STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2024AP2391-FT

In the matter of the Mental Commitment of D.P.:

WINNEBAGO COUNTY,

Petitioner-Respondent,

v.

D.P.,

Respondent-Appellant-Petitioner

RESPONSE TO PETITION FOR REVIEW

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The reasons for this Court to deny review are greater in number and weight than the reasons to grant it.

I. This appeal is moot, resulting from D.P.'s stipulation to recommitment.

D.P. was recommitted on April 22, 2025. (R. 196; Supp. App. 102-103). As a result of his 2025 recommitment, the appeal of his 2024 recommitment is moot. *Portage Cty. v. J.W.K.*, 2019 WI 54, ¶¶ 13-14, 386 Wis. 2d 672, 927 N.W.2d 509. Similar to the case in *J.W.K.*, the order challenged by D.P. has now expired, and has been replaced by a new order which, based on his stipulation thereto, he does not challenge. There is therefore no live controversy.

II. Neither of D.P.'s arguments were addressed or developed at the trial court level, and were therefore forfeited on appeal.

The forfeiture rule exists "to enable the circuit court to avoid or correct any error with minimal disruption of the judicial process, eliminating the need for appeal." *State vs. Ndina*, 2009 WI 21, ¶ 30, 761 N.W.2d 612. The rule also "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 and later claiming that the error is grounds for reversal." *Id.*

During the evidentiary hearing, the theory advanced by D.P. was that he was capable of expressing and applying an understanding of the advantages, disadvantages, and alternatives to his medications, and with that information, wished to discontinue his involuntary medication order. Because he felt he was competent to refuse medications, he did not challenge Winnebago County's contention that Dr. David Zerrien had provided a reasonable explanation of the advantages, disadvantages, and alternatives to the recommended psychotropic medications, and did not attempt to elicit evidence concerning any potential side effects of which he was not informed. *See* Brief of Petitioner-Respondent at 1-4. Because that was the theory developed and argued in the trial court, there is no

factual record to support his contention on appeal that he was only incompetent to refuse medications because he may not have been informed of some "less common" side effects of his medication. Nor is there any record as to whether Dr. Zerrien read side effects off a list, or what entity published such a list.

The Court of Appeals found it more expedient to "footnote" the forfeiture issue in favor of addressing the merits of the appeal. If this Court were to grant review, the Court would be faced with hypothetical questions unsupported by the factual record. If the Court were to wish to address the topic of what constitutes a reasonable explanation of advantages, disadvantages, and alternatives to medication, it would be preferable to do so in a case that includes some factual basis, rather than speculation as to what information may not have been explained.

III. No further caselaw is required to clarify the County's burden of proof at commitment or recommitment hearings.

The Petition for Review requests that the Court clarify the burden of proof as to one fact the County is required to prove in cases pertaining to the Fifth Standard. The quantum of evidence the County must produce at a commitment or recommitment hearing is well-established, both by statute and by caselaw. *See J.W.K.* at ¶ 24, citing Wis. Stat. § 51.20(13)(e), (g)3 ("The petitioner has the burden of proving all required facts by clear and convincing evidence."). The determination of whether clear and convincing evidence has been provided is, necessarily, case- and fact-specific. For that reason, on appeal, the reviewing court upholds a circuit court's findings of fact unless they are clearly erroneous. *Langlade County v. D.J.W.*, 2020 WI 41, ¶ 24, 391 Wis. 2d 231, 942 N.W.2d 277. There is nothing significant or novel concerning the application of statutes, caselaw, and a well-settled burden of proof.

IV. There is no need for the Court to create a rule micromanaging doctors' evaluations of their patients, particularly without a factual record supporting its necessity.

