Appeal Nos. 2019AP839
2020AP1580

Cir. Ct. Nos. 2017ME1
2019ME12

WISCONSIN COURT OF APPEALS
DISTRICT III

IN THE MATTER OF THE MENTAL COMMITMENT OF A. A.:

RUSK COUNTY,

PETITIONER-RESPONDENT,

V.

A. A.,

RESPONDENT-APPELLANT.

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Stark, P.J., Hruz and Seidl, JJ.

Pursuant to WIS. STAT. RULE 809.61 (2019-20),[1] these appeals are certified to the Wisconsin Supreme Court for its review and determination.[2]

ISSUES

The Wisconsin Supreme Court recently held in ***Waukesha County v. S.L.L.***, 2019 WI 66, ¶24, 387 Wis. 2d 333, 929 N.W.2d 140, that recommitment

[1] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

[2] By this court's February 19, 2021 order, these cases were consolidated for disposition pursuant to WIS. STAT. RULE 809.10(3). Another order issued on the same date provided that these appeals would be decided by a panel of three judges pursuant to WIS. STAT. RULE 809.41(3).

proceedings under WIS. STAT. ch. 51 are governed only by the procedures set forth in WIS. STAT. § 51.20(10)-(13). As such, the court held that the procedural requirements in § 51.20(1)-(9) are inapplicable to recommitment proceedings. *See, e.g.*, ***S.L.L.***, 387 Wis. 2d 333, ¶¶24, 27.

In these appeals, Andy[3] challenges two orders that extended his WIS. STAT. ch. 51 commitment. He argues the recommitment petitions underlying both of those orders were deficient because they failed to comply with requirements set forth in WIS. STAT. § 51.20(1). Although Andy acknowledges the supreme court's holding in ***S.L.L.***, he argues that case was wrongly decided. In so doing, he makes arguments that were not raised by the parties or addressed by the supreme court in ***S.L.L.*** First, Andy argues the plain language of § 51.20 shows that § 51.20(1) does apply to recommitment proceedings. Second, Andy argues that if § 51.20(1)-(9) do not apply to recommitment proceedings, then ch. 51's recommitment provisions violate both due process and equal protection.

Andy's arguments raise novel—and important—questions about the procedures that govern recommitment proceedings. Moreover, the issues Andy raises are likely to arise in many future cases, and resolution of these issues is

[3] For ease of reading, we refer to the appellant in these confidential appeals using a pseudonym, rather than his initials.

therefore of crucial importance for Wisconsin attorneys, litigants, and lower courts. We therefore certify these appeals to the Wisconsin Supreme Court.[4]

BACKGROUND

Andy was taken into custody pursuant to a statement of emergency detention filed on January 10, 2017, after he called police and stated he wanted to kill himself. After examining Andy, a physician and a psychologist both opined that he was mentally ill, a proper subject for commitment, and dangerous to himself. Upon the parties' stipulation, on January 23, 2017, the circuit court entered an order for Andy's involuntary commitment on an outpatient basis for a period of six months, along with an order for his involuntary medication and treatment. On July 21, 2017, the court granted the County's petition to recommit Andy on an outpatient basis for a period of twelve months, and it again entered an order for involuntary medication and treatment during the period of his recommitment.[5]

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[4] Andy's appeals raise several additional issues. In case No. 2019AP839, Andy argues: (1) petitioner-respondent Rusk County ("the County") did not present sufficient evidence to support a recommitment order; and (2) WISCONSIN STAT. § 51.20(1)(am) violates substantive due process and equal protection. In case No. 2020AP1580, Andy argues: (1) the circuit court erred by concluding that his motion to dismiss the recommitment petition was not timely filed; and (2) the court erred by admitting hearsay evidence at the recommitment hearing, and that error was not harmless.

We do not believe that these additional issues, in and of themselves, are worthy of certification, and we therefore do not address them further. However, if the supreme court were to accept this certification, it would acquire jurisdiction over Andy's appeals in their entirety, including all issues raised before this court. *See* ***State v. Denk***, 2008 WI 130, ¶29, 315 Wis. 2d 5, 758 N.W.2d 775.

[5] As our supreme court has previously noted, WIS. STAT. § 51.20 uses the terms "recommitment" and "extension of a commitment" interchangeably. *See* ***Portage Cnty. v. J.W.K.***, 2019 WI 54, ¶1 n.1, 386 Wis. 2d 672, 927 N.W.2d 509. We therefore do the same.

