STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2016AP2082, 2017AP0634

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 W. FOSTER, PRESIDING

DEFENDANT-APPELLANT'S REPLY BRIEF

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I. This case does not present a justiciable controversy.

A. DHS preserved justiciability arguments, and this Court could decide them if it had not.

Professional Homecare Providers, Inc. (PHP), citing *State v. Santana-Lopez*, 2000 WI App 122, ¶ 6 n.4, 237 Wis. 2d 332, 613 N.W.2d 918, claims the Department of Health Services (DHS) forfeited its lack-of-standing argument because it was made in a footnote. (PHP Br. 42–45.) Plaintiffs misread *Santana-Lopez*. The decisions it relied on, *Badger III Limited Partnership v. Howard, Needles, Tammen & Bergdoff*, 196 Wis. 2d 891, 899 n.1, 539 N.W.2d 904 (Ct. App. 1995), and *United States v. Restrepo*, 986 F.2d 1462, 1463 (2d Cir. 1993), rejected a party's argument where it was barely developed and improperly raised *in toto* in a footnote.

Here, DHS raised the issues of standing and ripeness in the body of its circuit court brief. (R. 20:5–7.) The circuit court's oral ruling recognized DHS's standing and ripeness arguments (R. 63:18–20) and its Final Order stated that the case was ripe (R. 35:4).

Even if DHS did not preserve justiciability issues, this Court may still address them. The forfeiture rule is one of judicial administration and a reviewing court has inherent authority to consider issues that were not properly raised. *Vill. of Trempealeau v. Mikrut*, 2004 WI 79, ¶ 17, 273 Wis. 2d 76, 681 N.W.2d 190. The parties and amici have devoted several pages of their briefs to the issues. (DHS Substitute Br. 14–26; PHP Br. 45–54; Nonparty Brief of Wisconsin Manufacturers and Commerce and Wisconsin Personal Services Association ("WMC" Br.) 8–11). The justiciability issues may be addressed.

B. Plaintiffs lack standing.

1. Lack of standing is fatal to Plaintiffs' action.

Plaintiffs assert that Wisconsin courts evaluate standing as a matter of judicial policy. (PHP Br. 46.) That is generally true, but not in the context of a review of an administrative rule. *Wisconsin Hospital Ass'n v. Natural Resources Board*, 156 Wis. 2d 688, 700–01, 457 N.W.2d 879 (Ct. App. 1990), holds that standing is not a matter of judicial policy in a ch. 227 proceeding reviewing an administrative rule. Rather, "[l]ack of standing deprives the trial court of subject-matter jurisdiction" in such a case. *Id.* at 700. Thus, if neither plaintiff has standing, this case *must* be dismissed.

2. Papa lacks standing.

Plaintiffs claim Papa has standing by way of receiving Medicaid reimbursement payments within the last five years. (PHP Br. 49–51.) That is not enough. To have standing a plaintiff must possess a personal stake in the outcome and be directly affected by the issue in controversy. *Lake Country Racquet & Athletic Club, Inc. v. Vill. of Hartland*, 2002 WI App 301, ¶ 17, 259 Wis. 2d 107, 655 N.W.2d 189. "This is measured by whether the claimant has sustained, or will sustain, some pecuniary loss or otherwise will sustain a substantial injury to his or her interests." *Id.* Here, there are no allegations in the complaint,[1] or evidence on summary judgment, that DHS

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[1] PHP agrees with DHS that the pleadings determine standing. (DHS Substitute Br. 19; PHP Br. 46.) But to the extent the summary judgment materials matter, PHP only cites evidence that DHS sought recovery to its members *in the past.* (PHP Br. 52.)

ever threatened Papa with recovery of payments at all, let alone pursuant to Topic #66. Papa lacks standing.

