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STATE OF WISCONSIN
SUPREME COURT

Case Nos. 2016AP2082 and 2017AP634

KATHLEEN PAPA and
PROFESSIONAL HOMECARE
PROVIDERS INC.,

Plaintiffs-Respondents-Petitioners,

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

REPLY BRIEF OF PLAINTIFFS-RESPONDENTS-PETITIONERS KATHLEEN PAPA AND PROFESSIONAL HOMECARE PROVIDERS, INC.

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ARGUMENT

The Department of Health Services admits, "During audits of private duty nurses, [Office of Inspector General] auditors have alleged that services were 'non-covered,' and therefore subject to recoupment, due to alleged inadequate documentation or other shortcomings. OIG has at times characterized all the compensation a nurse received for services she provided to Medicaid patients for days, weeks, month[s], or even years as 'overpayments' due to non-compliance." (DHS Response Brief, p. 8, citing R.9:9.) Nevertheless, the Department argues the policy underlying its recoupment efforts cannot be subject to judicial review either because the issue is not ripe, the policy is not a rule, or the policy is a guidance document—and although guidance documents are subject to judicial review, the Nurses did not explicitly plead that they were challenging the policy *as a guidance document* in their 2015 Complaint.

The Department has expended great effort to avoid judicial review of the policy underlying its recoupment practices. In contrast, DHS offers no argument that the challenged policy does not actually exceed its statutory recoupment authority under Wis. Stat. § 49.45.

The Wisconsin Legislature has authorized Wisconsin Courts to review the validity of agency policies—whether set forth in guidance

documents or rules. As articulated in their Complaint, the Nurses are challenging Topic #66, the Department's "statement of general policy" under which DHS claims that covered services provided to Medicaid enrollees are converted to "non-covered services" and subject to recoupment based on any alleged finding of noncompliance or documentation shortcoming. (P-App. 28-29; R.1:6-7, ¶¶ 15, 16, 17.) The Nurses accurately characterized this as a "perfection policy," because DHS has imposed a perfection standard upon Medicaid providers and claims the authority to recoup if the standard is not met, as evidenced by unrebutted affidavits, arguments advanced by the Department, and administrative decisions applying this policy.

The record demonstrates this issue is ripe for review and that the circuit court properly determined that the policy of recouping based on Topic #66 exceeds the Department's statutory recoupment authority under Wis. Stat. § 49.45. And because Topic #66 exceeds the Department's statutory recoupment authority, so would the Department's interpretation of the myriad regulations it lists in parsing Topic #66 (*see* table in DHS Response Brief, pp. 20-21) whether collectively termed the "perfection rule," or under any other name, or under no name at all.

Further, the circuit court's post-judgment orders—issued after the court determined that DHS had failed to comply with its order—are necessary and proper to enforce the court's judgment and should be upheld.

I. Topic #66 Meets the Definition of a Rule.

A. Topic #66 is more than a summary document.

The Department claims that Topic #66 "has no independent force of law" but instead is a "simple summary statement of state statutes and administrative code provision." (DHS Response Brief, p. 14.) Although it lists a myriad of federal and state rules and laws in a table in its brief, the Department does not present any actual legal argument explaining how the various provisions cited or paraphrased in its table provide actual legal support. The brief is devoid of any statutory interpretation of the cited provisions. And, the Department imprecisely paraphrases the regulations on which it relies. This Court should reject the Department's superficial claim, lacking in substantive analysis.[1] An actual interpretation of the asserted underlying statutes and rules proves that Topic #66 is not merely

[1] This Court need not develop the Department's statutory interpretation argument when it has chosen not to do so. *American Family Mut. Ins. Co. v. Cintas Corp. No. 2*, 2018 WI 81, ¶ 17, 383 Wis.2d 63, 914 N.W.2d 76.

a summary, but instead imposes a perfection standard which is beyond the Department's legal authority.

To be clear—because it appears that the Court of Appeals majority missed this point—the table provided in the Department's brief is not included in the Medicaid Provider Handbook. (*See* P-App. 36; R. 1:14). In fact, there are no citations to any statute or rule in Topic #66 as published in the Handbook (P-App. 36; R. 1:14). Hence, the Court of Appeals' determination that "Topic #66 directs the reader to other sources of law," is wholly unfounded. (P-App. 10, ¶ 17); *Papa v. DHS*, 2019 WI App 48, 388 Wis.2d 474, 934 N.W. 2d 568 (unpublished).