On June 28, 2018, the County again petitioned to extend Andy's involuntary commitment for twelve months. On July 20, 2018, the parties stipulated to the extension of Andy's commitment for a four-month period. In accordance with the parties' stipulation, the circuit court entered an order extending Andy's outpatient commitment until November 20, 2018. The court did not, however, enter another order for his involuntary medication and treatment.

On July 26, 2018—just six days after the circuit court had extended Andy's commitment—the County filed another recommitment petition. The July 26 petition sought a twelve-month extension "of the involuntary commitment ordered by this court on July 21, 2017." As Andy correctly observes, however, the petition's reference to the July 21, 2017 commitment order was incorrect, as that commitment had already expired.

In support of its July 26, 2018 recommitment petition, the County submitted an affidavit of Chris Soltis, the County's behavioral health coordinator. Soltis averred that Andy had been found to be mentally ill and had been involuntarily committed to the County for treatment; that he remained under commitment and was receiving treatment; and that he had a continued need for treatment based on a diagnosis of "Psychotic Disorder, Schizophrenia (Paranoid Type)." Soltis then averred that "if treatment were withdrawn there is a substantial likelihood based on [Andy's] treatment record that he/she would be a proper subject for treatment under Sec. 51.20(l)(a), Wis. Stats." Soltis's affidavit did not, however, set forth any factual basis for that opinion.

Moreover, as Andy correctly observes, Soltis misstated the statutory standard for dangerousness in the context of a recommitment proceeding. Under that standard, in order to recommit Andy, the County was required to prove a

substantial likelihood, based on Andy's treatment record, that he would be a proper subject for *commitment* if treatment were withdrawn. *See* WIS. STAT. § 51.20(1)(am). Soltis instead opined that Andy would be a proper subject for *treatment* if treatment were withdrawn.

The circuit court scheduled a recommitment hearing for November 12, 2018. On that date, Andy's attorney filed a motion to dismiss the July 26, 2018 recommitment petition on various grounds. As relevant here, the motion alleged that the recommitment petition was deficient because it failed to set forth "a clear and concise statement of the facts which constitute probable cause to believe the allegations of the petition," as required by WIS. STAT. § 51.20(1)(c).

As neither the circuit court nor the County had the opportunity to review Andy's motion to dismiss before the November 12, 2018 hearing, the hearing proceeded as scheduled, with the understanding that the court would address the motion at a later date. Two days later, on November 14, 2018, the court denied Andy's motion to dismiss in an oral ruling. In particular, the court held that the County's recommitment petition was not obligated to comply with the requirements set forth in WIS. STAT. § 51.20(1)(c) because those requirements applied only to initial commitment petitions, not petitions for recommitment. After denying Andy's motion to dismiss, the court granted the County's recommitment petition and entered a written order recommitting Andy on an outpatient basis for twelve months. The court did not enter an order for involuntary medication and treatment. Andy appealed the court's November 14, 2018 recommitment order in case No. 2019AP839.

Approximately eight months later, Andy was again taken into custody pursuant to a statement of emergency detention filed on July 24, 2019. According to an attached incident report, Andy had told both a physician and a police officer that he was having thoughts about killing multiple individuals. A psychiatrist and a psychologist subsequently examined Andy and opined that he was mentally ill, a proper subject for commitment, and dangerous to others. On August 2, 2019, pursuant to the parties' stipulation, the circuit court entered an order for involuntary commitment on an outpatient basis for six months and an order for involuntary medication and treatment.

On January 9, 2020, the County moved to extend Andy's August 2, 2019 commitment for twelve months. Again, the County submitted an affidavit of Chris Soltis in support of its petition. Aside from the relevant dates, Soltis's affidavit was identical in all respects to the affidavit she had previously filed in support of the County's July 26, 2018 recommitment petition. Soltis again averred that if treatment were withdrawn there was "a substantial likelihood based on [Andy's] treatment record that he/she would be a proper subject for treatment under Sec. 51.20(l)(a), Wis. Stats." And, once again, Soltis's affidavit did not set forth any facts in support of that opinion, aside from noting Andy's diagnosis and the fact that he was receiving treatment under an involuntary commitment order.

