that an individual is incompetent to refuse medication.[3] *Melanie L.*, 2013 WI 67, ¶37. A person is incompetent

[3]There is an exception to this rule for individuals admitted under Wis. Stat. § 51.20(1)(a)2.e. This exception does not apply here. There is a second exception for emergency

to refuse medication only if:

> (a) "The individual is incapable of expressing an understanding of the advantages and disadvantages of accepting medication or treatment and the alternatives" or
>
> (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.

Whether the county has met its burden is a mixed question of law and fact. *Melanie L.*, 2013 WI 67, ¶¶38-39. This court will uphold the circuit court's factual findings unless they are clearly erroneous. *Id*. However, whether those facts meet the standard in Wis. Stat. § 51.61(1)(g)4.a. and b. is a question of law reviewed de novo. *Id*.

To prove that an individual is incompetent to refuse medications, "attention to detail is important." *Id.* at ¶94. Therefore, a medical expert cannot satisfy the county's burden by only offering "conclusory opinions parroting the statutory language." *See*

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situations, which the statute describes as "a situation in which the medication or treatment is necessary to prevent serious physical harm to the patient or to others." Wis. Stat. § 51.61(1)(g)1. This exception is also not at issue in this case.

Winnebago County v. S.H., 2020 WI App 46, ¶17, 393 Wis. 2d 511, 947 N.W.2d 761; *Calumet County v. J.M.K.*, No. 2020AP1183-FT, unpublished slip op., ¶11 (2020) (App. 57-66). Instead, experts must provide detailed explanations of the "facts and reasoning" used to support their competency determination. *Melanie L.*, 2013 WI 67, ¶¶75, 94. They are also expected to "explain how they probed the issue of whether the person can 'apply' his or her understanding to his or her own mental conditions." *Id*. at ¶75.

The circuit court here referenced "medical testimony" to find Carly was "substantially incapable of applying an understanding of the advantages, disadvantages and alternatives to his or her condition in order to make an informed choice as to whether to accept or refuse psychotropic medications." (62:41; App. 5). This application of the legal standard was erroneous, as the medical testimony shows the county failed to meet its high burden to prove Carly was incompetent to refuse medication.

First, Bales opined that Carly was "incompetent" to refuse medication and "could neither express nor apply my attempt at reviewing medications with her." (62:10-11; App. 15-16). Bales' testimony, however, lacks the details necessary to meet the county's burden, as he does not provide any factual basis or rationale to support his view. Instead, Bales simply provides a conclusory opinion that parrots § 51.61(1)(g)4.'s language. (*See* 62:10-12; App. 15-17). Without any explanation of the "facts and

reasoning" used to ground his competency determination, Bales' testimony cannot satisfy the county's clear and convincing burden. *Melanie L.*, 2013 WI 67, ¶¶75, 94.

The remaining medical testimony also cannot help the county meet its burden, as Bales and Thumann otherwise never discussed whether Carly is incompetent to refuse medications. Instead, their testimony was centered on Carly's mental illness. For example, Bales and Thumann both mentioned symptoms of Carly's mental illness observed during their examinations. (*See* 62:10-12, 22-23; App. 15-17, 27-28). While this evidence is probative to show Carly is mentally ill, which Carly does not dispute, it does not, and cannot, prove that Carly is also incompetent to refuse medications. *C.f. Melanie L.*, 2013 WI 67, ¶94 ("A county cannot expect that a judge concerned about a person with mental illness will automatically approve an involuntary medication order… The county, under Wis. Stat. § 51.61(1)(g)4.b., must prove that the person is substantially incapable of applying an understanding of the advantages and disadvantages of particular medication to her own mental illness").

While the county fails to prove that Carly is incompetent to refuse medication, Carly's testimony demonstrates she does understand her medications and can apply that understanding to "make an informed choice as to whether to accept or refuse medication or treatment." Wis. Stat. § 51.61(1)(g)4.

At the final hearing, Carly identified and explained her ongoing treatment:

> Q: Do you currently work with a psychiatrist?
>
> A: Yes, I do. I did until he left, but I'm still seeing a counselor.
>
> Q: Who is your psychiatrist that left?
>
> A: Dr. Shopbell.
>
> Q: Who are you working with now?
>
> A: His name is Josh. I don't remember his last name, but he's with Aurora Health Clinic in Neenah.
>
> Q: Does he provide you with medications?
>
> A: No. Dr. Shopbell did, but my internist will be filling the prescription now, which happened the last time Dr. Shopbell left the clinic I was at."

(62:30; App. 35).