Notably, DHS has modified the content of the table as this litigation has progressed—demonstrating that the table is the Department's *ex post facto* attempt to justify the language of Topic #66, as opposed to supporting the notion that Topic #66 is just a tool to collect the statutory and administrative requirements. (*Compare* R.20:21-22 *with* DHS Response Brief, pp. 20-21).

Topic #66 imprecisely expands the underlying legal authority to create a perfection standard upon which DHS bases recoupment actions. For example, in support of the phrase: "In addition, the service must meet all applicable program requirements," the Department cites, but only

partially quotes from, Wis. Admin. Code § DHS 106.02(4). (DHS Response Brief, p. 20). The rule states:

> Compliance with state and federal requirements. A provider shall be reimbursed only if the provider complies with applicable state and federal procedural requirements relating to the delivery of the service.

The underlined section, which the Department omits, demonstrates that the focus is on the ***delivery of service***, and not ***all*** procedural or ***all*** program requirements. The Court of Appeals has rejected the Department's effort to rely on comparable language in § DHS 107.02(2)(a)[2] to justify recoupment where claim submissions were imperfect. "This regulation permits DHS to ***reject payment*** for services that fail to comply with state and federal requirements; it does not provide for DHS to recoup payments already made." *Newcap v. DHS,* 2018 WI App 40, ¶ 41, 383 Wis.2d 515, 916 N.W.2d 173 (emphasis in original). The Court also determined the focus is on the "type of services rendered, rather than technical defects in a provider's claims." *Id.* at ¶ 41, n. 18.

[2] Wis. Admin. Code § DHS 107.02(2)(a) provides: "The department may reject payment for a service which ordinarily would be covered if the service fails to meet program requirements. Non-reimbursable services include:

> (a) Services which fail to comply with program policies or state and federal statutes, rules and regulations, for instance, sterilizations performed without following proper informed consent procedures, or controlled substances prescribed or dispensed illegally; . . ."

Further, the federal statute and regulations the Department included in support of this provision (DHS Response Brief, p. 20) do not indicate that a covered service must "meet all applicable program requirements." 42 U.S.C. § 1396a(a)(30)(A) (setting forth a requirement that State Medicaid agencies provide for utilization control); 42 C.F.R. §§ 456.1-.6 (prescribing general provisions for utilization control by State Medicaid agencies); 42 C.F.R. § 431.960 (defining "medical review errors"—and notably stating it is an "error resulting in an overpayment or underpayment"). Regardless, these federal regulations establish obligations for state Medicaid agencies and are not obligations placed upon Medicaid providers. And although DHS is expected to comply with federal funding conditions, this does not mean that it may do so by fiat or in a manner which is inconsistent with its state statutory authority.

A second example of the Department's exaggeration of its authority is the "documentation requirements" section of the Department's table. The Department contends, "services for which records are not kept or other documentation failure (sic) are not Medicaid reimbursable." (DHS Response Brief, p. 21, citing Wis. Admin. Code §§ DHS 107.02(2)(e) and (f)). Contrary to the Department's stated interpretation, neither §§ 107.02(2)(e) nor (f) provide that any "documentation failure" makes the

service not reimbursable. Rather, these regulations authorize DHS to prospectively reject (not recoup) payment for "[s]ervices for which ***records or other documentation were not prepared or maintained***, as required under s. DHS 106.02(9)," or "[s]ervices provided by a provider who ***fails or refuses to prepare or maintain records*** or other documentation as required under s. DHS 106.02(9)." Wis. Admin. Code §§ DHS 107.02(2)(e), (f) (emphasis added).

Likewise, 42 U.S.C. § 1396a(27) provides that State Medicaid agencies must include in their provider agreements a requirement that providers keep records as necessary to disclose the extent of services. There is a critical difference between a failure to "prepare or maintain records" and an auditor's post-payment finding of an imperfection within the documents which the provider has prepared, maintained, and made available to DHS. The Department's interpretation that any documentation shortcoming or "failure" causes a service to be noncovered goes beyond the cited authority and exemplifies the Department's overreach.