A final hearing on the County's January 9, 2020 recommitment petition took place on January 31, 2020. At the beginning of the hearing, Andy's attorney moved to dismiss the petition on the grounds that it did not set forth an adequate factual basis for recommitment. In response, the County argued that WIS. STAT. § 51.20(13)(g)3. did not require a recommitment petition to include any factual allegations in support of recommitment. Andy's attorney countered that if § 51.20 did not specify the necessary contents of a recommitment petition,

then "the basic rules of civil procedure apply. And part of civil procedure is [that] in a petition[,] you have to state a claim."

The circuit court denied Andy's motion to dismiss. The court explained that under the rules of civil procedure, Wisconsin is a notice-pleading state. The court then stated that Soltis's affidavit was sufficient under the notice-pleading standard because it alleged that Andy had been found to be mentally ill; that he was receiving treatment; that he was currently diagnosed with paranoid schizophrenia; and that there was a substantial likelihood based on his treatment record that he would be a proper subject for treatment if treatment were withdrawn. The court concluded, "So I think that there is enough to put [Andy] on notice as to what … Rusk County in this particular case is alleging."

After hearing a psychiatrist's testimony, the circuit court granted the County's petition to recommit Andy. On February 5, 2020, the court entered a written order recommitting Andy on an inpatient basis for a period of twelve months. On the same date, the court entered an order for involuntary medication and treatment during the period of Andy's recommitment. Andy appealed the court's February 5, 2020 orders in case No. 2020AP1580.

DISCUSSION

I. Andy's arguments regarding the sufficiency of the County's recommitment petitions

The purpose of WIS. STAT. ch. 51 is "to assure the provision of a full range of treatment and rehabilitation services in the state for all mental disorders and developmental disabilities and for mental illness, alcoholism and other drug abuse." WIS. STAT. § 51.001(1). To that end, WIS. STAT. § 51.20 sets forth

procedures by which individuals who suffer from those conditions may be involuntarily committed for treatment under certain circumstances.

Involuntary commitment proceedings are initiated by the filing of a written petition for examination.[6] *See* WIS. STAT. § 51.20(1). As relevant to these appeals, a petition for examination must allege that the subject individual is: (1) mentally ill; (2) a proper subject for treatment; and (3) dangerous. Sec. 51.20(1)(a)1.-2. The statute sets forth five ways in which a petitioner may establish that the subject individual is dangerous. Sec. 51.20(1)(a)2.a.-e. Section 51.20(1)(am), in turn, sets forth an additional way that a petitioner may establish dangerousness in a recommitment proceeding. ***Langlade Cnty. v. D.J.W.***, 2020 WI 41, ¶32, 391 Wis. 2d 231, 942 N.W.2d 277.

The statute further provides that a petition for examination "shall contain a clear and concise statement of the facts which constitute probable cause to believe the allegations of the petition." WIS. STAT. § 51.20(1)(c). After a petition for examination has been filed, a court must "review the petition within 24 hours … to determine whether an order of detention should be issued." Sec. 51.20(2)(a).

> The subject individual shall be detained only if there is cause to believe that the individual is mentally ill … and the individual is eligible for commitment under sub. (1)(a) or (am) based upon specific recent overt acts, attempts or threats to act or on a pattern of recent acts or omissions made by the individual.

Id.

[6] Involuntary commitment proceedings may also be initiated by the filing of a statement of emergency detention, which "has the same effect as a petition for commitment under [WIS. STAT. §] 51.20." WIS. STAT. § 51.15(5).

Andy argues the recommitment petitions that the County filed on July 26, 2018, and January 9, 2020, were insufficient under WIS. STAT. § 51.20(1)(c) because neither petition contained "a clear and concise statement of the facts which constitute probable cause to believe the allegations of the petition." Andy's argument that the petitions did not contain facts giving rise to probable cause appears to have merit. As noted above, both petitions were supported by nearly identical affidavits of Chris Soltis, the County's behavioral health coordinator. In each of those affidavits, Soltis summarily averred that Andy was mentally ill, was receiving treatment under an involuntary commitment order, and had a need for treatment based on his diagnosis of paranoid schizophrenia. Soltis then averred "[t]hat if treatment were withdrawn there is a substantial likelihood based on [Andy's] treatment record that he/she would be a proper subject for treatment under Sec. 51.20(l)(a), Wis. Stats."