Carly then described her current medications and recognized that they do not give her any side effects:

> Q: Do you know what medications you take?
>
> A: I take trazodone for sleeping at night, and I take venlafaxine, which is a mood stabilizer, and I have medication for seizures, blood pressure medication…
>
> Q: Do you have any disadvantages or any side effects from the medications?

> A: No. In fact, they don't work. They don't put me to sleep.

(62:31; App. 36).

While Bales and Thumann both fail to document Carly's current medications or recommend a treatment plan, Carly clearly outlines her current medication and therapy schedule. (*See* 62:11, 13, 22; App. 16, 18, 27) This demonstrates a keen awareness of her ongoing treatment plan. *See Melanie L.*, 2013 WI 67, ¶ 50 (citing *In re Virgil D.*, 189 Wis. 2d 1, 14-15, 524 N.W.2d 894 (1994)). Furthermore, Carly's weighing of the effectiveness of her sleeping medication and identifying side effects shows she understands her current medications and can apply that understanding to her ongoing treatment needs.

Involuntary medication orders are not "perfunctory under the law"; the county "cannot expect" courts to "automatically approve an involuntary medication order." *Melanie L.*, 2013 WI 67, ¶94. Instead, the county has the burden of providing clear and convincing evidence to overcome the presumption of Carly's competence to refuse medication. *Id*. at ¶¶37, 94. Contrary to the circuit court's conclusion, the body of evidence fails to prove by clear and convincing evidence that Carly is "substantially incapable of applying an understanding of the advantages, disadvantages and alternatives to his or her condition in order to make an informed choice as to whether to accept or refuse psychotropic medications." (41; App. 5). Because the county failed

to meet its burden, the circuit court erred in denying Carly her due process right to refuse medication. The involuntary medication order must be reversed.

III. Carly's appeal is not moot.

A. Introduction and standard of review.

Although Carly's commitment and involuntary medication orders have expired, this appeal is not moot due to the collateral consequences that outlast the orders. However, even if Carly's medication order is moot, two established exceptions to mootness apply.

An issue is moot where the order at issue has since expired or there is some other reason why resolution of the appeal would not have a practical effect on the controversy. *State ex rel. Olson v. Litscher*, 2000 WI App 61, ¶3, 233 Wis. 2d 685, 608 N.W.2d 425. This court reviews the issue of mootness de novo. *PRN Assocs. LLC v. DOA*, 2009 WI 53, ¶25, 317 Wis. 2d 656, 766 N.W.2d 559.

B. The collateral consequences of Carly's commitment and medication orders preclude dismissal for mootness.

An appeal is not moot if the order on appeal results in collateral effects that outlast the order. *Marathon County v. D.K.*, 2020 WI 8, ¶25. Carly's commitment and involuntary medication orders both result in significant, ongoing collateral consequences that makes her appeal not moot.

First, Carly's commitment resulted in a ban on possessing firearms that did not terminate when the commitment expired. (42; App. 3-4). As a result, the circuit court's commitment order continues to deprive

Carly of her fundamental right to bear arms. *See Wisconsin Carry, Inc. v. City of Madison*, 2017 WI 19, ¶¶8-9, 373 Wis. 2d 543, 892 N.W.2d 233. The deprivation of this fundamental right is of "no minor consequence." *D.K.*, 2020 WI 8, ¶25. The court in *D.K.* found the firearms ban, on its own, made D.K.'s appeal not a moot issue. *Id*. As in *D.K.*, the ongoing firearms ban here means Carly's appeal is not moot. *Id*; *see Matter of Commitment of S.A.M.*, 2022 WI 46, ¶23, 402 Wis. 2d 379, 975 N.W.2d 162.

Second, Carly's financial liability for her commitment and medication orders also precludes mootness. Under Wis. Stat. § 46.10(2), individuals are indebted to the county for the "costs of the care, maintenance, services, and supplies" related to each commitment period. While the expiration of a commitment order does not lift this debt, a reversal on appeal does. *Jankowski v. Milwaukee Cty.*, 104 Wis. 2d 431, 441, 312 N.W.2d 45 (1981). This mandatory liability for the cost of the care received in commitment is a collateral consequence that makes the appeal of Carly's commitment order not moot. *S.A.M.*, 2022 WI 46, ¶24.

Similarly, the liability for the costs of the involuntary medication order is also enough to preclude mootness. The involuntary medication order mandated additional services and supplies that likely increased Carly's financial liability for her commitment. A reversal of Carly's medication order would have the practical effect of reducing her liability for her cost of care. *See S.A.M.*, 2022 WI 46, ¶24.

