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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Case Nos. 2016AP2082 and 2017AP634

KATHLEEN PAPA and
PROFESSIONAL HOMECARE
PROVIDERS INC.,

Plaintiffs-Respondents,

v.

WISCONSIN DEPARTMENT OF
HEALTH SERVICES,

Defendant-Appellant.

APPEAL FROM FINAL ORDERS OF THE
WAUKESHA COUNTY CIRCUIT COURT,
THE HONORABLE KATHRYN FOSTER, PRESIDING
WAUKESHA COUNTY CASE NO. 15CV2403

PLAINTIFFS-RESPONDENTS' BRIEF

Diane M. Welsh, SBN 1030940
Susan M. Crawford, SBN 1030716
PINES BACH LLP
122 W. Washington Avenue, Ste. 900
Madison, Wisconsin 53703
Telephone: (608) 251-0101
dwelsh@pinesbach.com
scrawford@pinesbach.com
Attorneys for Plaintiffs-Respondents

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INTRODUCTION

Kathleen Papa, R.N., and the members of Professional Homecare Providers, Inc. (PHP) (collectively, "Plaintiffs-Respondents" or "the Nurses"), are certified Medicaid providers who work as Nurses in independent practice. They provide in-home care to children and adults enrolled in the Medicaid program who have complex medical needs, enabling these individuals to remain in their homes. Unlike Nurses who provide services through a clinic or institutional healthcare provider, independent practice Nurses bill their services directly to the Medicaid program. The Wisconsin Medicaid Program reimburses the Nurses as compensation for the nursing services they provide to patients.

In recent years, the Wisconsin Department of Health Services ("the Department") has begun to demand that independent care Nurses return payments they received for Medicaid services, even where the Department does not dispute that the Nurses provided the services and the payments were appropriate for the services. The Nurses brought an action for declaratory and injunctive relief against the Department, challenging the validity of the policy and interpretations on which the Department has based its recoupment actions. Under these policies, the Department has asserted that the Nurses' failure to strictly comply with one or more of the

complex, evolving billing and record-keeping requirements found in the Wisconsin Statutes, the administrative code, the online Medicaid Provider Handbook ("Handbook"), provider updates issued by the Department, or other sources justify its recoupment actions.

The circuit court issued an order granting the Nurses' motion for summary judgment, ruling that the Department's statutory authority to recover payments from Medicaid providers "is limited to claims for which either (1) the Department is unable to verify from a provider's records that a service was actually provided; or (2) an amount claimed was inaccurate or inappropriate for the service that was provided." (R35:6; App.106[1]). The court further ruled that "[t]he Department's policy of recouping payments for noncompliance with Medicaid program requirements, other than as legislatively authorized by Wis. Stat. §49.45(3)(f) . . . imposes a 'Perfection Rule' which exceeds the Department's authority" and "is also a rule not properly promulgated under Wis. Stat. §227.10(1)" (R35:6; App.106).

Pursuant to this declaration of law, the court issued an injunction prohibiting the Department from "applying or enforcing the Perfection Rule." The court ordered that:

[1] For purposes of citing to the Appeal Record, we will use the record for Appeal No. 2017AP634 because it includes all of the documents from the Circuit Court Record.

> The Department may not recoup Medicaid payments made to Medicaid-certified providers for medically necessary, statutorily covered benefits provided to Medicaid enrollees, based solely on findings of the provider's noncompliance with Medicaid policies or guidance where the documentation verifies that the services were provided.

(R35:6-7; App.106-107).

In March 2017, after the Department continued to pursue recoupment actions, the circuit court issued a supplemental order to "restate and give effect to the declaratory judgment and injunction previously entered" by the Court. (R.56:1.) The court also ordered the Department to pay the costs and attorney fees the Nurses expended to bring the motion for contempt or supplemental relief, based on the Department's failure to comply with its prior Order (R.56:2; R.58).

This Court should affirm each challenged circuit court order and the court's appropriate recognition of the Department's overreach. This Court should also reject the Department's attempts to expansively interpret its statutory authority, ignore the actual language of the statutes, and distract this Court with irrelevant minutiae and procedural challenges. The record establishes that the policy being challenged here does, in fact go beyond the Department's statutory authority and is an unpromulgated "rule." The record further establishes that the Nurses had standing to bring this declaratory judgement action and that the issue was ripe for review.

STATEMENT OF THE ISSUES

1. Does the Department's policy of recouping payments for Medicaid services based on the provider's failure to strictly comply with program requirements found in the Wisconsin Statutes, administrative code, the Medicaid Provider Handbook, the Department's "provider updates," or other sources exceed the scope of the Department's recoupment authority under Wis. Stat. §49.45(3)(f)2., where the Department does not dispute that the services were actually provided and that the payments were appropriate for the services?

   The circuit court answered: Yes.
   This Court should answer: Yes.

2. Is the Department's general policy and interpretation of statute that it may recoup Medicaid payments from a provider based solely on a provider's asserted noncompliance with a Medicaid Provider Handbook provision or other program requirement an unpromulgated administrative rule in violation of Wis. Stat. §227.10(1)?

   The circuit court answered: Yes.
   This Court should answer: Yes.

3. Did the Circuit Court act within its authority in enjoining the Department to cease recoupment activities in excess of its statutory authority?

   The circuit court answered: Yes.
   This Court should answer: Yes.

4. Did the Circuit Court act within its authority in granting supplemental relief to enforce its judgment after the Department filed its notice of appeal?

   The circuit court answered: Yes.
   This Court should answer: Yes.

5. Is the declaratory judgment action filed by Plaintiffs-Respondents Kathleen Papa and Professional Homecare Providers, Inc. a justiciable controversy?

The circuit court answered: Yes.
This Court should answer: Yes.

6. Was the circuit court empowered to order the Department to pay the Plaintiffs-Respondents' costs and fees of bringing a post-judgment motion where the Department's non-compliance with the circuit court's order and injunction drove the Plaintiffs back to court for supplemental relief?

The circuit court answered: Yes.
This Court should answer: Yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument may benefit the Court to give the parties an opportunity to address any questions created by the often confusing interaction between federal and state Medicaid statutes, regulations, policies, and guidance documents.

Publication of the Court's decision is appropriate because the Court will decide an issue of substantial and continuing public importance affecting Medicaid providers and recipients throughout the state. A published decision will clarify the statutory limits on when the Department may demand the return of payments from Medicaid providers. Moreover, the decision may clarify the broader issue of what checks exist on a state agency's attempt to expand its own authority by publishing handbooks, other guidance materials, or policy statements

interpreting its administrative rules in a manner inconsistent with state statutes.

STATEMENT OF THE CASE

I. Legal Background

Medicaid is a health care program for eligible children, pregnant women, elderly adults, low-income adults, and persons with disabilities, administered by the state and jointly funded by the state and federal government. *See* Wis. Stat. §49.45; 42 U.S.C. §§1396 *et seq*.

Title XIX of the Social Security Act establishes Medicaid and sets forth requirements for state participation in the Medicaid program and access to federal funds for coverage of Medicaid expenses. 42 U.S.C. 1396a, *et seq.* The U.S. Department of Health and Human Services, Centers for Medicare and Medicaid Services ("CMS") issues federal regulations implementing the Medicaid program. *See, e.g.,* 42 CFR 440-456. State Medicaid programs are administered by state agencies, not federal agencies. The control and operation each state's Medicaid program is left to the state governments.

The Wisconsin Department of Health Services ("Department") administers the Wisconsin Medicaid program. Wis. Stat. §49.45(1). The Wisconsin Statutes direct the Department, *inter alia*, to establish criteria for

certification of providers, certify providers, and set conditions of participation and reimbursement in provider contracts, and to promulgate administrative rules as part of these duties. *See* Wis. Stat. §§49.45, *et seq*.

The statutes also require the Department to pay allowable charges to certified providers for federally mandated benefits, including nursing services. Wis. Stat. §§49.46(2)(a)(4)c., d.

As part of its administration of the Medicaid program, the Department publishes the Online Medicaid Provider Handbook ("Handbook"). Wis. Admin. Code §DHS 108.02(4). The Handbook is an extensive collection of billing procedures, documentation requirements, and other policies and directives applicable to Medicaid providers.

The Department's Office of the Inspector General ("OIG") conducts audits of Medicaid providers to ascertain their compliance with all applicable Wisconsin laws and policies. *See* Wis. Stat. §15.193; §§49.45(2)(b)4 and (3)(f)1; Wis. Admin. Code §DHS 106.02(9)(e)4. Any Medicaid provider who has billed Medicaid within the past five years may be audited by OIG. (R.9:2 ¶8.) OIG is authorized to recover overpayments in the manner set forth in Wis. Admin. Code §DHS 108.02(9)(a), which tracks the statutory language of Wis. Stat. §49.45(2)(a)10.a.

II. Statement Of The Facts

This case began in 2013 when the Department initiated more aggressive audits of and recoupment efforts against Medicaid providers (R.14:1 ¶4; R.13:2 ¶5; R.16:2 ¶7; R.15:2 ¶6; R.17:1 ¶4). PHP officers observed that the Department was initiating recoupment actions against its members that were forcing members to consider leaving their practice, selling their homes, or declaring bankruptcy (R.11:2-3, ¶¶8, 10, 14, 15; R.12:2-4, ¶¶8, 10, 13-15; R.18:2 ¶¶7-9). PHP was concerned about the financial and emotional toll that the recoupment efforts placed on its members, as well as their impact on vulnerable Medicaid enrollees (R.11:3 ¶¶14-16; R.12:3-4 ¶¶12-16; R.16:2, ¶¶13, 14, 16; R.18:2 ¶¶5-9).