As Andy notes, Soltis misstated the applicable statutory standard for dangerousness. The proper inquiry under WIS. STAT. § 51.20(1)(am) is whether there was a substantial likelihood based on Andy's treatment record "that [he] would be a proper subject for *commitment* if treatment were withdrawn." (Emphasis added.) Soltis instead opined that Andy would be a proper subject for *treatment* if treatment were withdrawn. Thus, neither of Soltis's affidavits

contained an averment that Andy met the applicable legal standard for dangerousness.[7]

More importantly, neither of Soltis's affidavits contained a factual basis for her conclusion that Andy would be a proper subject for treatment if treatment were withdrawn. Soltis's averments that Andy had been involuntarily committed and was receiving treatment for paranoid schizophrenia were insufficient to show that, if treatment were withdrawn, he would become a proper subject for either treatment or commitment. Soltis did not opine, for instance, that based on her review of Andy's treatment records, she believed that if treatment were withdrawn Andy would decompensate and therefore become dangerous to himself or others under one of the five standards set forth in WIS. STAT. § 51.20(1)(a)2.a.-e. Under these circumstances, we agree with Andy that neither of the County's petitions contained "a clear and concise statement of the facts

[7] As Andy aptly notes, the terms "commitment" and "treatment" are not synonymous. A WIS. STAT. ch. 51 commitment is a restriction on the subject individual's liberty. "Treatment," in contrast, is defined as "those psychological, educational, social, chemical, medical or somatic techniques designed to bring about rehabilitation of a mentally ill, alcoholic, drug dependent or developmentally disabled person." WIS. STAT. § 51.01(17). As such, an averment that a subject individual would be a proper subject for treatment if treatment were withdrawn is not equivalent to an averment that he or she would be a proper subject for commitment if treatment were withdrawn.

which constitute probable cause to believe the allegations of the petition."[8] *See* § 51.20(1)(c).

In response, the County does not argue that its recommitment petitions satisfied the probable cause requirement in WIS. STAT. § 51.20(1)(c). Instead, the County argues the supreme court clearly held in ***S.L.L.*** that the requirements in § 51.20(1)—including the probable cause requirement in (1)(c)—do not apply in recommitment proceedings.

S.L.L. appealed an order extending her WIS. STAT. ch. 51 commitment. ***S.L.L.***, 387 Wis. 2d 333, ¶1. As relevant here, she argued the circuit court lacked personal jurisdiction over her because Waukesha County's petition to extend her commitment did not satisfy the requirements in WIS. STAT. § 51.20(1), as it did not allege that she was mentally ill, a proper subject for treatment, and dangerous, and it did not contain a clear and concise statement of facts in support of those allegations. ***S.L.L.***, 387 Wis. 2d 333, ¶11.

The supreme court rejected S.L.L.'s argument that Waukesha County's extension petition "was deficient because it did not establish probable cause to believe she [was] mentally ill, a proper subject for treatment, and dangerous." ***Id.***, ¶24. The court reasoned that S.L.L.

[8] Andy also argues in case No. 2019AP839 that the County's July 26, 2018 petition was insufficient because it mistakenly stated that the County sought to extend Andy's July 21, 2017 commitment order, which had already expired, rather than the commitment order entered on July 20, 2018. The circuit court rejected Andy's argument that the petition's factual error regarding the date of the prior commitment order required dismissal, concluding that error was merely technical and did not affect Andy's substantial rights. *See* WIS. STAT. § 51.20(10)(c) ("The court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings that does not affect the substantial rights of either party."). On appeal, Andy does not address the court's reasoning in that regard.

> takes those specifics from [WIS. STAT.] § 51.20(1), which governs an initial petition for examination, not a petition for extension of a commitment. Although the County must establish all of those elements at the Extension Hearing, there is no statutory mandate that it must serve a document with such a factual recitation in advance.

S.L.L., 387 Wis. 2d 333, ¶24.