3. PHP lacks standing.

PHP's pleadings allege no current recovery demand from DHS against PHP member nurses, either. WMC claims members' interests because they might be audited, but that possibility is not enough. (WMC Br. 10.) *Metropolitan Builders Ass'n of Greater Milwaukee v. Village of Germantown*, 2005 WI App 103, 282 Wis. 2d 458, 698 N.W.2d 301, is consistent. That case relied on *Wisconsin's Environmental Decade, Inc. v. Public Service Commission of Wisconsin*, 69 Wis. 2d 1, 230 N.W.2d 243 (1975), where the supreme court allowed standing for the organization "provided it could demonstrate sufficient facts . . . to show that a member of the organization could have sued." *Metro Builders Ass'n*, 282 Wis. 2d 458, ¶ 14. Here, PHP has not shown that any member could have commenced the action. PHP lacks standing, too.[2]

C. This case is not ripe.

Independent of standing, this case is not ripe for adjudication. PHP's "Statement of the Facts" reveals that there are no sufficiently developed facts. The unacceptable result of reaching the merits is the Court entangling itself in an "abstract disagreement." *Miller Brands-Milwaukee, Inc. v. Case*, 162 Wis. 2d 684, 694, 470 N.W.2d 290 (1991).

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[2] PHP claims that it has standing under an organizational theory (PHP Br. 51), but its brief only discusses the associational theory. And WMC's brief provides no legal authority for an organizational standing theory. (WMC Br. 9).

PHP contends that DHS seeks recovery of Medicaid payments "based on asserted findings of noncompliance with a Medicaid Provider Update, a Handbook provision, an Administrative Code provision, or other standard or policy." (PHP Br. 8.) PHP includes a long string-cite of record entries in support. *Id.* But those citations offer no "asserted findings." PHP's evidence consists only of member nurses' affidavits, and includes no detailed description of agency "findings" or an attempted recovery. And notably, none of the nurses testify that DHS used Topic #66 as a basis for any attempted recovery efforts.

PHP cites a *DHS brief* filed in the administrative agency hearing concerning a PHP member nurse, Nidra Moore (R. 10:125–33), but that is unhelpful. PHP claims that DHS sought to recover Medicaid payments for Moore's failure to countersign and date a patient's care plan. (PHP Br. 9.) PHP claims this is an example of DHS requiring "record perfection" (*Id.*), but there are no certified documents from the Moore matter in this appellate record that would document DHS's approach.

But even assuming DHS's argument in an administrative hearing brief were evidence of the agency's official approach, Moore's failure to countersign the patient's care plan—a health care record Medicaid providers are required to maintain and "an important part of the delivery of Medicaid-covered services"—would have prevented DHS from verifying the accuracy and appropriateness of her claim under Wis. Stat. § 49.45(3)(f). Without it, as documented there was no evidence that Moore even read her patient's care plan or that she was familiar with it before providing services. (R. 10:130.)

PHP wants this Court to rule on legal issues concerning the scope of DHS's statutory authority to recover Medicaid reimbursement payments. But such a ruling is only appropriate in the context of concrete facts and a

judicial review following an audit and contested case hearing such as the Moore matter itself.

Amicus Dane County asserts that DHS may not disqualify Medicaid claims "of entire shifts of care where there is a paperwork defect regarding one of the services provided." (Dane Cty. Br. 7.) There are two reasons for this Court to ignore this assertion. First, Dane County points to no admissible evidence in the record concerning DHS disqualifying entire shifts of care. Second, a similar recovery issue is being addressed by this Court in *Lee Quality Home Care LLC v. DHS*, Appeal No. 2017AP1216 (Wis. Ct. App., Dist. IV). In that pending appeal, unlike here, there is a complete administrative agency record from a contested case hearing with documentary evidence of specific claims. And another appeal from a contested case hearing concerning DHS's authority to recover Medicaid payments just completed briefing—*Newcap, Inc. v. DHS*, Appeal No. 2017AP1432 (Wis. Ct. App., Dist. III).

The ripeness requirement "guarantees that declaratory judgment is not used as a procedural tool for the adjudication of hypothetical issues." *Putnam v. Time Warner Cable of Se. Wis., Ltd. P'ship*, 2002 WI 108, ¶ 72, 255 Wis. 2d 447, 649 N.W.2d 626. Here, without sufficiently developed facts, any decision on the scope of DHS's recovery authority will be too vague to provide any real guidance to DHS, PHP, and other home care nursing Medicaid providers. Moreover, the circuit court's general declaration here invites unending litigation. PHP will be haling DHS back before the Waukesha County Circuit Court whenever it thinks DHS is violating the injunction in future administrative agency proceedings, as it has already done. (R. 43; 44.) That is not an outcome this Court should endorse.