The Department's overly expansive interpretation of its own authority was recognized by the Court of Appeals in *Newcap*, 2018 WI App 40. The court indicated that DHS may deny a claim or recover payment

when the actual provision of services or the appropriateness and accuracy of the claim cannot be verified using the records the Department requires the provider to maintain "for the purpose of verifying the provider's reimbursement claim." *Newcap,* at ¶ 33. The Court held that DHS had no legal authority to recoup under its asserted bases—for omissions or errors on claim submissions (which did not lead to an overpayment) or for not maintaining or producing records that the Department, by rule, did not require be maintained to verify claims. *Id.* at ¶¶ 24-43, 45.

This court should reject the Department's reliance on *Tannler v. Wisconsin Dep't of Health & Soc. Servs.*, 211 Wis.2d 179, 564 N.W.2d 735 (1997) to argue that Topic #66 is not a rule and not subject to judicial review. (DHS Response Brief, pp. 18-19).

First, the *Tannler* decision preceded more recent legislative acts designed to rein in agency overreach and permit broader independent judicial review of agency action. *Tannler* was decided prior to the enactment of 2011 Act 21, § 1R, which created Wis. Stat. § 227.10(2m), prohibiting an agency from enforcing any standard that is not expressly required or permitted by statute or a properly promulgated rule. *Tannler* was also decided prior to enactment of 2017 Act 369, § 65 and § 80, which expanded Wis. Stat. § 227.40 to permit judicial review of guidance

documents and amended § 227.57(11) to indicate courts "shall accord no deference to the agency's interpretation of law." Application of *Tannler*, as argued by DHS, is inconsistent with current statutes.

This matter is also readily distinguished from *Tannler* on the facts. In discussing a different handbook (not the Medicaid Provider Handbook at issue here), 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" *Tannler,* 211 Wis.2d at 187-88. Although the portion of the handbook reviewed by the *Tannler* Court was found to be "consistent with controlling legislation," *Id.*, as discussed above and in the Nurses' initial brief, the same cannot be said about Medicaid Provider Handbook Topic #66.

B. The Circuit Court Properly Determined that Topic #66 has the Force of Law

The Department acknowledges that OIG "auditors have alleged that services were 'non-covered,' and therefore subject to recoupment, due to alleged inadequate documentation or other shortcomings," prompting OIG to characterize all the compensation a nurse received for services she provided to Medicaid patients for days, weeks, months, or even years as "'overpayments' due to non-compliance." (DHS Response Brief, p. 8.) The circuit court correctly understood that DHS was using Topic #66 as a

statement of general policy to recoup payments for otherwise covered services, in excess of its statutory authority.

In the circuit court, DHS unsuccessfully argued that its statutes, rules, and past administrative decisions support Topic #66 and recoupment based on this policy (*e.g.,* R.20). The Department now claims the Nurses failed to establish that OIG's recoupment efforts were based on Topic #66. It does not matter that the words "Topic #66" do not appear in the affidavits submitted by the Nurses. What matters is the Department's demonstrated reliance on Topic #66 as a perfection standard that converts otherwise covered services into "non-covered services" justifying recoupment.

Notably, in the circuit court, DHS did not dispute that it had relied on this policy in the recoupment efforts identified in the affidavits. (R.20). The Department created all the audits, preliminary audit findings, final audit reports, notices of intent to recover, and final administrative decisions discussed by the Nurses. All of these documents are in the possession of DHS. If the Department believed that any of the documents would have contradicted the Nurses' claim that DHS recoupment efforts relied on Topic #66, the Department should have presented this evidence

to the circuit court.[3] It did not do so then and cannot now be heard to claim otherwise.

In an effort to avoid a game of whack-a-mole, in which the Department would apply the same perfection policy under a different name, the Nurses sought and obtained an interpretation of the limits of the Department's recoupment authority under Wis. Stat. §§ 49.45(3)(f) and 49.45(2)(a)10—limits which this Court should uphold.

The record establishes that DHS has a policy of recouping from Medicaid providers if providers fail to meet the perfection standard, as set forth in Topic #66. There is no logical or legal reason to find that this policy is not subject to judicial review even if DHS has other rules or guidance documents that purportedly say the same thing. The declaratory judgment statute does not require a party to challenge *all* similar or related rules or guidance documents in the same action. *See* Wis. Stat. § 227.40.

[3] During the Motion for Summary Judgment proceedings, DHS did submit an affidavit by auditor Brenda Campbell (R.24) Ms. Campbell does not claim that OIG did not rely on Topic #66 to support its initial demand for repayment by Nurse Zuhse-Green. Rather, Ms. Campbell described, in more detail, the alleged documentation shortcomings that were ultimately resolved during the audit (R.24). Notably, the matter was resolved only after Nurse Zuhse-Green invested significant time and resources, hired counsel, and endured emotional and financial burdens (R.16, ¶¶ 13-15).