The supreme court's conclusion in that regard was based on WIS. STAT. § 51.20(13)(g)3., which states in relevant part: "Upon application for extension of a commitment by the department or the county department having custody of the subject, the court shall proceed under subs. (10) to (13)." Relying on § 51.20(13)(g)3., the ***S.L.L.*** court held that "the procedure for extending a person's commitment is governed by WIS. STAT. § 51.20(10) through (13), not § 51.20(1)." ***S.L.L.***, 387 Wis. 2d 333, ¶24. The court stated S.L.L. "identifies nothing in the procedures governing extension hearings [i.e., § 51.20(10)-(13)] that requires service of a document containing the information she demands." ***S.L.L.***, 387 Wis. 2d 333, ¶24. Accordingly, the court concluded there was "no statutory support for [S.L.L.'s] position." ***Id.***

The County argues ***S.L.L.*** is dispositive of Andy's argument that the recommitment petitions in these appeals were deficient under WIS. STAT. § 51.20(1)(c). Andy argues, however, that ***S.L.L.*** was wrongly decided. He contends the plain language of various parts of § 51.20 shows that subsec. (1) applies to petitions for recommitment, as well as initial commitment petitions. In so doing, Andy raises arguments that were neither raised by the parties in ***S.L.L.*** nor addressed by the supreme court's decision in that case.

Andy first asserts the supreme court's holding in ***S.L.L.*** is inconsistent with the plain language of WIS. STAT. § 51.20(13)(g)3. Again, that

subdivision states that "[u]pon application for extension of a commitment by the department or the county department having custody of the subject, the court shall proceed under subs. (10) to (13)." Relying on dictionary definitions, Andy contends that the ordinary meaning of "upon" is "immediately or very soon after"; the ordinary meaning of "application" is "the act of requesting"; and the ordinary meaning of "shall" is "must."[9] Applying these definitions, Andy argues § 51.20(13)(g)3. "simply provides that *after* a county applies for recommitment, the court must comply with § 51.20(10) (hearing requirements), § 51.20(11) (jury trials), § 51.20(12) (open hearings), and § 51.20(13) (dispositions)." (Emphasis added.) Andy therefore asserts that § 51.20(13)(g)3. does not "speak to the contents of an application for recommitment" or "exempt recommitment proceedings from § 51.20(1) through (9)."

In addition, Andy contends that if WIS. STAT. § 51.20(13)(g)3. is interpreted to mean that only subsecs. (10) through (13) apply to recommitment proceedings, "then § 51.20(1)(am), the alternate standard of dangerousness for a recommitment[,] would not apply to a recommitment proceeding." That result, Andy argues, would be absurd. *See* ***State ex rel. Kalal v. Circuit Court for Dane Cnty.***, 2004 WI 58, ¶46, 271 Wis. 2d 633, 681 N.W.2d 110 (we interpret statutes "reasonably, to avoid absurd or unreasonable results").

Furthermore, Andy asserts the ***S.L.L.*** court's conclusion that WIS. STAT. § 51.20(1) does not apply to recommitment proceedings conflicts with the plain language of § 51.20(1)(a), (1m), and (2)(a). Section 51.20(1)(a)

[9] "Absent statutory definition, the ordinary and accepted meaning of a word can be established by reference to a recognized dictionary." ***Door Cnty. Highway Dep't v. DILHR***, 137 Wis. 2d 280, 293-94, 404 N.W.2d 548 (Ct. App. 1987).

begins: "*Except as provided in pars.* (ab), *(am)*, and (ar), *every written petition for examination* shall allege that all of the following apply to the subject individual to be examined …." (Emphasis added.) Thus, § 51.20(1)(a), which governs petitions for examination, expressly references § 51.20(1)(am), the alternative standard for establishing dangerousness in recommitment proceedings. Andy argues § 51.20(1)(a)'s reference to (1)(am) shows that a petitioner is required to file a petition for examination that complies with § 51.20(1) at the recommitment stage.

Andy asserts that WIS. STAT. § 51.20(1m) and (2)(a) reinforce this conclusion. Subsection (2)(a) provides:

> *Upon the filing of a petition for examination*, the court shall review the petition within 24 hours after the petition is filed … to determine whether an order of detention should be issued. The subject individual shall be detained only if there is *cause to believe* that the individual is mentally ill, drug dependent or developmentally disabled and the individual is eligible for commitment under sub. (1)(a) *or (am)* based upon specific recent overt acts, attempts or threats to act or on a pattern of recent acts or omissions made by the individual.