II. PHP's declaratory judgement action fails because there is no "rule" to challenge.

A. PHP challenges Topic #66, not any promulgated rules.

PHP claims its declaratory judgment action is not solely about Topic #66 but it concerns a so-called "Perfection Rule" too. (PHP Br. 32.) To the extent these are different "rules," this assertion is not credible and the circuit court's orders about anything beyond Topic #66 were improper.

PHP's complaint referenced only Topic #66 and even attached it as an exhibit. PHP asserts it also challenged a "Perfection Rule," a term of its coinage that includes challenges to various sections of the Wisconsin Administrative Code. (PHP Br. 35, 40) PHP contends that it did not need to identify those specific rules in its complaint. (PHP Br. 35.) The text of Wis. Stat. § 227.40 forbids that approach. PHP cannot challenge a promulgated rule under Wis. Stat. § 227.40 without notifying the Legislature.[3]

PHP challenges only Topic #66. The validity of any promulgated rules are not in doubt.

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[3] PHP characterizes DHS's argument as that the "Perfection Rule" cannot be challenged under Wis. Stat. § 227.40 because it is not a promulgated rule. (PHP Br. 31–32.) DHS expressly acknowledged that unpromulgated rules could be challenged. (DHS Substitute Br. 35–36.)

B. Topic #66 is not a "rule."

Topic #66 reads in full:

Program Requirements

> For a covered service to meet program requirements, the service must be provided by a qualified Medicaid-enrolled provider to an enrolled member. In addition, the service must meet all applicable program requirements, including, but not limited to, medical necessity, PA (prior authorization), claims submission, prescription, and documentation requirements.

(R. 10:2, 124.) Topic #66 is not a "rule." It is simply a recitation of statutes and promulgated rules. (DHS Substitute Br. 28–31 (citing numerous federal and state statutes and regulations).) Services provided by Medicaid providers must be medically necessary (Wis. Admin. Code §§ DHS 106.02(5), 107.01(1)), must have prior authorization (Wis. Stat. § 49.45(49)), be a claim appropriately and accurately submitted (Wis. Admin. Code § DHS 106.03), prescribed (Wis. Admin. Code § DHS 107.02(2m)(a)), and documented (Wis. Stat. § 49.45(3)(f)1.). And, notably, Wis. Admin. Code § DHS 107.02(1)(a) is strikingly similar to Topic #66: "The department shall reject payment for claims which fail to meet program requirements. However, claims rejected for this reason may be eligible for reimbursement if, upon resubmission, *all program requirements are met*." (emphasis added). Topic #66 does not establish a policy that goes beyond DHS's statutory and regulatory authority. It confirms it. *Tannler v. Wis. Dep't of Health & Soc. Servs.*, 211 Wis. 2d 179, 564 N.W.2d 735 (1997). Indeed, there would be no point in promulgating Topic #66 when it merely recites rules already promulgated.

Ignoring DHS's explanation of why Topic #66 is not a rule, PHP announces that its self-described "Perfection Rule is more than informational in nature and does not simply recite a policy or guideline." (PHP Br. 30.) It fails to explain why that is so.

III. Topic #66 falls within the scope of DHS's authority to recover improper Medicaid payments.

DHS possesses legal authority to take the recovery action PHP and the amici complain about.

A. DHS may recover payments based on a provider's failure to maintain required documentation.

PHP and amici argue that DHS may not recover Medicaid payments for a provider's failure to strictly comply with all program requirements, but mainly complain about recovery for record-keeping violations. (PHP Br. 21–23 ("detailed and extensive record-keeping, billing, or numerous other requirements"); Ass'ns Br. 6–7 ("burdensome paperwork requirements")). They claim that DHS cannot recover when records verify that the services were "actually provided" and appropriate. (PHP Br. 22–23; Ass'ns Br. 10–11; Dane Cty. Br. 6–7.) Not so.

First, Medicaid providers "shall maintain records *as required by [DHS]* for verification of provider claims for reimbursement." Wis. Stat. § 49.45(3)(f)1. DHS decides "whatever records are necessary" to verify claims. Wis. Admin. Code. § DHS 105.02(4). And the types of records are laid out in regulations. *See e.g.,* Wis. Admin. Code. § DHS 105.02(6) (records to be maintained by all providers), (7)(b) (records to be maintained by certain providers).