II. Topic #66 Exceeds the Department's Statutory Authority

As set forth in the Nurses' initial brief, the circuit court correctly determined that Topic #66 exceeds the Department's statutory authority under the recoupment provisions of Chapter 49. The court expressly rejected the Department's effort to daisy-chain together a variety of provisions of the administrative code or rely on past administrative decisions in a manner that would expand the Department's own recoupment authority. (P-App. 16; R.35:3.)

Topic #66 plainly requires that a service must meet "***all*** applicable program requirements" (including documentation requirements) in order to be deemed to meet program requirements and qualify as a covered service, thus entitled to Medicaid payment and resistant to recoupment. The Department has again tried and failed to show legal underpinnings for this Perfection Policy. The Department has also failed (and not actually tried) to refute the record evidence that this Policy is the basis for the Department's recoupment efforts, thus being intentionally deployed with the force of law. Therefore, DHS has not and cannot refute the Nurses' argument—and the circuit court's finding—that the Topic constitutes a rule in excess of the Department's legal authority.

Because the perfection standard in Topic #66 exceeds the Department's legal authority to recoup,[4] DHS exceeds its authority when relying on it to recoup from Medicaid providers. Likewise, DHS would be acting beyond its authority if it applies that same perfection standard by another name (or under a different rule or guidance document) or if it applies the policy without naming it at all. In each case, DHS would lack authorization in statute or rule for the recoupment action.

III. The Legislature has Authorized Judicial Review of Guidance Documents

The Department falsely claims that Nurses offered no legal authority that would allow the Court to review Topic #66 if it finds that it is a guidance document but not a rule. (DHS Response Brief, pp. 16-17). In fact, the Nurses' initial brief presents substantial case law describing both why the Nurses' Complaint sufficiently pleads a guidance document claim and why 2017 Act 369's remedial and procedural guidance document provision must be applied in cases, like this one, pending on appeal when the Act was passed. By contrast, it is DHS that fails to cite any contrary authority.

[4] The Department misstates the burden of proof. As the Nurses observed in their opening brief, "Neither party bears any burden when the issue before this court is whether an administrative agency exceeded the scope of its powers in promulgating a rule." *Wisconsin Citizens Concerned for Cranes & Doves v. Wisconsin Dep't of Nat. Res.*, 2004 WI 40, ¶ 10 & n. 6, 270 Wis. 2d 318, 677 N.W.2d 612.

Furthermore, the effective date of Act 369, as set by the Legislature, provides the legal authority necessary for this Court to review the legal question presented here.

The Nurses are not raising a new claim. Rather, their fundamental claim remains that Topic #66 exceeds the Department's statutory authority under Chapter 49. This claim presents a question of law, which was addressed by the circuit court and which this Court is competent to hear. Whether the policy is deemed to be a rule or a guidance document, as of December 16, 2018, Wisconsin courts have been authorized by the Legislature to rule on its validity. Wis. Act 369, § 65. The Court of Appeals dissent recognized this, stating "Nor is it required that a party bring a challenge only to a 'rule' under Wis. Stat. § 227.40(1) as judicial review under the statute also applies to a 'guidance document.'" *Papa,* ¶ 21, n. 2 (Reilly, P.J., dissenting).

Consistent with the pleading requirements of *Liberty Homes, Inc. v. Dep't of Indus., Labor & Human Relations*, 136 Wis.2d 368, 377, 401 N.W.2d 805 (1987), the Nurses stated which types of challenge were being made—exceeding statutory authority, exceeding constitutional authority, and failure to comply with statutory regulatory procedures (P-App. 31-32; R.1:9-10). The Nurses identified the policy at issue (Topic #66) and

provided appropriate notice to the Legislature pursuant to Wis. Stat. § 227.40(5).

If the Court concludes that Topic #66 is a guidance document but not a rule, there is no legal or logical reason to avoid reviewing its validity as a guidance document.

IV. 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. The record supports the circuit court's determination that the issues presented were ripe for judicial determination (P-App. 17; R.35:4).

