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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case Nos. 2016AP2082, 2017AP634

KATHLEEN PAPA AND PROFESSIONAL HOMECARE PROVIDERS, INC.,

Plaintiffs-Respondents,

v.

WISCONSIN DEPARTMENT OF HEALTH SERVICES,

Defendant-Appellant.

FROM FINAL ORDERS OF THE WAUKESHA COUNTY CIRCUIT COURT, THE HONORABLE KATHRYN W. FOSTER, PRESIDING

DEFENDANT-APPELLANT'S SUPPLEMENTAL REPLY BRIEF

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ARGUMENT

I. The *Newcap* decision requires reversal and vacation of the circuit court orders.

In their supplemental response brief, Plaintiffs-Respondents Kathleen Papa and Professional Homecare Providers, Inc. (collectively "PHP") first argue that the circuit court orders are consistent with this Court's decision in *Newcap, Inc. v. DHS*, 2018 WI App 40, 383 Wis. 2d 515, 916 N.W.2d 173. (PHP's Br. 4.) This is only partially correct. PHP explains how one portion of the circuit court's declaration interpreting Wis. Stat. § 49.45(3)(f) closely parallels the *Newcap* court's interpretation. (PHP's Supp. Br. 6.) As Department of Health Services (DHS) has said previously, that declaration is simply a recitation of the statute itself. (DHS's Subst. Br. 38; R. 35:6.) PHP also says that *Newcap* stands for the proposition that DHS has authority to recover Medicaid payments only when, from the records the provider is required to maintain, it is unable to verify that a service was actually provided or that a claim is appropriate and accurate. (PHP's Supp. Br. 7.) That is also correct. Indeed, the *Newcap* court accepted DHS's arguments about its recovery authority under Wis. Stat. § 49.45(3)(f). (DHS's Subst. Br. 36; DHS's Reply Br. 8–9.) But, as explained in its previous briefs, certain aspects of the circuit court's declaration and injunctions—that DHS's policy of recovery imposed a "Perfection Rule" and the injunction conflicts with the statute (R. 35:6–7, 55:1–2)—cannot survive *Newcap*. (DHS's Supp. Br. 7–9.)

Newcap also illustrates the importance of looking at a recoupment within the context of concrete facts. In *Newcap*, the Court had specific facts on which to base its further holding that DHS could not recoup for the provider's failures to maintain prescription drug invoices and to submit claims with missing or incorrect national drug codes.

383 Wis. 2d 515, ¶¶ 24–43. Here, the circuit court could not apply the law to any specific facts. So PHP takes "issue with recoupment where the required documents were provided and verify that services were provided, but an auditor finds the documents to be *lacking in some manner*." (PHP's Supp. Br. 7) (emphasis added). Neither PHP nor the circuit court could explain what "lacking in some manner" means. (DHS's Subst. Br. 11 n.7.) *Newcap* paints a clear standard of DHS's recovery authority; the circuit court's orders do not.[1]

Lastly, PHP pushes for affirmance in this chapter 227 declaratory judgment rule challenge because it is too costly and time-consuming for PHP nurses to litigate individual claims at contested case hearings. (PHP's Br. 13–14.) However, PHP cites no case law that there are cost and burdensomeness exceptions to the rule of ripeness—and *Newcap* certainly does not support such an argument. When there are no sufficiently developed facts, courts must avoid becoming entangled in "abstract disagreements." *Miller Brands-Milwaukee, Inc. v. Case*, 162 Wis. 2d 684, 694, 470 N.W.2d 290 (1991).

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[1] As stated previously, DHS is also involved in an appeal before the Court of Appeals, Dist. IV, involving a Medicaid provider's challenge to a DHS final decision that Medicaid payments received were subject to recoupment because of insufficient documentation—*Lee Quality Home Care LLC v. DHS*, Appeal No. 2017AP1216 (Wis. Ct. App.). (DHS's Reply Br. 5.) Like *Newcap*, a published decision in *Lee* would further set forth the contours of DHS's recovery authority.

II. The Attorney General opinion is not relevant to this appeal.

PHP also discusses the Attorney General opinion, OAG–4–17, but it is irrelevant here. PHP claims that the so-called "Perfection Rule," including Topic #66, "plainly" contains a more restrictive standard, requirement, or threshold than that contained in the relevant statute, because DHS "is using it to initiate recoupment actions in situations beyond those allowed under Wis. Stat. § 49.45(3)(f)1." (PHP's Supp. Br. 17.) This argument reveals that—to the extent Topic #66 is even a rule, which DHS contends it is not—PHP's complaint against Topic #66 is only with its application. This cuts against PHP's claim that Topic #66 is an unpromulgated rule on its face. Further, PHP has pointed to nothing in the record showing that DHS has ever relied on Topic #66 to seek recovery. (DHS's Reply Br. 4.) As to the so-called "Perfection Rule," PHP points to DHS's attempted recovery action in *Newcap* in support of its position that it is implementing a perfection standard. (PHP's Supp. Br. 18.) But the fact that DHS took a certain recovery action based on specific recordkeeping requirements does not mean that it has created an umpromulgated agency "rule" subject to challenge. *See* Wis. Stat. § 227.01(13)(b) ("'Rule' does not include, and section 227.10 does not apply to, any action or inaction of an agency, whether it would otherwise meet the definition under this subsection, which . . . [i]s a decision or order in a contested case.").[2]

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[2] Moreover, DHS argues that PHP never properly commenced a chapter 227 declaratory judgment rule challenge to the so-called "Perfection Rule" in any event. (DHS's Subst. Br. 35, 39 n.15.)