Following post-payment audits of the Nurses, the Department has sought recoupment of Medicaid funds based on asserted findings of noncompliance with a Medicaid Provider Update, a Handbook provision, an Administrative Code provision, or other standard or policy. (R.14:2 ¶7; 16:2 ¶10; 17:2 ¶6; 13:2 ¶6; 15:2 ¶8; 11:2 ¶9; 12:2 ¶9.) The OIG "findings" did not call into question whether the healthcare services were actually provided or whether the Medicaid patient was entitled to receive the healthcare services. (R.16:2 ¶¶8-9; 17:2 ¶5; 13:2 ¶¶8-9; 15:2 ¶7; 14:2 ¶¶5-6.) Rather, OIG characterized the services as "non-covered," and therefore

subject to recoupment, due to alleged documentation or other shortcomings, and at times characterized as "overpayments" all the compensation a nurse received for services she actually provided to Medicaid patients for days, weeks, months, or even years. (R.16:2 ¶9; 13:2 ¶9; 14:2 ¶6.)

For example, the Department has sought to recoup all payments made to a PHP member because of a post-payment audit finding that the nurse had not counter-signed the plan of care, although the documentation established that she provided cares consistent with that plan and although there is no regulation which requires the form be signed (R.10:125 -33; R.65:4-5; App.161-162). In 2014, the Department ordered recoupment against a different nurse for failing to countersign this same form (R.10:134-38). The Department sought to recoup from a PHP member the entire income she received for six months, totaling over $57,000, because she did not submit the claims for her services to the employer-based health plan of the parent of a medically-fragile child where it had already been established that the services were not covered under that health plan and where Medicaid had previously authorized the delivery of the services to the child. (R.16:2 ¶¶9, 10.)

As a result, the Nurses undergoing audits are forced to invest significant time and resources, including attorneys' fees, to defend themselves against OIG findings and recoupment attempts, imposing significant financial burdens on them. (R.17:2 ¶7; 16:2-3 ¶13; 13:2 ¶9; 15:2 ¶9; 11:3 ¶14; 14:2 ¶8; 12:3 ¶14.) In some cases, OIG's efforts caused providers to declare bankruptcy, refrain from providing Medicaid services in the future, or both. (R.12:3 ¶15; 11:3 ¶15; 16:3 ¶¶14, 16; 17:2 ¶¶8-9; 13:2-3 ¶¶10-11; 15:2 ¶10; 18:2 ¶¶7-8; 14:2 ¶9; 19:2 ¶¶13, 15, 17.) OIG's actions have had a chilling effect on Nurses' willingness to provide Medicaid services at all, for fear that OIG will demand recoupment of days, weeks, months, or years of income for services they actually provided to patients. (R.12:4 ¶16; 11:3-4 ¶16; 16:3 ¶16; 17:2 ¶¶8-9; 13:2-3 ¶11; 15:2 ¶10; 14:2 ¶9.)

Additional facts will be cited, as warranted, below.

III. Procedural History

The Nurses filed an action for declaratory judgment and injunctive relief against the Department pursuant to Wis. Stat. §227.40(1), *et seq.*, on December 14, 2015, challenging the validity of the Department's policy and interpretations on which it relied to demand that the Nurses return payments for Medicaid-covered services under certain circumstances. (R.1:9 ¶32; App.149.)

The Nurses alleged that the Department was misinterpreting its statutory authority as a basis to seek recoupment of Medicaid payments from Nurses whenever an otherwise-covered service failed to meet any one of the numerous requirements set forth in federal and state law, Medicaid Provider Updates, the Handbook, and other standards deemed relevant by OIG auditors, even when the services were verified as actually provided and the payments received for the services were appropriate and accurate. (R.1:6-7 ¶¶15-16; App.145-146.) The Nurses attached Provider Handbook Topic #66 to the complaint, as an example of the Department's perfection standard used in support of its recoupment actions. The Nurses also alleged the Department's overly broad recoupment policy constituted an unpromulgated rule. (R.1:14; App.154.)

The Nurses moved for summary judgment on March 18, 2016 (R.8:19), and the Department responded on May 17, 2016 (R.20). The Nurses replied on May 27, 2016. (R.26.) The court held oral argument on the motion on June 3, 2016. (R.64.)

On August 12, 2016, the circuit court granted the Nurses' motion for summary judgment. (R.63; App.108-142.) In its September 27, 2016 written order, the court declared

> A. The Department of Health Service's authority under Wis. Stat. §49.45(3)(f) and 49.45(2)(a)10 to recover payments form Medicaid providers is limited to claims for which either (1) the Department is unable to verify from a provider's records that a service was actually provided; or (2) an amount claimed was inaccurate or inappropriate for the service that was provided; [and]
>
> B. The Department's policy of recouping payments for noncompliance with Medicaid program requirements, other than as legislatively authorized by Wis. Stat. §49.45(3)(f), as described above, imposes a "Perfection Rule" which exceeds the Department's authority. This recoupment policy, including the standard as set forth in the Medicaid Provider Handbook at Topic # 66, is also a rule not properly promulgated under Wis. Stat. §227.10(1).

(R.35:6; App.106, the "Final Order.") Furthermore, the circuit court enjoined the Department from applying or enforcing the unpromulgated rule, specifying

> [t]he Department may not recoup Medicaid payments made to Medicaid-certified providers for medically necessary, statutorily covered benefits provided to Medicaid enrollees, based solely on findings of the provider's noncompliance with Medicaid policies or guidance where the documentation verifies that the services were provided.

(R.35:6-7; App.106-107.)

The Department filed a notice of appeal on October 20, 2016 (R.38), and this Court took appeal number 2016AP2082. The Department filed its opening appeal brief on March 24, 2017.

Following the circuit court's issuance of the Final Order, the Department continued to pursue recoupment from the Nurses of Medicaid funds based on OIG's asserted findings of noncompliance with a Medicaid Provider Update, a Handbook provision, an Administrative Code

provision, or other standard or policy. (R.45:13-22, 23-34, 36-37, 38-39, 53-54, 64-65, 66.) The Department's actions included issuing a final decision authorizing recoupment, conducting audits, issuing notices of intent to recover payments, and proceeding with administrative hearings in recoupment actions, in each instance applying legal standards that were inconsistent with the Court's Order and Injunction. (R.45:23-34, 36-37, 38-39, 53-54, 64-65, 66.) The Nurses were forced to return to court, citing examples where OIG either found that the services had actually been provided (R.45:30, 32), or made no allegation that the services had not actually been provided (R.45:36-37, 38-39, 50-52, 53-54, 55-63), yet still attempted recoupment. The Department's numerous recoupment actions against the Nurses following the Final Order caused the Nurses to incur additional legal fees and other costs to defend themselves. (R.52:1-8.)

On January 12, 2017, the Nurses moved the circuit court for supplemental relief or, in the alternative, contempt sanctions, in light of the Department's ongoing violations of the injunction. (R.43.) The Nurses asked the circuit court to enforce its original order with either damages or remedial sanctions in order to deter further violations by the Department. (R.43:3.)

The circuit court granted the motion for supplemental relief. (R.65; App.158-203.) On March 24, 2017, the circuit court issued a written order "[t]o restate and give effect to the declaratory judgment and injunction previously entered." (R.56:1, the "Order for Supplemental Relief.") As before, the court prohibited the Department from issuing a notice of intent to recoup or furthering any agency action seeking to recoup Medicaid payments from a Medicaid provider if the provider's records verified that the services were actually provided and the provider was paid an appropriate amount. (R.56:2.) The court directed the Department to pay the costs and attorney fees the Nurses had incurred to bring the motion—a result of the Department's continuing violations of the injunction after the September 27, 2016 Final Order. (R.58; R.72:37.)

The Department amended its notice of appeal on April 5, 2017 (R.59), and the Court took appeal No. 2017AP0634. On April 13, 2017, the Nurses moved to dismiss appeal No. 2016AP2082 or to strike the Department's opening brief, and the Department moved to consolidate the two appeals on April 19, 2017. This Court consolidated the appeals on April 25, 2017.

The Department moved the circuit court for a stay of the Final Order, Order for Supplemental Relief, and Order for Costs and Attorney

Fees. (R.66:1-2.) At a May 16, 2017 hearing, the circuit court denied the Department's motion for a stay and issued a written order on May 26, 2017. (R.72; R.71.) The Department moved this Court for a stay on June 20, 2017, which this Court denied on August 15, 2017.

STANDARDS OF REVIEW

Whether an administrative rule exceeds an agency's statutory authority presents a question of law which is reviewed *de novo*. *Seider v. O'Connell*, 2000 WI 76, ¶25, 236 Wis.2d 211, 225, 612 N.W.2d 659, 666. Whether an agency's action constitutes a rule under Wis. Stat. §227.01(13) is also subject to *de novo* review. *Cholvin v. Wis. Dep't of Health & Family Servs.*, 2008 WI App 127, ¶11, 313 Wis.2d 749, 756, 758 N.W.2d 118, 121.