Second, DHS has express authority to recover Medicaid payments when providers do not maintain *required* documentation. Wis. Stat. § 49.45(3)(f); Wis. Admin. Code § DHS 106.02(9)(g) ("[DHS] may . . . recover previous payments made on claims where the provider fails or refuses to prepare and maintain records."). In sum, DHS has already decided that the documentation it requires to be maintained verifies that a service was actually provided and that a claim was appropriate or accurate.

Case law also supports DHS's position. In *Bircumshaw v. State*, 380 P.3d 524, 529–30, 534, 535 (Wash. Ct. App. 2016), the Washington Court of Appeals held that the state Medicaid agency had the power to recover payments because of the provider's failure to keep required records, even without proving that the services were not actually provided. In *1st Stop Health Services, Inc. v. Department of Medical Assistance Services*, 756 S.E.2d 183, 185–86 (Va. Ct. App. 2014), the Virginia Court of Appeals upheld an overpayment against a provider for its failure to maintain required records. After noting the significant portion of the state's budget devoted to Medicaid, it explained that "uniformity and clarity of documentation is essential . . . because it is difficult to reconstitute the nature . . . of the services provided months or years after the fact." *Id.* at 189.

As noted above, the question of whether the failure to maintain required records allows DHS to recover is already before this court in *Newcap, Inc. v. DHS*, Appeal No. 2017AP1432 (Wis. Ct. App., Dist. III).

B. DHS's recovery actions do not violate 2011 Wisconsin Act 21.

Amici, and to some extent PHP, claim that DHS violates 2011 Wisconsin Act 21 by imposing a standard not explicitly prescribed by the Legislature. (WMC Br. 2–5;

PHP Br. 19–20[4].) WMC asserts that DHS's policy of recouping payments for a provider's noncompliance with all applicable program requirements is invalid because there is "no corresponding statutory authority." (WMC Br. 5.) This argument fails for two reasons.

First, Act 21 does not mandate that only *a statute* explicitly requires an agency to enforce any standard, requirement, or threshold. Promulgated rules may also be the foundation for agency enforcement. Wis. Stat. § 227.10(2m) ("explicitly required or explicitly permitted by statute *or by a rule* that has been promulgated").

Second, the Legislature, through statutes and rules, *has* granted DHS explicit authority to recover Medicaid payments when providers do not maintain *required* documents that verify that a service was actually provided *and* that a claim was appropriate or accurate. *See infra*, sec. II.B.

PHP takes issue with DHS's assertion that "federal regulations provide DHS with authority" to recover improper payments. (PHP Br. 24–25; DHS Substitute Br. 33–34.) PHP states that "[i]f changes to Wisconsin Medicaid policies are necessary in order for the State to comply with CMS regulations, then [DHS] officials need to work with the Wisconsin Legislature to make the necessary changes." (PHP Br. 24–25.) PHP takes DHS's assertion out of context

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[4] PHP also filed a notice of supplemental authority, filed Dec. 15, 2017, regarding Wisconsin Attorney General Opinion OAG-04-17. In that formal opinion the Attorney General opined that a rule promulgated before the enactment of Act 21 may not be enforced if it does not comply with Act 21. Because Topic #66 is not a "rule" in the first instance and PHP does not challenge any promulgated rule, this opinion has no impact here.

by wholly ignoring its assertion that *state law* permits recovery action. PHP fails to understand the federal-state Medicaid relationship.

"In order to receive [Medicaid] funding, States must comply with federal criteria governing matters such as who receives care and what services are provided at what cost." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 541 (2012). To participate in Medicaid, the federal government approves a state's Medicaid plan. 42 U.S.C. §§ 1316(a)(1), 1396a(a), (b). This plan is an agreement between the state and federal governments describing how the state administers its Medicaid program. 42 C.F.R. § 430.10.