Finally, reversing the circuit court's orders would lessen the stigma resulting from Carly's commitment and involuntary medication orders. The U.S. and Wisconsin Supreme Courts recognize the

stigmatizing nature of involuntary commitments and involuntary medication orders. *Vitek v. Jones*, 445 U.S. 480, 491-92 (1980); *see also Winnebago County v. Christopher S.*, 2016 WI 1, ¶75 366 Wis. 2d 1, 878 N.W.2d 109 (Abrahamson, J., concurring in part, dissenting in part) (noting that both commitment and involuntary medication orders have "stigmatizing consequences"). The public perceives individuals with mental illness as more dangerous than individuals who are not, even though this perception is not founded. Substance Abuse and Mental Health Service Administration, Civil Commitment, and the Mental Health Care Continuum: Historical Trends and Principles for Law and Practice, 22 (2019).

Involuntary commitment enhances this stigma by creating a record of court findings that the individual is mentally ill and dangerous. Likewise, an involuntary medication order increases stigma by documenting that the individual is incompetent to refuse medication or treatment because of a mental illness. On the other hand, reversing these orders would create a court record showing Carly is neither dangerous nor incompetent to refuse medication. This is a meaningful remedy that should preclude any finding of mootness.

C. Carly's appeal of her medication order meets established exceptions to the mootness doctrine.

Even if this court decides Carly's appeal is moot, it should still address the merits on her medication order because exceptions to the mootness doctrine apply. Appellate courts decide issues that are otherwise moot if: (1) the issue is of great public

importance; (2) the issue pertains to the constitutionality of a statute; (3) the issue arises often and a decision is essential; (4) the issue is likely to recur and must be resolved to avoid uncertainty; or (5) the issue is likely of repetition and evades review. *D.K.*, 2020 WI 8, ¶19. Carly's appeal of her medication order meets at least two of these exceptions.

First, involuntary medication orders are an issue of great public importance. Under the due process clause, individuals have a "significant liberty interest in avoiding the unwanted administration" of drugs. *Washington v. Harper*, 494 U.S. at 222; *Melanie L.*, 2013 WI 67, ¶ 43. Wisconsin's mental health statutes seek to balance this individual liberty interest with the public's interest in "treating mental illness and protecting the individual and society from danger." *Melanie L.*, 2013 WI 67, ¶ 43. Because medication orders address the public's interest at the expense of individual liberties, the issue of whether an involuntary medication order was validly issued is a matter of great importance to both the public and the individual. *Melanie L.*, 2013 WI 67, ¶ 43 (quoting *Harper*, 494 U.S. at 222).

Second, whether Carly is competent to refuse medication is likely to repeat and evade appellate review. Appeals of involuntary medication orders proceed under Wis. Stat. § 809.30, which contemplate over 300 days from the date of the involuntary medication order to the full briefing of the issue to the

court of appeals.[4] As a result of this timeline, courts have repeatedly found that appeals of medication orders are "likely to evade appellate review in many instances because the order appealed from will have expired before an appeal is completed." *Melanie L.*, 2013 WI 67, ¶80; *Matter of Commitment of L. X. D.-O.*, 2023 WI App 17, ¶ 18, 407 Wis. 2d 441, 991 N.W.2d 518. As a result, this exception to mootness applies here. *See Melanie L.*, 2013 WI 67, ¶80 (where court applied this exception to an expired medication order); *L. X. D.-O.*, 2023 WI App 17, ¶ 18 (same). This court should reach the merits of Carly's appeal.

[4] Wis. Stat. § 809.30 contemplate: 20 days for a notice of intent; 5 days for the circuit court to furnish the judgment and list of court reporters; 30 days to request production of transcripts (and appointment of counsel, if applicable); 60 days for production of transcripts; 60 days for filing of a notice of appeal or postdisposition motion; 60 days for the circuit court to decide any postdisposition motion, 20 days for a notice of appeal, 40 days to transmit the record, 40 days for an appellant's brief, 30 days for a respondent's brief, and 15 days for a reply brief. Wis. Stat. §§ 809.30(2)(b)-(k); 809.19 (1), (3) and (4).

CONCLUSION

For the reasons given above, Carly respectfully asks this court to reverse the circuit court's orders with directions to vacate the commitment and involuntary medication orders. Alternatively, even if the commitment order is not reversed, the medication order must still be vacated because it was not supported by sufficient evidence.

Dated this 6th day of October, 2023.

Respectfully submitted,

Electronically signed by
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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in S. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 5,097 words.

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief 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 6th day of October, 2023.

Signed:
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