Whether or not sovereign immunity bars an award of costs and attorneys' fees is a question of law, to be reviewed *de novo*. *Aesthetic & Cosmetic Plastic Surgery Ctr., LLC v. Wis. Dep't of Transp.*, 2014 WI App 88, ¶12, 356 Wis.2d 197, 208, 853 N.W.2d 607, 612.

The issues of standing and ripeness are questions of law, which the Court reviews *de novo*. *Chenequa Land Conservancy, Inc. v. Vill. of Hartland*, 2004 WI App 144, ¶12, 275 Wis.2d 533, 544, 685 N.W.2d 573, 579; *Olson v. Town of Cottage Grove*, 2008 WI 51, ¶32, 309 Wis.2d 365, 381, 749 N.W.2d 211, 219.

ARGUMENT

At essence in this case is the Department's authority to take money from private citizens who are Medicaid providers. The circuit court correctly found it may only do so in very limited circumstances, which the

Department regularly exceeded. The court also correctly found that the Department's requirement that Nurses must be one-hundred-percent compliant with a constellation of rules, policies, and guidance documents in order to ward off recoupment imposed a "Perfection Rule" which was not only not promulgated, but also conflicted with statute. This Court should uphold the circuit court's rulings, as well as the court's subsequent reiterations of its ruling and award of attorneys' fees to the Nurses when the Department continued to violate the court's order. Finally, the Court should reject the Department's attempt to avoid the merits by claiming the Nurses lack standing and that this case is otherwise nonjusticiable.

I. The Department's Challenged Recoupment Policy Exceeds Its Statutory Authority Under Wis. Stat. §49.45(3)(f).

The circuit court properly concluded that the Department may only recoup payments to Medicaid providers in two discrete circumstances--when "(1) the Department is unable to verify from a provider's records that a service was actually provided; or (2) an amount claimed was inaccurate or inappropriate for the service that was provided." (R.35:6; App.106.) The circuit court also correctly concluded that under its unpromulgated "Perfection Rule," the Department has given itself authority to recoup payments in other circumstances, i.e. for a wide variety of compliance errors or omissions that do not involve a failure to actually

provide the services billed to Medicaid. The Department's policy of recouping payments based on this "perfection standard" exceeds the scope of its statutory authority and, as such, represents an abuse of its administrative powers.

A. An agency may only act as authorized by statute.

"Administrative agencies are creatures of the Legislature, with only those powers as are expressly conferred or necessarily implied from the statutory provisions under which [they] operate." Wis. Att'y Gen. Op. 01-16, ¶20 (May 10, 2016) citing *Lake Beulah Mgmt. Dist. v. DNR*, 2011 WI 54, ¶23, 355 Wis.2d 47, 799 N.W.2d 73; *Brown Cnty. v. Wis. Dept. of Health & Soc. Servs.*, 103 Wis.2d 37, 43, 307 N.W.2d 247 (1981); *also Schmidt v. Dep't. of Res. Dev.*, 39 Wis.2d 46, 56-67 (1968), citing *State ex rel. Wis. Inspection Bureau v. Whitman* 196 Wis. 472, 507-08 (1928); *Debeck v. DNR*, 172 Wis.2d 382, 387-388, 493 N.W.2d 234, 237 (Ct. App. 1992) (administrative agencies do not have powers superior to those of the legislature). "[T]here will remain two checks upon the abuse of power by administrative agencies. In the first place, every such agency must conform precisely to the statute which grants the power; secondly, such delegated powers must be exercised in the spirit of judicial fairness and equity and not oppressively and unreasonably." *Schmidt* at 57.

"[A]ny doubts as to the implied power of an agency are to be resolved against the existence of authority." *Debeck*, 172 Wis.2d at 387, 493 N.W.2d at 237 (citing *Trojan v. Board of Regents of Univ. of Wis. Sys.*, 128 Wis.2d 270, 277, 382 N.W.2d 75, 78 (Ct. App. 1985); *also* Wis. Att'y Gen. Op. 01-16, ¶20 ("Those statutes will be strictly construed to preclude the exercise of power not expressly granted."),citing *Wis. Citizens Concerned for Cranes & Doves v. DNR*, 2004 WI 40 ¶14, 270 Wis.2d 318, 677 N.W.2d 612. "An agency charged with administering a law may not substitute its own policy for that of the legislature." *Debeck*, 172 Wis.2d at 387 (citing *Niagara of Wis. Paper Corp. v. DNR*, 84 Wis.2d 32, 48, 268 N.W.2d 153, 160 (1978)).

In addition to this longstanding case law, 2011 Act 21 explicitly limits the authority of state agencies, both in enforcement and in rulemaking. Wis. Stat. §227.10(2m) clarifies that "[n]o agency may implement or enforce any standard, requirement, or threshold . . . unless that standard, requirement, or threshold is explicitly required or explicitly permitted by statute or by a rule that has been promulgated in accordance with this subchapter . . . ." Wis. Stat. §§227.11(2)(a)1.-2. further states "a rule is not valid if the rule exceeds the bounds of correct [statutory] interpretation," and that general statements of statutory purpose or implementation clauses do not expand an agency's rulemaking powers.

Wis. Stat. "Taken together, these sections represent the Legislature's unambiguous limitation of agency authority." (R.26:162; Wis. Att'y Gen. Op. 01-16, ¶27.)

B. The Wisconsin Statutes limit the Department's authority to recover payments made to Medicaid Providers.

The Legislature has delegated authority to the Department—a state agency—to administer the Medicaid program. Under Wis. Stat. §49.45(3)(f), the Legislature has set forth the conditions by which the Department may audit and recover Medicaid payments from providers:

> 1. Providers of services under this section shall maintain records as required by the department for verification of provider claims for reimbursement. The department ***may audit such records to verify actual provision of services and the appropriateness and accuracy of claims*.**
>
> 2. The department may deny any provider claim for reimbursement which cannot be verified under subd. 1. or ***may recover the value of any payment made to a provider which cannot be so verified***. The measure of recovery will be the full value of any claim ***if it is determined upon audit that actual provision of the service cannot be verified from the provider's records*** or that the service provided was not included in s. 49.46 (2) or 49.471 (11). In cases of mathematical inaccuracies in computations or statements of claims, the measure of recovery will be limited to the amount of the error.

Wis. Stat. §49.45(3)(f).

The statutes also direct the methods by which the Department may recover payments from a provider that were improper, erroneous, or excessive for the service provided:

> After reasonable notice and opportunity for hearing, [the Department may] *recover money improperly or erroneously paid or overpayments to a provider* by offsetting or adjusting amounts owed the provider under the program, crediting against a provider's future claims for reimbursement for other services or items furnished by the provider under the program, or requiring the provider to make direct payment to the department or its fiscal intermediary.

Wis. Stat. §49.45(2)(a)10.a.

The Department has promulgated an administrative rule that tracks this statutory language regarding the method of recovering overpayments:

> **Departmental recoupment of overpayments.**
> (a) Recoupment methods. If the department finds that a provider has received an overpayment, including but not limited to erroneous, excess, duplicative and improper payments regardless of cause, under the program, the department may recover the amount of the overpayment by any of the following methods, at its discretion:
>
> 1. Offsetting or making an appropriate adjustment against other amounts owed the provider for covered services;
>
> 2. Offsetting or crediting against amounts determined to be owed the provider for subsequent services provided under the program if:
>
> a. The amount owed the provider at the time of the department's finding is insufficient to recover in whole the amount of the overpayment; and
>
> b. The provider is claiming and receiving MA reimbursement in amounts sufficient to reasonably ensure full recovery of the overpayment within a reasonable period of time; or
>
> 3. Requiring the provider to pay directly to the department the amount of the overpayment.

Wis. Admin. Code DHS §108.02(9)(a). Notably, the above rule does not grant the Department any additional authority to recoup payments based merely on the provider's failure to strictly comply with other program

requirements, nor does the rule claim broader authority. Rather, the rule directs only the methods by which the Department may recover payments made to a provider that are inconsistent with the services provided (*e.g.*, duplicative, excessive, or erroneous payments).

The circuit court recognized the limits on the Department's authority. Based on Wis. Stat. §§49.45(3)(f) and 49.45(2)(a)10, the Court correctly concluded that when the value of the payment *can* be verified—in other words, when the audit confirms that the practitioner provided the care in question and was paid an appropriate amount for that service—the Department lacks statutory authority to recover payments. (R:35; App.101-107.) The Legislature has not authorized the Department to recover funds due to documentation that fails to strictly comply with the copious and sometimes contradictory requirements dispersed throughout its administrative rules, online Handbook, and frequent Provider Updates. Imperfections in the provider's paperwork or other compliance issues do not mean the provider received an overpayment, if in fact the service was authorized, the provider actually provided it, and the payment was appropriate for the service.

Further, the Department's recoupment policy expressly conflicts with its statutory obligation to pay for covered services, Wis. Stat.

§49.46(2)(a), and its own regulation that "The department ***shall*** reimburse providers for medically necessary and appropriate health care services listed in ss. 49.46 (2) and 49.47 (6) (a), Stats., when provided to currently eligible medical assistance recipients...". Wis. Admin. Code §DHS 107.01(1). Quite simply, the Department is legally obligated to pay providers for appropriate health services authorized by Medicaid. The Department may not disregard this rule when it wishes to penalize providers for failing to fully comply with the Department's detailed and extensive record-keeping, billing, or numerous other requirements.

C. Federal law neither requires recoupment based on a perfection standard nor authorizes the Department to take action inconsistent with state law.