III. Amici's arguments are unpersuasive.

Finally, DHS responds to the three issues raised by amici in their supplemental brief.

Amici first argues that *Newcap* stands for the proposition that DHS guidance, such as a handbook provision, cannot be a basis for recoupment. It follows that, amici claim, Topic #66 cannot stand. (Amici's Supp. Br. 4–6.) Amici's criticism assumes—incorrectly—that Topic #66 is not supported by statutory authority. But as the table in DHS's opening brief shows, Topic #66 relies on multiple statutes, administrative code provisions, or both.[3] (DHS's Subst. Br. 29–30.) Amici wholly misunderstand the table DHS provided, histrionically calling it a "regulatory cluster bomb." (Amici's Supp. Br. 5.) The table is not the cobbling together of statutes and regulations to give support to DHS's supposed power to recoup using Topic #66. *(Id.)* Instead, the table is simply an illustration that DHS has legal foundation to state the obvious—that all Medicaid services must meet all applicable program requirements. Topic #66 does not attempt to establish rules, but merely recites statutes and regulations. (DHS's Subst. Br. 27–31; DHS's Reply Br. 7–8.) In that sense, then, amici is correct in claiming that "invalidating Topic #66 would have no legal consequence for DHS." (Amici's Supp. Br. 5; DHS's Subst. Br. 2.) For Topic #66 is not a recovery mechanism and it has statutory and regulatory bases.

Amici next contends that the Attorney General opinion shows that DHS exceeds its authority through Topic #66.

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[3] PHP has not challenged any DHS administrative code provisions in this Wis. Stat. § 227.40 declaratory judgment rule challenge. (DHS's Subst. Br. 33; DHS's Reply Br. 6.)

However, amici's argument that is meets the three-step analysis is without merit. For one, the alleged rule (i.e. Topic #66) and the enabling statute (i.e., Wis. Stat. § 49.45(3)(f)), do not even contain the same specific requirement. Again, Topic #66 does *not* reference recoupment while the statute does. Second, because of this, Topic #66 cannot be more restrictive than the statute. In other words, the statutes limits recoupment to instances in which the Medicaid provider fails to maintain required documents, but Topic #66 does not even mention recoupment in the first instance. Thus, the requirements of Topic #66 are not more restrictive than those found in the statute and Wis. Stat. § 227.11(2)(a)3. cannot prevent DHS from administering it.

Third, amici argues against DHS's two justiciability contentions—(1) that neither PHP nor Ms. Papa has standing to bring this Wis. Stat. § 227.40 declaratory judgment rule challenge[4] and (2) that the action is not ripe for adjudication. (Amici's Br. 8–10.) Amici argue that "[t]his case is a dispute over a matter of law" rather than a fact-based dispute. (Amici's Br. 9.) But that is DHS's point. As stated previously, "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." (DHS's Reply Br. 5.) And contrary to amici's assertion, DHS does not contend that an alleged agency rule can *only* be challenged

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[4] Amici is correct that neither *Newcap* nor the Attorney General opinion discussed standing. (Amici's Br. 8.) But the Court's supplemental briefing order was general enough for DHS to properly explain how *Newcap* supports its (lack of) ripeness argument. Also, DHS's supplemental brief did not raise standing. For those reasons, any additional argument amici makes in favor of their own standing argument should be disregarded because the Court did not grant it leave to so argue.

under Wis. Stat. § 227.52; it merely contends that, here, PHP's Wis. Stat. § 227.40 action lacks sufficient concrete facts to be ripe for adjudication. *Newcap* provides an example of how, with sufficient facts, a court can properly draw the lines of DHS's recovery authority. DHS did not have authority to recover Medicaid payments for the provider's failure to maintain prescription drug in voices and its failure to submit claims with missing or incorrect national drug codes. *Newcap*, 383 Wis. 2d 515, ¶¶ 24–43. If the Court reaches the merits of this instant appeal, the parties and the general public are no closer to knowing when DHS exceeds its recoupment authority under Wis. Stat. § 49.45(3)(f) and interpreted by the *Newcap* court.

CONCLUSION

Defendant-Appellant Wisconsin Department of Health Services asks the Court to reverse the circuit court's Final Order, thereby granting it summary judgment, and vacate all subsequent orders.

Dated this 20th day of September, 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 1571 words.

Dated this 20th day of September, 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 20th day of September, 2018.

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