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 SUPPLEMENTAL BRIEF

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BACKROUND

I. Limited procedural history.

Defendant-Appellant Wisconsin Department of Health Services ("DHS") filed its opening brief in this consolidated appeal in late June 2017. Respondents Kathleen Papa and Professional Homecare Providers, Inc. (collectively "PHP") filed their brief in November 2017. Shortly thereafter, on December 8, 2017, the Attorney General issued OAG–4–17, which applied 2011 Wis. Act 21 ("Act 21") to a state agency rule. Five days later, PHP filed a notice of supplemental authority, citing that opinion. Then, in January 2018, DHS filed its reply brief, asserting in a footnote that the Attorney General Opinion did not support PHP's arguments, thereby concluding the briefing.

On June 12, 2018, the Wisconsin Court of Appeals, District III, issued its decision in *Newcap, Inc. v. DHS*, No. 2017AP1432, 2018 WI App 40, recommending it for publication.[1] Like the instant appeal, *Newcap* is a case about DHS's authority and actions to recover payments made to a provider participating in the State's Medicaid program.

Accordingly, this Court ordered the parties to "address the effect of [the *Newcap* decision] on the issues in this case." (Order 1, June 21, 2018.) The Court also ordered the parties to "address the effect of the [Dec. 8, 2017] Attorney General's opinion . . . on the issues in this case." *Id* at 2.

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[1] On July 25, 2018, the Wisconsin Court of Appeals ordered that the *Newcap* decision be published. Also, neither side in *Newcap* sought reconsideration or supreme court review. Therefore, *Newcap* is the final decision in the litigation and binding precedent.

ARGUMENT

I. *Newcap* requires reversal of the circuit court decision.

The *Newcap* decision undercuts PHPs arguments and the circuit court's decision. It illustrates why PHP's rule challenge is not ripe for adjudication and then confirms that DHS possesses the statutory authority to recover Medicaid payments when providers fails to comply with documentation requirements. Based on *Newcap*, this Court must reverse the circuit court's final order, granting DHS summary judgment, and vacate all subsequent orders.

A. The *Newcap* decision.

The *Newcap* case arose from an audit of a Medicaid-certified family planning clinic "to determine whether pharmacy services provided to Wisconsin Medicaid and BadgerCare Plus members were documented and billed appropriately." *Newcap v. DHS*, 2018 WI App 40, ¶ 5. DHS issued a "Notice of Intent to Recover" for "claims for which Newcap had failed to retain invoices documenting its purchase of prescription drugs," and for claims for which Newcap submitted invalid or incorrect National Drug Codes or none at all. *Id.* ¶ 7.

Newcap administratively appealed. *Id.* ¶ 8. At the hearing, Newcap's witness conceded that "Newcap had failed to retain invoices for some of the prescription drugs for which it had billed Medicaid." *Id.* She testified, however, that other records Newcap had, like patient charts, "showed the medications in question were actually provided to Medicaid patients." *Id.* Newcap also introduced into evidence some of the missing invoices, which it had obtained and produced after the audit. *Id.* As part of its challenge, Newcap argued that DHS was not authorized by law to recover Medicaid payments "where the provision of services has been

verified." *Id.* ¶ 9. The administrative law judge rejected this argument, affirming the Notice of Intent to Recover. *Id.* ¶ 10.

Newcap filed a Wis. Stat. ch. 227 judicial review action challenging the final agency decision. The circuit court reversed, reasoning that Newcap had presented evidence at the administrative hearing that the services were provided and any failure to maintain required records alone did not justify recoupment. *Id* ¶ 12.

On appeal, this Court issued two important holdings that affect the instant appeal.

First, this Court held that "Wis. Stat. § 49.45(3)(f) gives DHS authority to recoup payments made to a Medicaid provider when that provider has failed to maintain records required by DHS, regardless of whether the provider possesses other records that show the provider actually rendered the services in question." *Id.* ¶ 2.[2] *Second*, the Court held that "the provider has an obligation to make the required records available to DHS at the time of DHS's audit, and records subsequently submitted during an administrative hearing are insufficient to defeat DHS's recoupment claim." *Id.*

This Court then summarized its interpretation of Wis. Stat. § 49.45(3)(f)1.–2.: "(1) a provider must retain records as required by DHS; (2) DHS may audit the records it has required a provider to maintain in order to verify the actual provision of services and the appropriateness and accuracy of claims; and (3) DHS may deny a claim or recover

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[2] Put another way, the Court held: "We conclude the plain language of [Wis. Stat. § 49.45(3)(f)1.–2.] demonstrates that DHS has authority to recover payments made to a provider when an audit reveals that the provider failed to maintain records as required by DHS." *Newcap*, 2018 WI App 40, ¶ 15.

a payment already made to a provider when it cannot verify the actual provision of services or the appropriateness and accuracy of claims based on the records DHS required the provider to maintain." *Id.* ¶ 19.