The Department protests the circuit court's ruling, arguing that there are federal laws which provide that to be remain eligible for federal funds, a state Medicaid programs is expected recoup actual overpayments of Medicaid funds. (DHS Brief, p. 28). Yet neither the circuit court nor the Nurses have advanced a position that would hinder the Department from recouping against providers who were paid funds for services that were not delivered—inadvertently or intentionally. (R.72:33, 37-39.)

Notably, the Department has not – and cannot – articulate a single federal law that requires a state Medicaid program to impose a perfection

rule upon Medicaid providers as the basis for recoupment. The Department has not established that adherence to Wis. Stat. §49.45(3)(f), as interpreted by the circuit court, would be inconsistent with federal law.

More importantly, although CMS may set forth conditions for the federal government's reimbursement to states participating in the Medicaid program, CMS cannot ***authorize*** the Wisconsin Department of Health Services to take any action that is not expressly authorized by the Wisconsin Legislature. The Department is a creature of the State of Wisconsin, not the federal government. As a creature of the Wisconsin Legislature, the Department has "only those powers as are expressly conferred or necessarily implied from the statutory provisions" under which it operates. Wis. Att'y Gen. Op. 01-16, ¶20. "Those statutes will be strictly construed to preclude the exercise of power not expressly granted." *Id.*

CMS requirements are not accompanied by a grant of authority to a state agency. Hence, the Department's suggestion that "federal regulations provide DHS with authority" must be rejected (DHS Brief, pp. 33-34).

If changes to Wisconsin Medicaid policies are necessary in order for the State to comply with CMS regulations, then Department officials need

to work with the Wisconsin Legislature to make the necessary changes. Neither federal nor state agencies may change Wisconsin policy by fiat. Likewise, it is the legislative branch, not the judiciary, which is empowered to make any policy changes that may be needed for the State to comply with federal law.

D. The Department is authorized to impose sanctions other than recoupment of payments who fail to comply with Medicaid requirements.

The Department is not without recourse to enforce the Medicaid policies it establishes for providers. The Legislature has authorized the Department to take certain corrective actions in the event that providers do not fully comply with Medicaid statutes, administrative rules, terms of Medicaid provider agreement, and certification criteria. Notably, sanctions are ***prospective***, not retroactive, and may only be imposed upon due process.

Thus, the Legislature has authorized the Department to enforce the extensive requirements of participation in Medicaid, including the terms of provider agreements and provider certification requirements, by levying sanctions. The compliance mechanisms authorized by the statute do not include forcing the provider to return payments for services provided. The Department may pursue recoupment of payments from providers only

when authorized by statute, i.e., when it cannot be verified that the services were actually provided or that the payments were accurate and appropriate for those services.

E. Construing the Statutes as authorizing the Department to recoup payments from Medicaid Providers only in circumstances of actual overpayment is consistent with sound public policy and the law.

The circuit court's construction of the Department's statutory enforcement authority under the Medicaid program advances the public policy goals of avoiding fraud and waste, without unnecessarily deterring qualified, honest providers from participating in Medicaid. (R.70:10; R.7233-37, 42-43.) The Legislature has authorized the Department to recoup payments from providers only when the documentation calls into question the actual provision of services or the accuracy of payments. Granting the Department this circumscribed authority to recover payments protects taxpayers against waste and fraud. The Nurses support such actions and do not dispute the Department's ability to utilize sanctions against providers for noncompliance.

By contrast, the Department's interpretation of its statutory authority as empowering its auditors to seek recoupment from the Nurses for virtually any failure to comply strictly with myriad program requirements is a bureaucratic overreach that is contrary to public policy.

Rather than deterring waste and abuse, this overly-broad policy is deterring qualified independent care Nurses from participating in Medicaid, out of fear that the Department's demand to repay thousands of dollars for services they actually provided to high-needs patients--along with the legal costs to contest such orders—will drive them into bankruptcy. (*See* R.12 ¶15; R.11 ¶15; R.16 ¶¶14, 16; R.17 ¶¶8-9; R.13 ¶¶10-11; R.15 ¶10; R.18 ¶¶7-8; R.14 ¶9; R.19 ¶¶13, 15, 17.)

The Department has exceeded its statutory authority by relying on its Perfection Rule to recoup funds from providers for approved services that were actually provided.

II. The Recoupment Policy Is Invalid Because It Was Not Properly Promulgated As An Administrative Rule.

Not only did the Department exceed its authority in recouping payment from providers, but its policy of doing so operated as an unpromulgated rule that the circuit court properly enjoined.

A. The "Perfection Rule" is an Unpromulgated Rule.

A state agency "***shall*** promulgate as a rule each statement of general policy and each interpretation of a statute which it specifically adopts to govern its enforcement or administration of that statute. " Wis. Stat. §227.10 (emphasis added). The statutes define a "rule" as:

> a regulation, ***standard, statement of policy***, or general order of general application which has the effect of law and which is ***issued by an agency to implement, interpret***, or make specific ***legislation enforced or administered by the agency*** or to govern the organization or ***procedure of the agency***.

Wis. Stat. §227.01(13). In *Coyne v. Walker*, 2016 WI 38, 368 Wis.2d 444, 879 N.W.2d 520, the Court explained:

> Agencies generally must promulgate rules to take any action pursuant to the statutes they are tasked with administering unless the statute explicitly contains the threshold, standard, or requirement to be enforced. All agencies are required to promulgate rules to adopt general policies and interpretations of statutes that will govern the agency's enforcement or administration of that statute. Wis. Stat. §227.10(1). Additionally, an agency may not "implement or enforce any standard, requirement, or threshold, including as a term or condition of any license issued by the agency, unless that standard, requirement, or threshold is explicitly required or explicitly permitted by statute or by a rule that has been promulgated in accordance with [Wis. Stat. ch. 227, subchapter II] . . . ." Wis. Stat. §227.10(2m).

Id., ¶19 (emphasis in original; footnotes omitted).

Thus, a rule is "(1) a regulation, standard, statement of policy or general order; (2) of general application; (3) having the effect of law; (4) issued by an agency; (5) to implement, interpret or make specific legislation enforced or administered by such agency." *Cholvin*, 2008 WI App 127, ¶22 (citing *Citizens for Sensible Zoning, Inc. v. DNR*, 90 Wis.2d 804, 814, 280 N.W.2d 702 (1979)).

The Department's Perfection Rule meets this definition. The perfection rule knits together interpretations of various regulations to create a policy under which the Department recoups payments made for

covered Medicaid services based on some aspect of noncompliance with any program requirement, including claims submission and documentation requirements (R.1:14; App.154). It is a "regulation, standard, statement of policy or general order" "issued by" the Department "to implement, interpret, or make specific legislation enforced or administered" by the agency.

A rule is of general application if it applies to a "class," if "that class is described in general terms and new members can be added to the class." *Citizens for Sensible Zoning*, 90 Wis.2d at 816. *See also Cholvin*, 2008 WI App 127, ¶25 (holding that a Medicaid policy was of general application because it "*applies* to all applicants even though it may only *affect* some of them.") (emphasis in original).

The class to which the Perfection Rule applies is Medicaid providers, which includes Plaintiff Papa and Plaintiff PHP members. New members—additional Medicaid providers—can be added to the class. Likewise, the Department's Perfection Rule establishes a general policy of recoupment applicable to all Medicaid providers, now and in the future, even though it may only affect some of the providers.

An agency action has the "effect of law" if criminal or civil sanctions can result as a violation; if licensure can be denied; or if the interest of

individuals in a class can be legally effected through enforcement of the agency action. *See Wis. Elec. Power Co. v. DNR*, 93 Wis.2d 222, 287 N.W.2d 113 (1980); *Schoolway Transp. Co. v. Div. of Motor Vehicles*, 72 Wis.2d 223, 240 N.W.2d 403 (1976); and *Frankenthal v. Wis. Real Estate Bd*, 3 Wis.2d 249, 88 N.W.2d 352, 89 N.W.2d 825 (1958).

In this case, the Perfection Rule is more than informational in nature and does not simply recite a policy or guideline. The Perfection Rule has the effect of law because all Medicaid providers can be legally affected by the enforcement of the Department's Perfection Rule due to the possibility of an audit that could deprive them of months or years of payments they legitimately earned for approved care they provided.

The Department admits its Perfection Rule was not promulgated as a rule (R.10:151-152). The Department failed to comply with any of the rulemaking requirements of Wis. Stat. §227.10. The Department also failed to comply with Wis. Stat. §227.114 even though the rule has a significant effect on small businesses. Furthermore, as discussed above, because such a policy conflicts with the Department's statutory recoupment authority, no such rule would be lawful. Wis. Stat. §227.10(2) ("No agency may promulgate a rule which conflicts with state law.")

Requiring the Department to formally adopt such an important policy that affects the provision of Medicaid services in Wisconsin is sound public policy. As aptly stated in *Mack v. Wis. Dept. of Health & Family Servs.*, 231 Wis.2d 644, 649, 231 N.W.2d 651, 654 (Ct. App. 1999):

> The requirement of formal rulemaking requires administrative agencies to follow a rational, public process. This requirement ensures that administrative agencies will not issue public policy of general application in an arbitrary, capricious, or oppressive manner. Many public policy concerns could be illuminated through the rulemaking process.

Likewise, an agency must comply with statutory requirements to evaluate the impact of a proposed rule on small businesses before promulgating the rule. Wis. Stat. §224.114(2).

