**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**September 27, 2006**

**Cornelia G. Clark**
**Clerk of Court of Appeals**

**NOTICE**

**This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.**

**A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.**

**Appeal No. 2006AP1536-FT** **Cir. Ct. No. 2005ME178**

**STATE OF WISCONSIN** **IN COURT OF APPEALS**
**DISTRICT II**

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**IN THE MATTER OF THE MENTAL COMMITMENT OF JOHN J.V.**

**SHEBOYGAN COUNTY,**

**PETITIONER-RESPONDENT,**

**V.**

**JOHN J. V.,**

**RESPONDENT-APPELLANT.**

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APPEAL from an order of the circuit court for Sheboygan County: GARY LANGHOFF, Judge. *Affirmed.*

¶1 NETTESHEIM, J.[1] John J.V. appeals from an order extending his WIS. STAT. ch. 51 commitment for an additional year. John contends that the trial court lost competency to issue the order because it was entered more than one year from the expiration date of the prior extension order. We deem the court of appeals decision in ***County of Milwaukee v. Edward S.***, 2001 WI App 169, 247 Wis. 2d 87, 633 N.W.2d 241, as controlling because the delay in entering the extension order was caused by John's request for an adjournment.

¶2 The facts are not in dispute. On December 15, 2004, the circuit court entered an order extending John's WIS. STAT. ch. 51 commitment for one year to December 15, 2005. On October 24, 2005, the Sheboygan County Health and Human Services Department (the County) petitioned to further extend John's commitment. The circuit court commenced a hearing on the County's petition on December 1, 2005. After hearing one witness, the court continued the hearing with agreement of the parties to December 8, 2005. At the adjourned hearing, John's attorney, Robert Wells, indicated that he needed additional time to obtain and review John's medical records from the Milwaukee County Mental Health Complex (Milwaukee County). Wells represented that these records were "important" to John's defense and that Milwaukee County had indicated that it would take four or five days to retrieve and compile the records. In response to the trial court's inquiry as to how much time Wells would need to review the records, Wells responded that the following week (the week of December 12) "would be difficult," although he eventually stated he would be available "early" on December 15. However, the County's expert witness was unavailable that day,

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(d) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

so the court continued the hearing to December 20, 2005, beyond the expiration date of the standing extension order.

¶3 At the continued hearing on December 20, 2005, the County presented the testimony of its expert witness. Wells then requested another adjournment to evaluate the Milwaukee County records, which he had received the previous day. The circuit court proposed December 27 as the adjourned date, but neither John's nor the County's expert witness was available on that date so the court continued the matter to January 3, 2006. However, Wells was ill on that date and could not appear so the court again continued the matter. Shortly thereafter, Wells reported to the court that he would not be presenting any additional evidence. The court then scheduled the matter for January 9, 2006, but the matter did not go forth on that date because of an illness in the family of the assistant corporation counsel handling the case for the County.

¶4 The matter was finally concluded on January 18, 2006. At the outset of this hearing, Wells filed a motion claiming that the circuit court had lost competency to proceed because the prior extension order had expired. In support, Wells cited ***G.O.T. v. Rock County***, 151 Wis. 2d 629, 445 N.W.2d 697 (Ct. App. 1989). Wells stated that he was previously unaware of the ***G.O.T.*** case and that it was John who had brought the case to his attention. The court denied John's motion, noting that the County had commenced the extension proceeding prior to the expiration of the previous extension order and that the delay was caused by John's request for an adjournment which was granted "in an effort to fully and fairly give [John] an opportunity to contest the petition for the extension of the commitment." The court then found that the County had established sufficient grounds to extend John's commitment for an additional year and entered a final order to that effect. John appeals.

¶5 As he did in the circuit court, John relies principally on ***G.O.T.***, where the court of appeals held that the circuit court lost competency to proceed when it entered an extension order beyond the statutory deadline. ***Id***. at 635-36. In response, the County contends that John is judicially estopped from making this argument because it was his motion for an adjournment that caused the delay. The County cites ***Edward S.*** in support.

¶6 We examine each case and some related case law in turn. We begin with ***G.O.T.*** There, G.O.T. was committed for six months under WIS. STAT. ch. 51 on November 4, 1987. ***G.O.T.***, 151 Wis. 2d at 631. Rock County timely petitioned for an extension of the commitment order on April 25, 1988. ***Id.*** at 632. On April 27, G.O.T. demanded a jury trial. ***Id.*** The following day, Rock County objected to G.O.T.'s jury demand and asked for an adjournment to argue the issue. ***Id.*** On April 29, the circuit court continued the matter for fourteen days and also entered a temporary order extending G.O.T.'s standing commitment to May 10. ***Id.*** At the May 10 hearing, the court heard argument on the jury demand issue and then again extended G.O.T's commitment to May 24. ***Id.*** On May 23, the court rejected G.O.T.'s jury demand and, following a bench trial the next day, granted Rock County's petition for extension of the commitment. ***Id***.