By definition, the ripeness required in declaratory judgment actions is different from the ripeness required in other actions. *Olson v. Town of Cottage Grove*, 2008 WI 51, ¶43, 309 Wis.2d 365, 381, 749 N.W.2d 211, 219 (citing *Putnam v. Time Warner Cable of Se. Wis., Ltd.*, 2002 WI 108, ¶44, 255 Wis.2d 447, 649 N.W.2d 626). 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*, 2008 WI 51, ¶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*. at ¶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 need only be sufficiently developed enough to allow a conclusive adjudication. *Id*. "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.* at ¶43; *see also Coyne v. Walker*, 2016 WI 38, ¶¶27-29, 368 Wis.2d 444, 879 N.W.2d 520.

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 the language of Topic #66, several affidavits from PHP members, and the Department's own documents,

showing that DHS had, in fact, demanded recoupment of past payments made to Nurses for services they actually provided to Medicaid recipients.

The Nurses established that DHS has a policy and practice of recouping past payments from Medicaid providers based on allegedly imperfect compliance with a Medicaid Provider Update, a Handbook provision, an Administrative Code provision, or other standard or policy, even though DHS 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 applied such a policy is not hypothetical. This has been the all-too-real experience for many nurses. The Department did not rebut this evidence before the circuit court. Furthermore, the language of Topic #66 is not hypothetical.

More importantly, although the Nurses cited various recoupment efforts to establish justiciability, the Nurses did not seek a declaratory ruling with respect to the facts of any specific recoupment effort. Rather, this is a challenge to the validity of Topic #66 under Wis. Stat. § 227.40(4)(a) alleging that the policy exceeds the statutory authority of the agency or was promulgated without compliance with statutory rule-making procedures. 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, 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").

As in *Coyne,* the germane facts here are the text of the statutes and the language of the challenged policy; hence, the issue is ripe for review. *Id*. at ¶ 29. The Court should hold that the Nurses' declaratory judgment action is ripe for adjudication.

V. The Circuit Court Acted Within its Authority in Imposing Costs and Fees Upon the Department for Failing to Comply with its Order and Injunction.

This Court reviews a circuit court's decision to impose sanctions under the erroneous exercise of discretion standard. *Schultz v. Sykes*, 2001 WI App 255, ¶ 8, 248 Wis.2d 746, 638 N.W.2d 604.

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; R.44) The court granted the Nurses' post-judgment costs and attorney fees in the form of supplemental relief.

(R.55:2; P-App.22.) The 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; P-App.22; R.65:41.)

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 at 81. The fee-shifting statute provided express language for circumstances in which it applied, to 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 circuit court's 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.55:2; P-App.22; R.65:41.)

The Department's reliance on *Wisconsin Dep't of Transportation v. Wisconsin Personnel Comm'n*, 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 contrary to a court's order.

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 DHS 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). Moreover, courts "possess certain inherent powers, not conferred by rule or statute, to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Goodyear Tire & Rubber Co. v. Haeger*, ___ U.S. ___, 137 S.Ct. 1178, 1186, 197 L.Ed.2d 585 (2017) *quoted in Fuery v. City of Chicago*, 900 F.3d 450, 452 (7th Cir. 2018). Likewise, Wisconsin courts have recognized their inherent powers:

> In addition to the powers expressly granted to the courts in the constitution, courts have inherent, implied and incidental powers. These terms are used to describe those powers which must necessarily be used to enable the judiciary to accomplish its constitutionally or legislatively mandated functions. Inherent powers are those that have been conceded to courts because they are courts. Such powers have been conceded because without them they could neither maintain their dignity, transact their business, nor accomplish the purposes of their existence.

City of Sun Prairie v. Davis, 226 Wis.2d 738, 747–48, 595 N.W.2d 635 (1999) (internal quotations and citations omitted). "A court's power to use contempt stems from the inherent authority of the court." *Frisch v. Henrichs*, 2007 WI 102, ¶ 32, 304 Wis.2d 1, 736 N.W.2d 85 *citing Griffin v. Reeve*, 141 Wis.2d 699, 706 n. 4, 416 N.W.2d 612 (1987). Although the legislature may regulate and limit the contempt power, it may not render the contempt power ineffectual. *Frisch*, ¶ 32.