The Departments' failure to properly promulgate the rule, under Wis. Stat. §227.10 or §227.114, invalidates the rule. Wis. Stat. §227.40(4)(a). This Court should affirm the circuit court.

B. The Unpromulgated "Perfection Rule" is subject to judicial review under Wis. Stat. §227.40.

The Court properly determined that the Department's "Perfection Rule" has been enforced as a rule by the Department without being properly promulgated under Wis. Stat. Chapter 227 (R.35:4; App.104).

The Department contends that it should be able to completely avoid judicial review of its recoupment policy because it is not a promulgated rule. The notion that if a state agency does not put a rule in the

administrative code and give it a number then it cannot be subject to judicial review is not only circular logic, but it also lacks legal support. First, the Department has interwoven and interpreted various administrative rules, state statutes, and federal statutes and regulations to set forth a standard or policy which it applies generally and uses as its authority to recoup payments made to Medicaid providers (DHS Brief, pp. 29-30). The proper focus is the agency's action and ***how*** it exercises its authority not ***where*** it expresses policy. This case is not solely about Topic #66, as DHS suggests, but the Department's use of this topic as well as other policies as a basis for compliance with its "Perfection Rule."

Further, even if this case were just about Topic #66, rules set forth in a Medicaid handbook are subject to judicial review under the declaratory judgment provision of Chapter 227. *See Dane Cnty. v. Wis. Dep't of Health & Soc. Servs.*, 79 Wis.2d 323, 331, 255 N.W.2d 539, 544 (1977) (holding that the validity of unpromulgated rules set forth in a Medicaid manual could be challenged by county through the declaratory judgment proceeding set forth in ch. 227).[2]

[2] At the time the *Dane County* case was heard, the declaratory judgment provision was at Wis. Stat. § 227.05. The provision was renumbered to Wis. Stat. § 227.40 by 1985 Act 182, § 26, effective April 22, 1986.

The Department cites *Tannler v. Wis. Dep't Health & Soc. Servs.*, 211 Wis.2d 179, 564 N.W.2d 735 (1997) to suggest that the Medicaid handbook "simply recites policies and guidelines, without attempting to establish rule or regulations." (DHS Brief, pp. 27-28). The handbook considered in *Tannler* was not the Medicaid Provider Handbook at issue here, it was a handbook "designed to assist state and local agencies to implement the federal-state MA program." *Tannler*, 211 Wis.2d 184. In discussing that handbook, the *Tannler* Court indicated, "As long as the document simply recites policies and guidelines without attempting to establish rules or regulations, use of the document is permissible" *Id.*, pp. 187-88. The court examined specific provisions and concluded that those provisions were consistent with state and federal law. *Id.* at 188.

The same cannot be said about Topic #66. The circuit court found that neither state statute nor federal law establish support of Topic #66 (*see* Section II, above). Hence, *Tannler* is readily distinguishable from this matter.

The Perfection Rule—as exemplified by Topic #66—is, by definition, a rule. Because the enforcement of a perfection standard is a statement of general policy issued to govern agency procedure, it meets the definition a

"rule," and was properly subject to judicial review under Wis. Stat. §227.40.

III. The Circuit Court Acted Within Its Authority In Imposing Remedies Against The Department For Enforcing A Rule Which Exceeds Its Statutory Authority And Which Was Not Properly Promulgated.

The Circuit Court followed applicable statutes in determining the remedy for the Department's overreach.

A. The Court's declaration was consistent with the challenge brought by Plaintiffs.

"The court shall declare the rule invalid if it finds it . . . exceeds the statutory authority of the agency . . . ." Wis. Stat. §227.40(4)(a). The Court's declaration interpreting the statutory limits of the Department's recoupment authority here is consistent with the Court's obligations under Wis. Stat. §227.40(4)(a).

The Complaint challenged the Department's policy of recouping monies paid to the Nurses for Medicaid-covered services the Nurses actually provided to Medicaid enrollees, merely because post-payment audits found that the services or documentation failed to meet any single one of numerous, evolving requirements set forth in federal and state law, updates issued the Department, the online Medicaid Handbook, as well as other standards deemed relevant by individual auditors of the Office of

the Inspector General. (R.1:3-13; App.143-153.) Plaintiffs argued that the Department had daisy-chained together interpretations of various rules, including Topic #66, to support this recoupment policy based on a perfection standard (R.9; R.1:4-11; App.144-151).

The Department does not dispute this—in fact, even now the Department states that Handbook Topic #66 is an amalgamation of various regulatory provisions (DHS brief, 28-31). The Court determined that the recoupment policy that results from this daisy-chaining of various regulations to create a perfection standard exceeds the Department's statutory authority and was therefore invalid. (R.35:3; App. 103).

The Department cites to no authority which requires a plaintiff to specifically enumerate and challenge in the complaint each and every underlying regulation upon which the challenged policy rests (DHS Brief, p. 36). Likewise, Plaintiffs are aware of no such requirement.

To the extent that the Department's interpretations of "properly promulgated rules" is being used to permit the Department to exceed its statutory recoupment authority (DHS Brief, p. 36), those interpretations cannot stand. Wis. Stat. §§227.01(1), (2). Moreover, the rules cited by the Department can be read in a manner that does not offend the limits of Wis.

Stat. §49.45(3)(f), and therefore the rules do not support the Department's reliance on them to enforce a perfection standard (R.35:3; App. 101-07).

B. The Court's injunction was within the bounds of its remedial powers under Wis. Stat. §227.40.

The circuit court has the authority to issue an injunction in support of declaratory judgment invalidating a rule. Section 227.40 provides that "the exclusive means of judicial review of the validity of a rule shall be an action for declaratory judgment as to the validity of the rule brought in…circuit court." Wis. Stat. §227.40(1). The only statutory limit placed on a court's injunctive powers is that "a court may not restrain, enjoin or suspend enforcement of the rule during the course of the proceeding on the basis of the alleged failure of the agency promulgating the rule to comply with s. 227.114." Wis. Stat. §227.40(4)(b). The injunction does not rest upon a violation of §227.114, which proscribes rulemaking considerations for small businesses. The subsection demonstrates is that there would be no need for this subsection if, as the Department contends, Section 227.40 contained a general prohibition against a court issuing an injunction.

A court's ability to issue an injunction under Wis. Stat. §227.40 is no different than under Wisconsin's other declaratory judgment statute, Wis. Stat. §806.04—a statute which likewise neither needs nor features explicit

authorization for injunctive relief. "Injunctive relief may be granted in aid of a declaratory judgment, where necessary or proper to make the judgment effective." *Town of Blooming Grove v. City of Madison*, 275 Wis. 328, 336, 81 N.W.2d 713, 717 (1957). Declaratory relief and injunctive relief against administrative actions go hand in hand. *See State Pub. Intervenor v. DNR*, 115 Wis.2d 28, 40–41, 339 N.W.2d 324, 329 (1983). The grant of an injunction lies in the discretion of the circuit court. *Blooming Grove,* 275 Wis. at 336. Here, the Court rightly determined that its injunction was necessary or proper to make its judgment effective.

The record establishes that the injunction was necessary to prevent irreparable injury to the PHP members because they could not be adequately compensated in damages. *Id.* at 337. Due to the Department's recoupment practices, Nurses undergoing audits have had to invest significant time and resources to defend against audit findings and recoupment attempts (R.12 ¶15; R.11 ¶15; R.16 ¶¶14-16; R.17 ¶¶8-9; R.13 ¶¶10-11; R.14 ¶9). The Department's implementation of its policy has imposed significant financial burdens on Medicaid providers, including PHP members (R.11 ¶14; R.12 ¶¶14-15; R.13 ¶9; R.14 ¶8; R.15 ¶9; R.16 ¶13; R.17 ¶7). In some instances, the Department's application of this policy caused providers to consider bankruptcy, refrain from providing Medicaid

services going forward, or reduce the amount of Medicaid services they provide (R.12 ¶¶15-16; R.11 ¶16; R.13 ¶¶10-11; R.15; R.16 ¶14; R.17 ¶¶8-9). The Department's policy has caused Nurses to be hesitant to provide Medicaid services for fear that the Department will demand recoupment of days, weeks, months, or even years of income for services they actually provided to patients (R.13:2-3 ¶11; R.18:2 ¶¶7-8; R.16:2 ¶16; R.12:3-4 ¶¶13-16). The stress and worry of one's personal financial ruin, feeling forced to change one's career to avoid extreme financial risks, draining one's savings to refund the Department despite doing the work, or alternatively to cover legal fees—these are all types of irreparable injury caused by the Department's overly expansive and incorrect interpretation of its recoupment authority which could not be repaired by a payment of damages or for which there was an adequate legal remedy.

The circuit court properly determined that the injunction was necessary to prevent irreparable injury to the Nurses (R.55; App.156-157). The Department's disregard of the declaratory judgment and injunction has demonstrated how essential the injunction is to help ensure a proper application of the recoupment statute (R.46; R.64:39, lns 3-8).