(Emphasis added.) Section 51.20(1m), in turn, states: "For purposes of subs. (2) to (9), the requirement of finding probable cause to believe the allegations in sub. (1)(a) *or (am)* may be satisfied by finding probable cause to believe …." (Emphasis added.)

Thus, both WIS. STAT. § 51.20(1m) and (2)(a) refer to a circuit court reviewing a petition for examination to determine whether it contains probable cause to believe that the subject individual is eligible for commitment under (1)(am)—the dangerousness standard for recommitment proceedings. Andy persuasively argues that the legislature would not have required circuit courts to

review a petition for examination to determine whether the subject individual is eligible for commitment under (1)(am) if a petitioner was not required to file a petition for examination that complies with § 51.20(1)(c) at the recommitment stage. Stated differently, Andy asserts that "[i]f § 51.20(1)(c)'s 'clear and concise statement of the facts constituting probable cause' requirement does not apply to a petition for recommitment," then a circuit court "is unable to fulfill its statutory mandate under § 51.20(2)(a) [to review] the petition for probable cause that the individual is eligible for commitment under '(1)(am),' the alternate standard of dangerousness for a recommitment proceeding."

Finally, Andy argues that interpreting WIS. STAT. § 51.20(1) as applying only to initial commitment proceedings leads to absurd results because "no other provision of § 51.20 prescribes the contents of a petition for recommitment[,] even though the legislature clearly expects the county to file one." Andy acknowledges that § 51.20(10)(c) states, "Except as otherwise provided in this chapter, the rules of evidence in civil actions and s. 801.01(2) apply to any judicial proceeding or hearing under this chapter." Andy further acknowledges that WIS. STAT. § 801.01(2) states that WIS. STAT. chs. 801 to 847 "govern procedure and practice in circuit courts of this state in all civil actions and special proceedings whether cognizable as cases at law, in equity or of statutory origin except where different procedure is prescribed by statute or rule." Andy therefore concedes that, in theory, if no other provisions of WIS. STAT. ch. 51 are deemed to apply, the "general rules of pleading" set forth in WIS. STAT. § 802.02(1)(a) could be read to apply to a petition for recommitment. He argues, however, that § 802.02(1)(a) "conflicts with the structure, purpose and plain language of § 51.20."

WISCONSIN STAT. § 802.02(1)(a) states that "[a] pleading or supplemental pleading that sets forth a claim for relief" must include "[a] short and plain statement of the claim, identifying the transaction or occurrence or series of transactions or occurrences out of which the claim arises and showing that the pleader is entitled to relief." Andy argues that recommitment proceedings under WIS. STAT. § 51.20 do not arise out of a transaction or occurrence that has taken place between the parties. Moreover, Andy observes that in recommitment proceedings, one party is not asserting a claim for relief, nor does one party seek a judgment of relief against the other party. Instead, Andy asserts that § 51.20 "contemplates a government entity petitioning a probate court for an examination and possible detention of an individual based on his [or her] alleged mental illness, suitability for treatment, and dangerous behavior." Andy therefore argues that § 802.02(1)(a) is not consistent with the structure and purpose of commitment proceedings under § 51.20.

In any event, Andy argues that even if the pleading standard in WIS. STAT. § 802.02(1)(a) applies to recommitment petitions, the petitions at issue in these appeals failed to meet that standard. To satisfy § 802.02(1)(a), "a complaint must plead facts, which if true, would entitle the plaintiff to relief." ***Data Key Partners v. Permira Advisers LLC***, 2014 WI 86, ¶21, 356 Wis. 2d 665, 849 N.W.2d 693. "Bare legal conclusions" do not suffice. ***Id.***

Here, as discussed above, Soltis's affidavits merely asserted that Andy would be a proper subject for treatment if treatment were withdrawn. Soltis did not allege any facts in support of that conclusion, aside from the fact of Andy's diagnosis and the fact that he was receiving treatment under an existing commitment order. Nor did Soltis allege any facts in support of the proper standard the County was required to prove for Andy's recommitment—i.e., that he

would be a proper subject for commitment if treatment were withdrawn. Under these circumstances, Andy persuasively argues that even under the pleading standard set forth in WIS. STAT. § 802.02(1)(a), the County's recommitment petitions were insufficient.