The Court then turned to two specific recordkeeping questions: whether statutes or administrative rules (1) required Newcap to maintain the particular records at issue for prescription drug purchases and (2) allowed DHS to seek reimbursement if a provider failed to list correct National Drug Codes on its reimbursement claims. The Court held that no law required Newcap "to retain invoices documenting its purchase of prescription drugs that it subsequently dispensed to Medicaid patients," and so its failure to do so did not allow DHS to recover these payments under Wis. Stat. § 49.45(3)(f). *Id.* ¶ 3. The Court also held that DHS did not possess legal authority to recover payment based on Newcap's "failure to include correct National Drug Codes (NDCs) on reimbursement claims it submitted to Medicaid." *Id.* (footnote omitted).

B. *Newcap* shows that PHP's rule challenge is not ripe.

A ripe case "requires that the facts be sufficiently developed to avoid courts entangling themselves in abstract disagreements." *Miller Brands-Milwaukee, Inc. v. Case*, 162 Wis. 2d 684, 694, 470 N.W.2d 290 (1991). A declaratory judgment should not be 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. *Newcap* confirms that PHP's lawsuit is not ripe because there are no sufficiently developed facts to permit this Court to issue a decision on any Medicaid recovery issues other than hypothetical ones.

Newcap illustrates that concrete facts are necessary to properly allow the courts to determine whether a provider has a duty to maintain specific types of records in order for its claim to be reimbursable. In *Newcap*, after deciding that DHS has the authority to recover Medicaid payments from a provider who had not maintained required records at the time of the audit, this Court determined that DHS nonetheless could not recover in that case because the provider was not required to maintain the specific records at issue (e.g., purchase invoices of certain prescription drugs). *Newcap*, 2018 WI App 40 ¶ 24. Here, however, unlike in *Newcap*, there are no "sufficiently developed" facts about the circumstances under which PHP complains that DHS intends to recover.

For example, PHP now complains that DHS sought recoupment of Medicaid payments because a non-member nurse[3] had not counter-signed a patient's plans of care. (PHP Br. 9.) But there is no factual record of this circumstance before this Court, and because PHP never pursued a claim in the circuit court that DHS could not require such a signature, no record was developed as to the legal basis for such a requirement.

PHP's citation is not to any evidence in the record upon which the circuit court issued its summary judgment decision. Rather, PHP merely points to a brief of DHS filed in an administrative agency hearing—*In re Nidra S. Moore,* Case No. ML-15-0234 (Wis. Div. Hearing & Appeals). (PHP Br. 9; R. 10:125–33.) Arguments in briefs, of course,

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[3] PHP tries to overcome this shortcoming by using post-judgment testimony of Plaintiff-Respondent Kathleen Papa, as co-president of PHP, to affirm that Moore is a member, but that tactic fails. (PHP Br. 9; DHS Subst. Br. 23–26.)

are not evidence. *David Christensen Trucking & Excavating, Inc. v. Mehdian*, 2006 WI App 254, ¶ 14 n.6, 297 Wis. 2d 765, 726 N.W.2d 689.

Ascertaining whether a provider has a legal duty to maintain and submit particular types of records depends on the particular type of record at issue. A party seeking to challenge a particular DHS recoupment can do so in a judicial review action, in the context of particularized facts. Not only did the circuit court ruling not resolve any concrete controversy, its broad declaration and injunctions are unhelpful to the parties or the public. The parties and general public are no closer to knowing whether DHS may recover payments when there is an issue concerning a specific medical necessity, prior authorization, or claims submission requirements.

C. *Newcap* confirms that DHS's interpretation of Wis. Stat. § 49.45(3)(f) is correct.

Newcap held that Wis. Stat. § 49.45(3)(f) provides DHS authority to recover Medicaid payments for services when the provider fails to maintain the records DHS requires, regardless of whether services were actually provided. *Newcap*, 2018 WI App 40 ¶¶ 15–20. The *Newcap* court reasoned: "It is self-evident that, if a provider fails to maintain the records DHS requires, DHS cannot use those records to verify the actual provision of services and the appropriateness and accuracy of the provider's claim. Section 49.45(3)(f) therefore grants DHS authority to recoup payments under those circumstances." *Id* ¶ 19. For this reason, it did not matter what the other records the provider possessed revealed, even if such records "show that the provider actually rendered the services in question." *Id* ¶ 44. This Court further opined, "When read together, [Wis. Stat. § 49.45(3)(f) 1.–2.] make it clear that a provider has an obligation to make the required records available to DHS at

the time of an audit in order to allow DHS to verify the provider's claims, and DHS may recoup payment already made if the provider fails to do so." *Id* ¶ 22.