IV. The Circuit Court Properly Issued The Order For Supplemental Relief.

The Department mischaracterizes the circuit court's original Final Order, interpreting it too narrowly in order to argue that the Order for Supplemented Relief expands the original order. The Final Order declares that the Department's authority under Wis. Stat. §§49.45(3)(f) and 49.45(2)(a)10 to recoup payments for noncompliance with Medicaid requirements is limited to instances in which either "(1) the Department is unable to verify from the provider's records that a service was actually provided; or (2) an amount claimed was inaccurate or inappropriate for the service that was provided." (R.35:6; App.106.) The Department's "Perfection Rule" exceeded the scope of the authority granted by Wis. Stat. §§49.45(3)(f) and 49.45(2)(a)10. (R.35:6; App.106.) The Final Order enjoined the Department from applying and enforcing that Perfection Rule, but the Department continued to do so. (R.45:13-22, 23-34, 36-37, 38-39, 53-54, 64-65, 66.)

Observing the Department's violation of the Final Order, the court issued the Order for Supplemental Relief in order to "restate and give effect" to the Final Order. It listed the specific actions that had been included in the injunction against "applying and enforcing the Perfection Rule": either (1) issuing a notice of intent to recover or otherwise recoup

funds or (2) furthering any agency action, including an administrative proceeding, currently underway to recoup funds, "if the provider's records verify that the services were provided and the provider was paid an appropriate amount for such services" (R.55; App.156-157).

On appeal, the Department argues that the Order for Supplemental Relief "effectively halt[s]" Wis. Admin. Code §§DHS 106.02(9)(f) and (g) and 107.02(2)(e) "even though the Final Order did not address them and PHP did not challenge them." (DHS Brief, p. 39.) But PHP's challenge and the Final Order *did* address them. If the Department interprets §§DHS 106.02(9)(f) and (g) and 107.02(2)(e)—or any other administrative rule or handbook provision—in a way that permits the Department to apply the a perfection standard, then that rule would exceed the Department's statutory authority. Hence, it would be unlawful and thus enjoined by the Final Order—even without the Supplemental Order (R.55; App. 156-157). The Order for Supplemental Review did not expand the scope of what was already enjoined. The Court specifically noted that it was not supplementing or attempting to change the September Order (R.65:44; App.201.) The Court indicated, "I just want the Department to understand the order and act accordingly going forward." (R.65:44; App. 201.)

Contrary to the Department's argument, *Madison Teachers, Inc. v. Walker,* 2013 WI 91, 351 Wis.2d 237, 839 N.W.2d 388, is readily distinguishable because it addresses a subsequent circuit court order involving non-parties that had "significantly altered" the original order, over a year after the original order had been certified on appeal. *Id*. ¶20. The Wisconsin Supreme Court held that this second and new form of relief had "expanded the scope of the [original] declaratory judgment by granting injunctive relief to non-parties," interfering with the pending appeal of the case. *Id*. ¶20. "Once an appeal had been perfected, the circuit court should not have taken any action that significantly altered its judgment." *Id*. ¶21.

Here, the request for supplemental relief was brought by the parties themselves, not a non-party. Further, the Order for Supplemental Relief does not significantly alter the Final Order; it simply reinforces the Final Order and clarifies the types of action that fall within the Final Order's injunction against "applying and enforcing the Perfection Rule" due to the Department's non-compliance. Both orders embody the objective the Nurses have pursued throughout the entire course of this litigation: prohibiting the Department from seeking recoupment of Medicaid

payments in circumstances beyond what have been authorized by the Legislature.

Because the Order for Supplemental Relief does not expand the Final Order, it does not interfere with this Court's jurisdiction over the Final Order.

V. The Circuit Court Correctly Determined That The Case Presents A Justiciable Controversy.

A declaratory judgment is properly entertained when a controversy is justiciable. *Milwaukee Dist. Council 48 v. Milwaukee Cnty*, 2001 WI 65, ¶37, 244 Wis.2d 333, 627 N.W.2d 866.[3] The Department argues that the case is not justiciable because the Plaintiffs lack standing and the matter is not ripe. The Court should reject these claims. First, the Department waived these arguments by failing to adequately raise them in the trial court. Second, even if the Department had properly raised its justiciability objections below, the record demonstrates that the Plaintiffs had standing

[3] A controversy is justiciable if:
(1) A controversy in which a claim of right is asserted against one who has an interest in contesting it;
(2) The controversy is between persons whose interests are adverse;
(3) The party seeking declaratory relief has a legal interest in the controversy, i.e., a legally protectable interest; and
(4) The issue involved in the controversy is ripe for judicial determination.

Id. "If all four factors are satisfied, the controversy is 'justiciable,' and it is proper for a court to entertain an action for declaratory judgment." *Id*.

to obtain declaratory relief and that the issues presented were ripe for judicial determination.

A. The Department waived its justiciability objections by failing to adequately raise them in the trial court.

The Department waived appellate review of its claims that the Plaintiffs lack standing and that the case was not ripe by failing to raise these claims in the circuit court. The Department's sole mention of standing in the circuit court was in a ***footnote*** in its brief opposing the Plaintiffs' motion for summary judgment. (R.20:5 fn. 2.) An argument set forth only in a footnote is not adequately raised or preserved for appellate review. *State v. Santana-Lopez*, 2000 WI App 122, ¶ 6 n. 4, 237 Wis.2d 332, 613 N.W.2d 918. The Department did not mention standing in oral argument at the hearing on the summary judgment motion. (*See* R.63; App.108-142.)

Moreover, the legal standard cited by the Department in the footnote is incorrect. A plaintiff is not required to allege a direct injury, or even immediate danger of a direct injury, to establish standing in a declaratory judgment action. Rather, the test for standing in a declaratory judgment action is whether the plaintiff has a personal stake in the outcome and is directly affected by the issues in controversy. *Lake Country Racquet & Athletic Club, Inc. v. Village of Hartland*, 2002 WI App 301, ¶15,

259 Wis.2d 107, 655 N.W.2d 189. As discussed below, the Plaintiffs readily meet this standard.

Likewise, the Department never raised the issue of ripeness in the circuit court, either in its summary judgment brief or at the hearing on the motion for summary judgment. The Department argued generally that the complaint failed to state a claim on which relief could be granted because it sought an "advisory opinion." (*See* R.20:5-8). The Plaintiffs were forced to guess as to the Department's legal basis for arguing that the complaint failed to state a claim on which relief could be granted. [4]

The circuit court briefly addressed standing in its oral ruling, stating: "under all of the circumstances here the further argument of the Defense that the Plaintiffs have no standing in a declaratory judgment action, I agree with the Plaintiff, standing is construed liberally…." (R.63:20; App.127.) The circuit court also discussed the Department's "advisory opinion" argument, concluding that the Plaintiffs had stated a claim on which relief could be granted. (*See* R.63:18-19; App.125-126.)

[4] The Department also presented a vague and plainly meritless argument, which they do not reassert on appeal, that the Plaintiffs had not "shown material undisputed facts" in support of its motion for summary judgment. *See* R.20:5-8. The Plaintiffs addressed the standards for justiciability in responding to the Department's vague and undeveloped arguments (*see* R.26:1-4).

This Court's consideration of the Department's unpreserved claims would not serve the efficient administration of justice or be in the interests of justice:

> [T]he waiver rule is one addressed to the efficient administration of judicial business. Whether we apply the waiver rule is addressed to our discretion. We may do so where the interests of justice require. *Id*. If the state had not consented to Milashoski's standing to challenge the evidence in the trial court, we would have the benefit of a fully litigated record on the question. Without such a record, we cannot meaningfully address the standing issue. To relax the waiver rule in favor of the state makes no sense and does not serve either the efficient administration of judicial business or the interests of justice.

State v. Milashoski, 159 Wis.2d 99, 109–10, 464 N.W.2d 21, 25 (Ct. App. 1990) (internal citations omitted), *aff'd*, 163 Wis.2d 72, 471 N.W.2d 42 (1991). The Department, having mentioned standing only in a footnote to a trial court brief that cited an erroneous legal standard, and having failed to argue that the claims were not ripe, waived appellate review of these issues. This Court should decline to address the Department's standing and ripeness claims.

B. The Plaintiffs have standing.

1. The Court must accept the material allegations of the complaint as true in evaluating whether plaintiffs have standing.

The Department did not raise any material dispute of fact related to standing in the summary judgment proceedings. *See* R.20:4-5. If this

Court reaches the merits of the standing claim, it should apply the standard for reviewing a standing challenge on the basis of the pleadings.

"When standing is challenged on the basis of the pleadings, [courts] accept as true all material allegations of the complaint, and . . . construe the complaint in favor of the complaining party." *Town of Eagle v. Christensen*, 191 Wis.2d 301, 316, 529 N.W.2d 245 (Ct. App. 1995). All facts pleaded and all reasonable inferences from those facts are admitted as true, but only for the purpose of testing the legal sufficiency of a claim, not for trial. *Scott v. Savers Property and Cas. Ins. Co*., 663 N.W.2d 715, 262 Wis.2d 127 (2003). "A complaint will be dismissed only if it appears certain that no relief can be granted under any set of facts that the plaintiffs might prove in support of their allegations." *Id*.

2. Standing to raise a claim in a Declaratory Judgment Action

Wisconsin courts evaluate standing as a matter of judicial policy rather than as a jurisdictional prerequisite. *Foley-Ciccantelli v. Bishop's Grove Condominium Ass'n, Inc.*, 2011 WI 36, ¶40, 333 Wis.2d 402, 422, n. 18, 797 N.W.2d 789 (2011); *Milwaukee Dist. Council 48*, 2001 WI 65, ¶38, n.7. The Wisconsin Supreme Court has explained the policy underpinnings to the law on standing as follows: "Standing requirements in Wisconsin are aimed at ensuring that the issues and arguments presented will be

carefully developed and zealously argued, as well as informing the court of the consequences of its decision."