Andy presents compelling arguments in support of his claim that the procedural requirements in WIS. STAT. § 51.20(1) do, in fact, apply to recommitment petitions. As noted above, these arguments were not raised by the parties in ***S.L.L.*** or addressed by the supreme court in that case. In light of Andy's arguments, we are left to question whether ***S.L.L.***'s holding that recommitment petitions are "governed by WIS. STAT. § 51.20(10) through (13), not § 51.20(1)," comports with the plain language of § 51.20. *See* ***S.L.L.***, 387 Wis. 2d 333, ¶24. Moreover, if ***S.L.L.*** was correct that the pleading standard in § 51.20(1)(c) does not apply to recommitment petitions, then clarification is needed as to the pleading standard against which such petitions should be measured. The resolution of these issues is critically important to individuals subject to WIS. STAT. ch. 51 commitments—whose liberty interests are directly affected by a determination of the applicable pleading standard for recommitment petitions; to ch. 51 petitioners—who need to know the applicable pleading standard so that they may ensure their recommitment petitions comply with it; and to circuit courts—which must determine whether the applicable pleading standard is met before proceeding with a recommitment action.

II. Andy's constitutional arguments

Andy also argues that if ***S.L.L.*** correctly held that WIS. STAT. § 51.20(1)-(9) do not apply to recommitment proceedings, then the recommitment provisions in WIS. STAT. ch. 51 violate both due process and equal protection.

With respect to due process, Andy correctly notes that a "civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." ***Addington v. Texas***, 441 U.S. 418, 425 (1979). In ***S.L.L.***, the supreme court similarly stated that "Chapter 51 proceedings are subject to the full complement of due process guarantees." ***S.L.L.***, 387 Wis. 2d 333, ¶33.

As a general matter, "due process requires notice and an opportunity to be heard before a deprivation of life, liberty or property." ***Santiago v. Ware***, 205 Wis. 2d 295, 336, 556 N.W.2d 356 (Ct. App. 1996). The requisite notice must "reasonably convey information about the proceedings so that the respondent can prepare a defense or make objections." ***Schramek v. Bohren***, 145 Wis. 2d 695, 704, 429 N.W.2d 501 (Ct. App. 1988). Here, Andy argues that absent any statutory provision that "prescribes the contents of a petition for recommitment or requires a county to give notice of the legal standard and grounds for commitment," § 51.20 violates due process by failing to require petitioners to give committed individuals adequate notice of the basis for recommitment.

In support of this argument, Andy relies heavily on ***Lessard v. Schmidt***, 349 F. Supp. 1078 (E.D. Wis. 1972), *vacated*, 414 U.S. 473 (1974).[10] In that case, the plaintiffs challenged the constitutionality of provisions in a prior version of Wisconsin's civil commitment statute that: (1) permitted involuntary detention for up to 145 days without a hearing; (2) failed to provide for

[10] As the supreme court has previously explained, ***Lessard v. Schmidt***, 349 F. Supp. 1078 (E.D. Wis. 1972), *vacated*, 414 U.S. 473 (1974), "has a complicated procedural history, but the substance of its holding was never overruled." ***Outagamie Cnty. v. Michael H.***, 2014 WI 127, ¶25 n.19, 359 Wis. 2d 272, 856 N.W.2d 603.

meaningful notice; and (3) allowed courts to dispense with notice altogether in certain cases. ***Id.*** at 1090. With respect to notice, the ***Lessard*** court held:

> Notice of the scheduled hearing, "to comply with due process requirements, must be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded," and it must set forth the basis for detention with particularity. Notice of date, time and place is not satisfactory. The patient should be informed of the basis for his detention, his right to jury trial, the standard upon which he may be detained, the names of examining physicians and all other persons who may testify in favor of his continued detention, and the substance of their proposed testimony.