Wisconsin accepts federal Medicaid dollars, and is required to designate a single agency to administer the program. 42 C.F.R. § 431.10(b). Consequently, the Legislature has directed and authorized DHS, as the state Medicaid agency, to comply with all federal Medicaid laws, including audit and recovery. *See* Wis. Stat. §§ 16.54(4) (state departments administering federal funds "shall . . . comply with the requirements of the act of congress making such appropriations and with the rules and regulations . . . prescribed"), 49.45(2)(a)10.a ("DHS shall "recover money improperly or erroneously paid or overpayments"); 42 C.F.R. §§ 433.300–.322 (state Medicaid agencies must recover improper payments); 42 C.F.R. § 431.10(e) (state Medicaid agencies must "develop policies, rules, and regulations on program matters.").

This Act 21 argument wholly fails.

IV. In addition to its declaratory judgment, the circuit court's other remedies are improper too.

A. The Order for Supplemental Relief must be vacated.

PHP asserts that the circuit court's Order for Supplemental Relief does not expand the scope of the Final Order. PHP claims that both prohibit DHS from enforcing the "Perfection Rule." (PHP Br. 39–42.) It also claims that *Madison Teachers, Inc. v. Walker*, 2013 WI 91, 351 Wis. 2d 237, 839 N.W.2d 388, does not require vacation of the Order for Supplemental Relief. Both arguments are unpersuasive.

First, and astonishingly, PHP asserts that the circuit court's Final Order enjoined promulgated rules, such as Wis. Admin. Code §§ DHS 106.02(9)(f), (g) and 107.02(2)(e). (PHP Br. 40.) This is wrong because this action only challenges Topic #66. *See infra* sec. II.A. Indeed, PHP effectively admits that the Final Order did not make express reference to any specific sections of the administrative code (PHP Br. 40); it only made reference to an unpromulgated "Perfection Rule," which PHP calls Topic #66. (R. 35.)

PHP then says *Madison Teachers* is distinguishable because in that case the circuit court's injunction applied to non-parties. (PHP Br. 41.) This factor was not dispositive. The supreme court explained its reasoning for vacating the circuit court's order: "Because the contempt order in the present case *expanded the scope of the judgment that is before us on appeal*, we . . . vacate the contempt order." 351 Wis. 2d 237, ¶ 17 (emphasis added). The expansion was that "the circuit court granted different relief than it originally granted . . . ." *Id.* ¶ 20. Here, the Order for Supplemental Relief greatly expands the Final Order because it enjoins enforcement of promulgated rules. (DHS Substitute Br. 39.)

B. The Order for Costs and Attorney Fees must be vacated.

PHP argues that Wis. Stat. § 808.07(2)(a)3. provided the circuit court with broad authority to order DHS to pay fees and costs. (PHP Br. 58–62.) But *Martineau* stands in its way: "[C]osts may not be taxed against the state or an administrative agency of the state unless expressly authorized by statute." *Martineau v. State Conservation Comm'n*, 54 Wis. 2d 76, 79, 194 N.W.2d 664 (1972). Because Wis. Stat. § 808.07(2)(a)3. makes no express reference to fees or costs, sovereign immunity bars the order.

PHP alternatively argues that the circuit court's order could be affirmed on a different ground: the costs and attorney fees are a contempt sanction. (PHP Br. 62–63.) This argument fails because the circuit court made no finding of contempt and PHP provides no legal authority that this Court may issue such a finding.

C. The circuit court's injunctions must be vacated.

DHS concedes that a circuit court has authority to enjoin enforcement of a statement of general policy it finds to be an unpromulgated "rule." But here the injunctions were not proper because PHP did not prove that the injunctions were necessary to prevent irreparable harm. (PHP Br. 37–38.) "Irreparable harm is that which is not adequately compensable in damages." *Allen v. Wis. Public Serv. Corp.*, 2005 WI App 40, ¶ 30, 279 Wis. 2d 488, 694 N.W.2d 420. Any potential injury—DHS's recovery of reimbursement payments—would be financial and thus compensable. And PHP cites no case law that "stress and worry," or legal expenses, fulfill the irreparable injury requirement. (PHP Br. 38.) The circuit court's injunctions should be vacated.

CONCLUSION

DHS respectfully asks this Court to reverse the circuit court's Final Order, thereby granting it summary judgment, and vacate all circuit court orders issued after the Final Order.

Dated this 10th day of January, 2018.

Respectfully submitted,

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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. The length of this brief is 3467 words.

Dated this 10th day of January, 2018.

STEVEN C. KILPATRICK
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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 10th day of January, 2018.

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