The *Newcap* decision essentially guts PHP's chapter 227 rule challenge and the three remedies ordered by the circuit court.

The circuit court here held first that DHS's "authority under Wis. Stat. §§ 49.45(3)(f) and 49.45(2)(a)10 to recover payments from Medicaid providers is limited to claims for which either (1) [DHS] 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. 35:6–7, Subst. App. 106–07.) This holding cannot stand after *Newcap* because it would mean that a provider may avoid maintaining the records DHS requires and force DHS to determine if services were actually provided from records other than those it requires the provider to maintain.[4]

Second, the court declared that DHS's "policy of recouping payments for noncompliance with Medicaid program requirements, other than legislatively authorized by Wis. Stat. § 49.45(3)(f) . . . imposes a 'Perfection Rule' which exceeds [DHS's] authority." (R. 35:6, Subst. App. 106.) Again, because the *Newcap* court rejected the circuit court's interpretation of Wis. Stat. § 49.45(3)(f), this declaration cannot stand either. A provider's failure to maintain

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[4] Thus, whenever PHP argues that records can verify if services were actually provided, its argument must be rejected—if those records are anything other than the records DHS requires and if the required records are not produced at the time of the audit. (*E.g.*, PHP Br. 22–23; Associations Br. 10–11; Dane County Br. 6–7.)

required records deprives DHS of its ability to determine if a covered service meets several program requirements, including but not limited to, prior authorization, medical necessity, or claims submission. *Newcap*, 2018 WI App 40 ¶ 33. Again, the circuit court's order directly conflicts with *Newcap*.

Third, the court issued an injunction: "[DHS] 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, Subst. App. 106–07.) For the same reasons the declarations cannot remain after *Newcap*, neither can the injunction.

At the post-judgment hearing on PHP's motion for supplemental relief, the circuit court issued another written order enjoining DHS from: (1) issuing a notice of intent to recoup Medicaid funds from a Medicaid provider; or (2) proceeding with any agency action, including any administrative proceeding, currently underway in which [DHS] "seeks to recoup Medicaid payments from a Medicaid provider, if the provider's records verify that the services were provided and the provider was paid an appropriate amount for such services, notwithstanding that an audit identified other errors or noncompliance with Department policies or rules." (R. 55:2, Subst. App. 157.) This injunction must be vacated as well, because it too prohibits DHS from recovering Medicaid payments if the provider has not

maintained the required records at the time of the audit, in direct conflict with *Newcap*.[5]

Because the circuit court's declarations and injunctions prohibit DHS from recovering Medicaid payments when a provider fails to maintain and produce the records that DHS requires it to at the time of the audit, they must be reversed based on *Newcap*.

II. The Attorney General opinion reveals the flaws in PHP's chapter 227 rule challenge.

A. The Attorney General opinion.

The Attorney General opinion concerned the application of Act 21 to a rule regulating fire sprinkler systems in multifamily dwellings, Wis. Admin. Code § SPS 361.05(1) (Dec. 2011) as amended by Wis. Admin. Code § SPS 362.0903 (Dec. 2011). The first question asked if the rule was a "standard, requirement, or threshold" that is more restrictive than the relevant statute, Wis. Stat. § 101.14(4m)(b). OAG–4–17, ¶¶ 1, 10, 14. The second question asked whether the rule, properly promulgated before the enactment of Act 21, could still be enforced. OAG–4–17, ¶¶ 1, 30. Only the first question has any potential relevance to this case.

The Attorney General began by stating that each agency has a duty to promulgate as a rule "each statement of general policy and each interpretation of a statute which it

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[5] In its oral ruling denying DHS's motion to stay its orders pending appeal, the circuit court said that Medicaid providers could create records after a DHS audit "to meet the criteria in the statute." (Stay Mot. App. 164–65 (Tr. at 43–44, May 16, 2017).) *Newcap* squarely rejects this ruling. *Newcap*, 2018 WI App 40 ¶¶ 2, 21–23.

specifically adopts to govern its enforcement or administration of that statute." OAG–4–17, ¶ 3 (quoting Wis. Stat. § 227.10(1)). He added that, under Act 21, statutory provisions containing a 'specific standard, requirement, or threshold' do not 'confer on the agency the authority to promulgate, enforce, or administer a rule that... is more restrictive than the standard, requirement, or threshold.'" OAG–4–17, ¶ 10 (quoting Wis. Stat. § 227.11(2)(a)3.).