Winnebago County has two central objections to this Court accepting review as to the second question presented:

1. It is entirely possible that Dr. Zerrien read every word on every DHS form for each of the medications to D.P., but at the evidentiary hearing, nobody asked, because it was not relevant to D.P.'s theory of the case. If the factual record showed that, for example, Dr. Zerrien had read the section of the DHS forms relating to the most common side effects, but omitted other sections, there would be an actual question as to whether reasonable information had been provided. Or, alternatively, if Dr. Zerrien's report had not included the phrase, "amongst other side effects that were reviewed," and he testified that he had only reviewed the specific side effects that were named, that would give this Court a factual basis to work with. Even then, a reasonable court could conclude that Dr. Zerrien provided reasonable information to D.P. about the advantages and disadvantages of the medications, as the named side effects were those most relevant to D.P.

2. There is already sufficient guidance for circuit and appellate courts to apply when determining whether a person was provided with sufficient information about their psychotropic medications in the context of an evaluation for an involuntary medication order. The fact that the guidance is flexible enough to apply to any situation does not render it insufficient or confusing.

The settled law is that in order for a circuit court to grant an involuntary medication order (or find dangerousness under the Fifth Standard), the court must find that clear and convincing evidence was presented that a reasonable explanation of the advantages, disadvantages, and alternatives to the requested medication was provided to the individual, and that after the explanation was provided, the individual was incapable of expressing or substantially incapable of applying an understanding of the advantages, disadvantages, and alternatives of

the medication to his mental illness. See *In re Melanie L.*, 2013 WI 67, 349 Wis. 2d 148, 833 N.W.2d 607. To add a requirement that a specific form be read to all patients, regardless of how the doctors would prefer to review the information with their patients, and regardless of the patients' conditions, funds of knowledge, or reactions to the information, would be to require that a two-way conversation be converted into a one-way pharmaceutical commercial. In some cases, this would hinder the patients' ability to receive and process the most pertinent information. In all cases, this would unreasonably interfere with the doctor-patient relationship. Presently, witnesses are not required to recite "magic words" for a ruling to stand as long as the language used in testimony links back to the language of the statute in some way. See *Matter of D.K.*, 2020 WI 8, ¶ 54, 390 Wis. 2d 50, 937 N.W.2d 901. At least on the facts of this case, there would be no benefit to instituting a "magic words" requirement during the doctor-patient evaluation.

V. The Court of Appeals did not, as repeatedly suggested in the Petition for Review, "essentially overrule" *Melanie L* or "reject[] the *Melanie L* standard."

The Court of Appeals decision in this case did not represent a departure from the holding in *Melanie L.* In *Melanie L.*, the medical provider testified that Melanie was not able to apply an understanding of the advantages, disadvantages, and alternatives of medication "to her benefit," which is not the statutory standard. The Court held:

> "Medical experts must apply the standards set out in the competency statute. An expert's use of different language to explain his or her conclusions should be linked back to the standards in the statute. When a county disapproves of the choices made by a person under an involuntary medication order, it should make a detailed record of the person's noncompliance in taking prescribed medication and show why the noncompliance demonstrates the person's substantial incapability of applying his or her understanding of the medication to his or her mental illness. *Melanie L* at ¶ 97.

Elsewhere in the *Melanie L* opinion, the Court broke down the various portions of the Fifth Standard, phrase by phrase. The phrase "after the advantages and

disadvantages of and alternatives to accepting a particular medication or treatment have been explained [to the person]" was deemed "self-explanatory." *Melanie L* at ¶ 67. The holding of the case had nothing to do with the level of detail of the explanations, as that was not in controversy, and all parties agreed that Melanie was capable of expressing an understanding of the advantages, disadvantages, and alternatives of medication; the question was whether clear and convincing evidence had been produced that she could not apply an understanding of those concepts to her mental illness. And because the doctor did not address the statutory standard, the answer was no.

As the Court of Appeals noted in the present case, "There simply is no question that Zerrien applied the statutory standard in his explanation to [D.P.] about the disadvantages to the medications and issue." This conclusion is not in conflict with *Melanie L*, or with any other precedential case.

CONCLUSION

This Court should deny the petition for review.

Dated and electronically filed this 2nd day of May, 2025.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this Response conforms to the rules contained in Wis. Stat. §809.62(4). The length of this Response is 1,520 words.

Respectfully submitted,

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