¶7 On appeal, the court of appeals ruled that the relevant statutes permitted only one fourteen-day extension, not two. ***Id.*** at 635. As a result, the court held that the underlying commitment had expired and the circuit court had lost competency to proceed. ***Id***. In so ruling, the court of appeals cited to ***State ex rel. Lockman v. Gerhardstein***, 107 Wis. 2d 325, 328-29, 320 N.W.2d 27 (Ct. App. 1982), for the proposition that a court may not conduct a final commitment proceeding after the mandatory time limits of WIS. STAT. ch. 51 have expired.

¶8 The County responds with ***Edward S.***, a later court of appeals case. There, Edward S. was detained on a petition for emergency detention under WIS. STAT. ch. 51 and was temporarily committed following a probable cause hearing. ***Edward S.***, 247 Wis. 2d 87, ¶2. The final hearing was scheduled for August 13, 1999, one day before the fourteen-day deadline prescribed by statute. ***Id.*** However, on August 12, the day before the scheduled final hearing, Edward S. fired his attorney. ***Id.***, ¶3. Apparently in anticipation of his discharge, the attorney had previously stipulated to an adjournment of the final hearing to August 27, 1999, beyond the statutorily mandated fourteen-day deadline. *See* ***id.*** At the adjourned final hearing, the circuit court committed Edward S. Postcommitment, the court rejected Edward S.'s argument that the court had lost competency to conduct the commitment hearing. ***Id.***, ¶4.

¶9 On appeal, Edward S. renewed his argument that the circuit court had lost competency to proceed because the final hearing was held beyond the statutory fourteen-day time limit. ***Id.***, ¶5. Edward S. relied on ***Lockman***, the case noted by the court of appeals in ***G.O.T. Edward S.***, 247 Wis. 2d 87, ¶5. The ***Edward S.*** court concluded that ***Lockman*** did not control, noting that in ***Lockman*** the state had caused the delay due to the unavailability of one of its witnesses whereas in ***Edward S.*** the delay was caused by Edward S.'s discharge of his attorney, making it impossible to comply with the statutory deadline. ***Edward S.***, 247 Wis. 2d 87, ¶7. The court said, "Public policy prohibits a detained subject's manipulation of the system by firing his attorney a day before the final hearing[,]" and, "Such an interpretation would defy common sense and create an absurdity …." ***Id.***, ¶8. The court of appeals also invoked the doctrine of judicial estoppel "because Edward S. asked the [circuit] court to agree to an adjournment in order to permit him to obtain new counsel." ***Id***., ¶10.

¶10 Although this case concerns an extension proceeding while ***Edward S.*** concerned an initial commitment, we conclude that this case is nonetheless governed by the rationale of ***Edward S.***, not ***G.O.T.*** In this case, the County timely filed its request for the extension of John's commitment in advance of the scheduled expiration of the prior extension order. In addition, the circuit court conducted the initial hearing on December 1, 2005, in advance of the expiration deadline. After hearing one witness, the matter was adjourned with agreement of all parties to December 8, still in advance of the expiration deadline. However, the matter was not concluded at that time because John, through Attorney Wells, sought and was granted an adjournment to obtain and review John's medical records from Milwaukee County. This ultimately led to a series of proceedings conducted after the standing extension order had expired.

¶11 The elements of judicial estoppel are: (1) the later position must be clearly inconsistent with the earlier position, (2) the facts at issue should be the same in both cases, and (3) the party to be estopped must have convinced the first court to adopt its position. ***Edward S.***, 247 Wis. 2d 87, ¶10 (citing ***State v. Petty***, 201 Wis. 2d 337, 348, 548 N.W.2d 817 (1996)). Those elements are satisfied by the facts of this case. First, John sought and was granted an adjournment in order to investigate his medical records from Milwaukee County. Later, he did an about-face, contending that the adjournment served to deprive the circuit court of competency to litigate the matter. This argument was clearly inconsistent with his initial request for an adjournment. Second, the relevant facts in each phase of the proceedings had not changed. To the contrary, the facts were exactly the same. Third, John prevailed upon the circuit court to grant the adjournment.

¶12 John contends that there is no evidence in this case demonstrating the he manipulated or played "fast and loose" with the system. True, ***Petty*** used

these terms at times when speaking of judicial estoppel under the facts of that case. ***Petty,*** 201 Wis. 2d at 354. But we must bear in mind that the core purpose of judicial estoppel is to protect the judiciary as an institution from the perversion of judicial machinery. ***Id***. at 346. As such, the law is intended "to protect against a litigant playing 'fast and loose' with the courts by asserting inconsistent positions." ***Id***. at 347 (citations omitted).

¶13 Whether or not intended, the net result in this case is that John played "fast and loose" with the circuit court by asserting inconsistent positions. Invoking the court's jurisdiction as a shield, John successfully persuaded the court to grant an adjournment in order to pursue a defense. He then turned on the court, using that history as a sword against the court's jurisdiction. This, bluntly put, was a manipulation of the system.

¶14 Given the liberty interest at stake in a WIS. STAT. ch. 51 commitment case, the circuit court here was understandably concerned about John's ability to prepare a defense. Acting on that concern, the court prudently granted John a continuance to further investigate. Like the court of appeals in ***Edward S.***, we will not countenance John's subsequent turnabout to "mousetrap" the court into losing its competency to proceed. Pursuant to ***Edward S.***, public policy does not permit such manipulation, and John is judicially estopped from arguing otherwise.

*By the Court.*—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.