The Attorney General then applied a three-step analytic inquiry to determine whether the rule contained a standard, requirement, or threshold more restrictive that the standard, requirement, or threshold in the statute, in violation of Wis. Stat. § 227.11(2)(a)3. OAG–4–17, ¶¶ 16–24.

In the first step, the Attorney General compared the governing statute to the rule. OAG–4–17, ¶ 17. According to statute, the agency must require an automatic fire sprinkler system in "every multifamily dwelling that contains . . . [m]ore than 20 dwelling units." Wis. Stat. § 101.14(4m)(b). But the rule at issue provided that an automatic sprinkler system must be installed in every multifamily dwelling that "contain[s] more than 4 dwelling units." Wis. Admin. Code § SPS 362.0903(5)(b)(Dec. 2011). The Attorney General determined that the statute and rule both contained requirements regarding the installation of sprinkler systems in multifamily dwellings. OAG–4–17, ¶ 20.

Second, the Attorney General determined that the requirement in the rule was more restrictive than the requirement in the statute. OAG–4–17, ¶ 21. The rule required Wisconsin builders to install automatic fire sprinklers in multifamily dwelling units that the statute does not otherwise require. *Id.*

Third, the Attorney General found that the rule's requirement was not otherwise "explicitly required or

explicitly permitted by statute or by a rule." OAG–4–17, ¶ 22 (quoting Wis. Stat. § 227.10(2m)).

The Attorney General concluded that the rule contains a requirement that is more restrictive than the Wisconsin Statutes, and it therefore could not be enforced, despite being promulgated before Act 21's existence. OAG–4–17, ¶¶ 2, 24, 32.

B. Under the opinion's reasoning, Topic #66 is not a "rule" requiring promulgation and does not impose a more restrictive requirement than the governing statute.

An agency has a duty to 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." OAG–4–17, ¶ 3 (quoting Wis. Stat. § 227.10(1)). Because neither Topic #66, nor the so-called Perfection Rule (to the extent it is any different), fulfills this definition, it is not a "rule" that is required to be promulgated. (DHS Subst. Br. 26.) Moreover, irrespective of Topic #66, as explained above, DHS has statutory authority to recover Medicaid payments when required documentation cannot verify the actual provision of services or the appropriateness and accuracy of claims. The application of the Attorney General opinion's three-step analysis here shows that PHP's rule challenge fails.

The first step exposes the problem with PHP's entire challenge. While the Attorney General could easily look at the rule and governing statute to see if both contain a specific standard, requirement, or threshold that govern the same subject matter, the same cannot be said here. Topic #66 simply states that a Medicaid covered service must meet all program requirements such as medical necessity, prior authorization, claims submission, prescription and documentation, to name a few. (R. 10:124.) These alleged

"rules" are not separate, specific requirements. They merely reiterate requirements found in statutes and promulgated rules not challenged here. (DHS Subst. Br. 28–31.)

Second, the opinion says to compare the requirement of the rule against the requirement of the statute to determine whether the rule's requirement is more restrictive. The alleged rule would satisfy that step, as well. As to documentation, according to *Newcap*, Wis. Stat. § 49.45(3)(f) requires a provider to maintain the records DHS requires it to; otherwise, DHS may recover Medicaid payment for services rendered, even if other records allegedly show that services were provided. Because the statute is not more restrictive than DHS's interpretation, Topic #66 does not exceed the bounds of the statutory documentation requirement. (PHP Br. 17–23.)

Because the requirement of Topic #66 is not more restrictive than the requirement of the statute, the third step in the Attorney General's analysis is inapplicable here.

PHP's challenge fails under the Attorney General's three-step analysis: any requirements in Topic #66 properly reflect the requirements set forth in statute and promulgated rules.

The second question in the Attorney General opinion is irrelevant to this appeal. That question addressed the retroactive effect of Act 21 on already promulgated rules. Here, PHP has not brought a challenge to any of the properly promulgated DHS code provisions referenced in this action. PHP only challenges Topic #66 (and the so-called Perfection Rule). (DHS Reply Br. 6.) And even if those were "rules," as discussed above, they do not set out substantive requirements that are any different from the governing statutes.

CONCLUSION

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

Dated this 7th day of August, 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 3,317 words.

Dated this 7th day of August, 2018.

STEVEN 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 7th day of August, 2018.

STEVEN KILPATRICK
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