Id. at 1092 (citation and footnote omitted). Based on ***Lessard***, Andy argues that if ***S.L.L.*** correctly held that the notice requirements in WIS. STAT. § 51.20(1) do not apply to recommitment proceedings, then WIS. STAT. ch. 51's recommitment provisions violate due process because they do not require a petitioner to specify the basis for a recommitment petition or set forth the facts on which that petition is based, thus inhibiting the subject individual's ability to prepare a defense.[11]

Moreover, Andy argues that if ***S.L.L.*** correctly held that WIS. STAT. § 51.20(1)-(9) do not apply to recommitment proceedings, then WIS. STAT. ch. 51 violates equal protection in two ways. First, Andy argues that if the requirements in § 51.20(1) do not apply to recommitment petitions, then ch. 51 fails to grant the same due process protections to subject individuals in recommitment proceedings that it grants to subject individuals in initial commitment proceedings. Second,

[11] As Andy correctly notes, this issue was not squarely addressed in ***S.L.L.*** The ***S.L.L.*** court addressed the notice required by due process in the context of S.L.L.'s argument that the circuit court lacked personal jurisdiction over her. ***S.L.L.***, 387 Wis. 2d 333, ¶25. The ***S.L.L.*** court did not address whether the recommitment petition in that case violated due process because it did not contain sufficient information to allow S.L.L. to prepare a defense.

Andy argues that if § 51.20(9) does not apply to recommitment proceedings, then the subject individuals in those proceedings do not have the same right as individuals in initial commitment proceedings to be personally examined by two doctors. *See* § 51.20(9)(a)1.

To prove an equal protection violation, the party challenging a statute's constitutionality must show that the statute unconstitutionally treats members of similarly situated classes differently. ***Waupaca Cnty. v. K.E.K.***, 2021 WI 9, ¶33, 395 Wis. 2d 460, 954 N.W.2d 366. The right to equal protection does not require that similarly situated classes be treated identically. ***Id.*** It requires, however, "that the distinction made in treatment have some relevance to the purpose for which classification of the classes is made." ***Id.*** Applying rational basis scrutiny, the question is whether there is a "reasonable basis to support" the disparate treatment. ***Id.***, ¶35 (quoting ***State v. Dennis H.***, 2002 WI 104, ¶32, 255 Wis. 2d 359, 647 N.W.2d 851).

Andy argues there is no reasonable basis to require a petitioner to provide advance notice of the legal standard and factual basis for a subject individual's detention at the initial commitment stage, and to require a personal examination by two doctors at that stage, while denying those protections in recommitment proceedings. As Andy correctly notes, an individual faces an even greater deprivation of liberty at the recommitment stage than at the initial commitment stage, as a recommitment can last twice as long as an initial commitment. *See* WIS. STAT. § 51.20(13)(g)1. (stating that an initial commitment order "may be for a period not to exceed 6 months, and all subsequent consecutive orders of commitment of the individual may be for a period not to exceed one year"). Andy therefore asserts there is no reasonable basis to provide fewer protections to individuals at the recommitment stage than those at the initial

commitment stage. The County does not meaningfully respond to this argument or assert any reasonable basis for this disparate treatment. The County also does not dispute that subject individuals in initial commitment proceedings and subject individuals in recommitment proceedings are similarly situated.

Andy raises novel questions about the constitutionality of WIS. STAT. ch. 51's recommitment provisions, given ***S.L.L.***'s holding that WIS. STAT. § 51.20(1)-(9) do not apply in recommitment proceedings. Andy's constitutional arguments were neither raised by the parties nor addressed by the supreme court in ***S.L.L.*** Resolution of these constitutional issues is of vital importance not only to the many individuals in this state who are subject to ch. 51 commitments, but also to ch. 51 petitioners and to the circuit courts tasked with applying ch. 51 on a day-to-day basis.

CONCLUSION

We submit that supreme court review of these appeals is necessary to clarify: (1) whether ***S.L.L.***'s holding that WIS. STAT. § 51.20(1)-(9) do not apply to recommitment proceedings conflicts with the plain language of § 51.20; (2) the proper standard to determine the legal sufficiency of a recommitment petition if ***S.L.L.*** was correctly decided and § 51.20(1)(c) therefore does not apply to recommitment petitions; and (3) in light of ***S.L.L.***'s holding, whether WIS. STAT. ch. 51's recommitment provisions violate due process and/or equal protection. To the extent that clarification of these issues may contradict or otherwise modify ***S.L.L.***, this court lacks authority to reach such a holding. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997). For that reason—and given the importance of the issues raised in these appeals and the high likelihood that they will recur in future cases—we believe supreme court

review is both appropriate and necessary. A decision by the supreme court "will help develop, clarify or harmonize the law," WIS. STAT. RULE 809.62(1r)(c), providing much-needed guidance to Wisconsin attorneys, litigants, and lower courts.