McConkey v. Van Hollen, 2010 WI 57, ¶16, 326 Wis.2d 1, 783 N.W.2d 855 (citing *Moedern v. McGinnis*, 70 Wis.2d 1056, 1064, 236 N.W.2d 240 (1975)). In accordance with these policies, "the law of standing should not be construed narrowly or restrictively," *State v. Iglesias*, 185 Wis.2d 117, 132, 517 N.W.2d 175 (1994), but must be liberally construed. *Fox v. Wis. Dept. of Health & Soc. Servs.*, 112 Wis.2d 514, 524, 334 N.W.2d 532 (1983).

Under the four-factor test applicable when determining if a declaratory judgment action is justiciable, the third factor, which asks if the party seeking declaratory relief has a legal interest in the controversy, determines whether the plaintiff has standing. *See Village of Slinger v. City of Hartford*, 256 Wis.2d 859, 865, 650 N.W.2d 81 (Ct. App. 2002) ("the legal interest requirement has often been expressed in terms of standing").

Although in most cases a litigant must allege facts that demonstrate an actual injury to a legally protected interest, a plaintiff need ***not*** suffer an actual injury in a declaratory judgment action. *Milwaukee Dist. Council 48*, 2001 WI 65, ¶41. Rather, "to have standing to bring an action for declaratory judgment, a party must have a personal stake in the outcome

and must be directly affected by the issues in controversy." *Lake Country Racquet,* 2002 WI App 301, ¶15.

Wis. Stat. §227.40(1), which specifically authorizes the use of a declaratory judgment action as the exclusive means of judicial review of the validity of a rule, likewise provides that a court may render a declaratory judgment "when it appears from the complaint and the supporting evidence that the rule or its threatened application interferes with or impairs, or threatens to interfere with or impair, the legal rights and privileges of the plaintiff." Consistent with the general standard for standing to bring a declaratory judgment action articulated in the case law, the statute does not require an allegation of injury or threatened injury. Rather, it requires only that it "appear" that the rule or its threatened application interferes with or impairs, or threatens to interfere with or impair, the plaintiffs' legal rights or interests. Wis. Stat. §227.40(1). In other words, the plaintiffs must have a personal stake in the outcome of the challenge to the validity of the rule and be directly affected by the issue in controversy, namely, whether the rule is valid.

The Department fails to differentiate between the two distinct tests for determining standing; it cites both tests without pointing out the difference or identifying the test that actually applies in this case (DHS

Brief, p. 15), the same as the test in other kinds of actions. *See* Wis. Stat. §227.40.

In addition, Wisconsin courts construe standing in declaratory judgment actions ***liberally***, in favor of the complaining party, because declaratory judgment affords relief from an uncertain infringement of a party's rights. *State ex rel. Vill. of Newburg v. Town of Trenton*, 2009 WI App 139, ¶10, 321 Wis.2d 424, 773 N.W.2d 500; *see also Putnam v. Time Warner Cable of Southeastern Wisconsin, Ltd.*, 255 Wis.2d 447, ¶44, 649 N.W.2d 626, 2002 WI 108. The Department ignores these authorities.

C. Papa has standing as a certified Medicaid provider to bring a Declaratory Judgment Action.

The facts have showed that Ms. Papa could meet the applicable standard for standing: she has a personal stake in the issues in dispute, and showed she would be affected by the issues in controversy.

Papa is a Medicaid-certified nurse in independent practice who provides in-home nursing care to children and adults with complex medical needs. (R.1:3; 9:8.) Papa has billed the Medicaid program within the past five years for covered Medicaid services that she has provided to Medicaid enrollees. (R.1:4; App.144.) Such payments become her private property. (R.1:4; App.144.) As a Medicaid provider, Papa may be audited

by the Department for a period of up to five years after she receives payments from Medicaid. (R.1:4; App.144; R.11:3.)

The Department's policy is that it may recoup any payment made within the past five years if it finds that the service did not meet all program requirements, including strictly complying with documentation requirements. (R.9:9.) As a result, Papa has legitimate concerns that the Department will demand recoupment of any payments she has received within the past five years for providing nursing services to medically fragile patients, due to unintentional record-keeping errors or other mistakes. (R.11:3.) Papa must therefore decide whether continuing to provide in-home care to Medicaid patients is worth the risk of losing days, weeks, months, or years of income for services she actually provided to patients. (R.11:3-4.)

Thus, Papa, as a Medicaid provider, has a personal stake in the outcome of this dispute and is directly affected by the issues in controversy. This is *not* a case in which a citizen asserts a generalized, non-justiciable grievance over a legislative policy with which she disagrees, but which does not affect her personally. Rather, Papa asserts a claim against a state administrative policy that threatens to infringe her legal rights under the Wisconsin Statutes as a Medicaid certified provider,

as well as her property interests. Her personal interests in the outcome are sufficiently concrete and direct as to ensure that the statutory issues raised have been carefully developed and zealously argued. Papa has standing to bring this declaratory judgment action to protect her legal rights and status.

D. PHP has standing as an association to bring a declaratory judgment action.

The Department also challenges PHP's standing to bring this declaratory judgment action. (DHS Brief at 17-20). The court should reject this argument because PHP has standing to sue on behalf of its members, on its own behalf, or both.

An association may "stand in the shoes of its members" in litigation. *Metropolitan Builders Ass'n of Greater Milwaukee v. Vill. of Germantown*, 282 Wis.2d 458, 466, 698 N.W.2d 301 (Ct. App. 2005). An association may bring suit on behalf of its members when "(1) the members would otherwise have standing to sue on their own, (2) the interests the association seeks to protect are germane to the association's purpose, and (3) neither the claim asserted nor the relief requested requires the participation of the individual members in the lawsuit." *Id.*, citing *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977). *Cf.*

Along with Ms. Papa discussed above, other PHP members would have standing to bring the declaratory judgment action. All members are Nurses in independent practice who are providing services to Medicaid patients and who risk the loss of income for services they have provided under the Department's recoupment policy challenged in this case. (R.1:4; App.144.) Numerous members have been audited by the Department and have received notices of the Department's intent to recoup payments for services the members had actually provided to patients, requiring them to invest significant time and resources, including attorney's fees, to rebut the Department's recoupment efforts. (R.1:6; App.146; R.9:9-10; 11; 12; 13; 14; 15; 16; 17.) Many members are hesitant to continue providing nursing services to Medicaid patients for fear that the Department will demand recoupment of income they received for services actually provided to patients. (R.9:10-11; 11; 12; 13; 14; 15; 16; 17.)

Further, the interests PHP seeks to protect in this action – the interests of independent Nurses relative to their participation as certified provides in the Medicaid program – are highly germane to PHP's purpose. PHP is a non-profit professional organization for independent Nurses in Wisconsin, including certified Medicaid providers who provide in-home nursing services to Medicaid enrollees for which the members obtain

reimbursement from Medicaid. (R.1:3-4; App.143-144.) PHP provides informational training and educational services to Nurses in independent practice to promote quality nursing care and adherence to professional standards and state regulations. (R.9:9; 11:2.) PHP provides this training because the training provided by Wisconsin Medicaid on Medicaid billing and record-keeping is very generic. (R.12:2.) PHP has asked Wisconsin Medicaid representatives to participate in their trainings for independent Nurses on Medicaid billing and record-keeping, but Wisconsin Medicaid has declined. (R.12:2.) As an association, PHP has a strong interest in seeking to clarify the scope of the Department's statutory recoupment authority under the Medicaid program and to enjoin the Department from taking action against its members in excess of that authority.

The third factor, whether the claim asserted or the relief requested requires the participation of the Association's individual members in the lawsuit, is largely irrelevant here because one of PHP's members is participating in the lawsuit. However, even if Papa were not a Plaintiff, her participation would not be necessary for the circuit court to grant the declaratory relief sought by the Plaintiffs because this is not an action for damages.

The Department's belated arguments that Papa and PHP lack standing is without lack merit. Both Papa and PHP have well-defined stakes in the outcome of the proceedings and are directly affected by the issues in this declaratory judgment action. If this Court overlooks the Department's waiver, it should hold that the Plaintiffs had standing to bring this action.

E. The case is ripe for adjudication.

This declaratory judgment action was ripe for adjudication. By definition, the ripeness required in declaratory judgment actions is different from the ripeness required in other actions. *Olson*, 2008 WI 51, ¶43, (citing *Putnam*, 2002 WI 108, ¶44). The purpose of a declaratory judgment action is "to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations." *Olson*, 309 Wis.2d. 365, ¶42. "[T]he preferred view appears to be that declaratory relief is appropriate wherever it will serve a useful purpose." *Id.* Thus, parties "may seek a construction of a statute or a test of its constitutional validity without subjecting themselves to forfeitures or prosecution." *Id.* ¶43.

"A plaintiff seeking declaratory judgment need not actually suffer an injury before availing himself of the Act." *Id.* Rather, it is well settled

law that for a declaratory judgment action to be ripe, the facts be sufficiently developed to allow a conclusive adjudication. *Id*. ¶43. "The facts on which the court is asked to make a judgment should not be contingent or uncertain, but not all adjudicatory facts must be resolved as a prerequisite to a declaratory judgment."

Id. ¶43; *see also Coyne*, 2016 WI 38, ¶¶27-29.

Further, Section §227.40 not only authorizes a court to review the validity of an administrative rule in a declaratory judgment action, but provides that an action for declaratory judgment is the exclusive means of judicial review. Notably, the statute directs that "[a] declaratory judgment may be rendered ***whether or not the plaintiff has first requested the agency to pass upon the validity of the rule in question***." Wis. Stat. §227.40.

The facts in this case met this standard. The Nurses sought a declaratory judgment to clarify the scope of the Department's statutory authority to recoup past payments from Medicaid providers. They presented facts showing that they, as Medicaid providers, are threatened under the Department's unpromulgated perfection rule with actions to recoup past payments from them for unintentional violations of policies or procedures, regardless of whether their records verify that they actually

provided the services and received payments that were appropriate for those services. These facts included several affidavits from PHP members, as well as the Department's own documents, showing that the Department had, in fact, demanded recoupment of past payments made to them for services they actually provided to Medicaid recipients.

For example, the Plaintiffs presented facts showing that the Department sought to recoup Medicaid payments made to PHP members based on alleged noncompliance with some provision of an update, handbook or rule, even though the Department did not dispute that the services were provided and were Medicaid-covered benefits. (R.11; 12; 13; 14; 15; 16; 17.)

In each instance, the Nurses had to invest substantial time and money to defend themselves against the recoupment actions. (R.11, 12, 13, 15, 17.)

The Nurses presented a showing that the Department has a policy and practice of recouping past payments from Medicaid providers based on noncompliance with a Medicaid Provider Update, a Handbook provision, an Administrative Code provision, or other standard or policy, even though the Department did not dispute that the services were provided and were covered by Medicaid. Contrary to the Department's

arguments, the evidence that the Department has such a policy is not nebulous or hypothetical.

The Department takes issue with the Nurses' presentation of documents from administrative proceedings showing that the Department had sought to recoup payments from Medicaid providers for documentation errors, where the Department was not disputing that the provider had provided the services or that the payment was appropriate and accurate for the services. The Department's primarily objection to this evidence appears to be that the matters at issue in the administrative proceedings would be subject to judicial review. It argues that the Nurses are "hijacking" the matters in the administrative proceedings and "using them" in this declaratory judgment action. (DHS Brief 24). The flaw in the Department's argument is that the Nurses did not seek, in this action, an adjudication of the individual recoupment actions at issue in the administrative proceedings. Rather, the documents from the administrative proceedings are presented as compelling evidence of the Department's policy of recouping past payments from Medicaid providers, even where the Department does not dispute that the services were provided or that the payments were accurate and appropriate for those services. The Nurses were not asking the circuit court to rule upon

any particular administrative action. Rather, the court was asked to see the departmental policies advanced by those actions as evidence that the policy exceeds the scope of the Department's statutory authority.

The Nurses presented sufficient facts to show a ripe controversy. These facts, which showed actual enforcement activity by the Department, are at least as developed as the facts in *pre-enforcement* declaratory judgment actions found to be justiciable. *See, e.g., Coyne*, 2016 WI 38, ¶¶27-29 (finding that declaratory judgment action challenging constitutionality of recently enacted statute was ripe because "the germane facts, namely, the constitutional provision and the text of the statutes, are already before us").

Again, if this Court excuses the Department's waiver of its ripeness claim, it should hold that the Plaintiffs' declaratory judgment action was ripe for adjudication.

VI. The Circuit Court Acted Within Its Authority In Imposing Costs And Fees Upon The Department For Failing To Comply With Its Order And Injunction.

The Wisconsin Legislature has declared that state agencies may be sued in circuit court in declaratory judgment actions. Wis. Stat. §227.40(1). Hence, the Legislature has waived sovereign immunity in this action and

the Department was properly assessed fees and costs for its noncompliance with the Court's Final Order.

The parties to a declaratory judgment action—including a state agency—are bound by the orders of the court. Furthermore, the Legislature has explicitly granted circuit courts the authority necessary to enforce and give effect to court orders, including by means of supplemental relief and findings of contempt. Wis. Stat. §§806.04(8), 785.04(1).

The Nurses moved the circuit court to impose upon the Department the Nurses' post-judgment costs and attorney fees through a finding of contempt and monetary sanctions or, in the alternative, in the form of supplemental relief. (R.43:1-2.) The court granted the Nurses' post-judgment costs and attorney fees in the form of supplemental relief. (R.55:2; App.157.) The circuit court explained unequivocally that the purpose of the supplemental relief was to compensate the Nurses for their costs of prosecuting the motion. (R.55:2; App.157; R.65:41; App.198.)

The Department argues it has sovereign immunity from the Order for Costs and Attorney Fees, citing *Martineau v. State Conservation Comm'n,* 54 Wis.2d 76, 194 N.W.2d 664 (1972) for the proposition that Wis. Stat. §808.07(2)(a)3 would have to explicitly reference "the state" in order to

defeat sovereign immunity. However, *Martineau* is not the blanket rule that the Department proposes and the Department's argument has been rejected by the Court of Appeals. *See State v. Zaragoza*, 2007 WI App 36, ¶¶7, 10, 300 Wis.2d 447, 452–53, 730 N.W.2d 421, 423 ("The State asserts that the legislature must use the word 'State' or some express reference that is comparable, such as the identity of a particular State agency, to satisfy the *Martineau* rule. We disagree.").

The *Martineau* rule is limited. There, at issue were attorney fees a party incurred in the course of defending itself against a condemnation action involuntarily abandoned by the State. 54 Wis.2d 76, 81, 194 N.W.2d 664, 667 (1972). The fee-shifting statute provided express language for circumstances in which it applied, at the exclusion of others. The court reasoned that because the statute directed fee-shifting in instances of "voluntary abandonment" of a condemnation case, other instances like involuntary abandonment were necessarily excluded. *Id*. at 84-85.

The *Martineau* rule is inapplicable here. This is not a condemnation case. Further the Order for Costs and Attorney Fees at issue did not shift costs and fees to the Department simply because the Nurses prevailed in obtaining declaratory judgment; rather, it imposed them because the Department repeatedly violated the injunction post-judgment, at the

significant expense of the PHP members leading the Nurses to return to Court. (R.43:2; R.54:1; App.155.)

The Department's reliance on *Department of Transportation v. Wisconsin Personnel Commission,* 176 Wis.2d 731, 500 N.W.2d 664 (1993), is similarly misplaced. In that case, at issue was whether one state agency had authority to order *another* state agency to pay the costs and attorney fees of a discovery motion. *Id*. at 734. The Supreme Court narrowly held that there was no statute giving the Wisconsin Personnel Commission that authority over the Department of Transportation simply because it had prevailed in the discovery motion. *Id*. at 736. Again, the holding does not reach whether a circuit court can assess post-judgment costs and attorney fees against the state when it has acted in contempt of a court's order.

A circuit court must be able to give force to an existing order whenever a party—including the state—directly violates it. That is why the Legislature granted a circuit court broad post-judgment authority to "make *any order* appropriate to preserve the existing state of affairs or the effectiveness of the judgment." Wis. Stat. §808.07(2)(a)(3) (emphasis added). The circuit court must be able to give its order effect. Had the Department honored the circuit court's order, the Nurses would not have incurred further costs and attorney fees. Instead, the Department persisted

with recoupment even after it had been declared to have no authority to do so. The Order for Costs and Attorney Fees post-declaratory judgment was necessary to return the Nurses to the position they should have been in following the issuance of the declaratory judgment.

As an alternative basis to uphold the order, the award for costs and fees could have been made under the contempt statute. The Nurses moved for contempt, and the record clearly supported such a finding. (R.45:13-22, 23-34, 36-37, 38-39, 53-54, 64-65, 66; R.65:41; App.198.) Instead of finding that the Department's repeated noncompliance was contempt, however, the circuit court issued an order for supplemental relief. This court could uphold the order on this alternative basis by finding that the Department was in contempt of the Court's Order.

The Department now claims it was not "put on notice" that it could be ordered to pay costs and attorney fees (DHS Brief, p. 42). However, it *was* on notice that it could be held in contempt, Courts and litigants must have tools to squelch a state agency's open defiance of a court order. Otherwise there would be a miscarriage of justice.

The Order for Costs and Attorney Fees was a necessary recourse to ensure that the Nurses did not have to continue defending themselves from the Department's actions even after obtaining a favorable declaratory

judgment. It was necessary to enforce the judgment. The Court should affirm the Order for Costs and Attorney Fees.

CONCLUSION

The circuit court decision and orders should be affirmed.

Respectfully submitted this 9th day of November, 2017.

PINES BACH LLP

/s/Diane M. Welsh
Diane M. Welsh, SBN 1030940
Susan M. Crawford, SBN 1030716
122 W. Washington Avenue, Suite 900
Madison, Wisconsin 53703
Telephone: (608) 251-0101
dwelsh@pinesbach.com
scrawford@pinesbach.com

Attorneys for Plaintiffs-Respondents

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §809.19(8)(b) and (c) for a brief produced with a proportional serif font, subject to this Court's granting of the motion to exceed the word limit filed herewith. The length of this brief is 11,948 words.

Dated this 9th day of November, 2017.

/s/Diane M. Welsh
Diane M. Welsh

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. §809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. §809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 9th day of November, 2017.

/s/Diane M. Welsh
Diane M. Welsh