A circuit court must be able to give force to an existing order whenever a party—including a state agency—directly violates it. Although it appears this Court has not specifically addressed the question of whether a court can tax a state agency for failing to comply with a court order, the Supreme Court of Nebraska has held "that Nebraska Courts through their inherent judicial power, have the authority to do all things necessary for the proper administration of justice…include[ing] the power to punish for contempt." *In re: Samantha L.*, 824 N.W.2d 691, 694 (Neb. 2012) (holding juvenile court has inherent authority to order Department of Health and Human Services to pay attorney fees and costs through contempt).

In addition to its inherent authority, 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). Had DHS honored the circuit court's Final Order, the Nurses would not have incurred further costs and attorney fees. Instead, DHS persisted with recoupment efforts applying the perfection standard even after the court declared it had no authority to do so. The Order for Costs and Attorney Fees 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. (*See, e.g.,* R.43; R.44; R.45.) 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 based on the record developed below.

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

Costs and Attorney Fees as an appropriate exercise of the circuit court's discretion.

VI. 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 declared that 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.44; R.45.)

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" (P-App. 21; R.55).

The Supplemental Order did not expand the scope of what was already enjoined. The court specifically noted that it was not supplementing or attempting to change the Final Order (R.65:44.) The Court indicated, "I just want the Department to understand the order and act accordingly going forward." (R.65:44.)

The Department argues that the Order for Supplemental Relief "effectively halt[s]" Wis. Admin. Code § DHS 106.02(9)(g) "even though the Final Order did not address this specific rule and PHP did not challenge it." (DHS Response Brief, p. 41.) The Nurse's challenge and the Final Order ***did*** address this. If the Department interprets § DHS 106.02(9)(g) —or any other administrative rule or handbook provision—in a way that permits DHS to apply a perfection standard and recoup beyond what is authorized in statute, then that interpretation of 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; P-App. 21-11).

The Department's claim now that § DHS 106.02(9)(g) allows recovery "based on a provider's failure to meet all documentation and record-keeping guidelines" only underscores the need for this declaratory

judgment action. Once again, DHS overstates what the rule provides. The rule states:

> The department may refuse to pay claims and may recover previous payments made on claims where the provider fails or refuses to prepare and maintain records or permit authorized department personnel to have access to records required under s. DHS 105.02 (6) or (7) and the relevant sections of chs. DHS 106 and 107 for purposes of disclosing, substantiating or otherwise auditing the provision, nature, scope, quality, appropriateness and necessity of services which are the subject of claims or for purposes of determining provider compliance with MA requirements.

Wis. Admin. Code § DHS 106.02(9)(g). Based on the explicit language of the rule, recoupment is not permitted for any mere failure to meet "all documentation and record-keeping guidelines." Rather, DHS may recover if a provider does not prepare or maintain records or refuses to permit auditors access to the specified records. If a provider refuses to prepare, maintain, or provide records then it likely would be impossible for an auditor to verify the actual provision of services and recoupment would be permitted under Wis. Stat. § 49.45(3)(f). However, this rule does not provide for the application of a perfection standard which authorizes the Department to recoup based on allegations of imperfections found with the documents the providers did prepare, maintain, and provide to OIG.

The Nurses' interpretation is consistent with the holdings of *Newcap v. DHS*, 2018 WI App. 40, ¶¶ 19, 33 (DHS may recover a payment 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 for purposes of such verification); ¶¶ 24-43, 45 (concluding DHS was not entitled to recoupment because clinic was not required to maintain invoices for the prescription drugs and the clinic's submission of claims with missing or invalid National Drug Codes did not grant DHS legal authority to recoup payments already made.).

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 from this matter 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*. at ¶20. This 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*. "Once an appeal had been perfected, the circuit court should not have taken any action that significantly altered its judgment." *Id*. at ¶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 DHS from seeking recoupment of Medicaid payments in circumstances beyond those authorized by the Legislature.

Because the Order for Supplemental Relief does not expand the Final Order, it did not interfere with the appeal of this matter.

CONCLUSION

The circuit court properly considered whether Handbook Topic #66 exceeded the Department of Health Services' statutory recoupment authority and properly concluded that it did. The court also correctly determined that Topic #66 acted as rule, despite not having been promulgated and was, therefore, invalid. When the Department flouted the court's order, the court properly exercised its discretion in imposing sanctions and correctly issued a supplemental clarifying the court's Final Order.

This Court should reverse the court of appeals and reinstate the circuit court orders.

Respectfully submitted this 4th day of March, 2020.

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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, subject to this Court's granting of the motion to exceed the word limit filed herewith. The length of this brief is 5,991 words.

Dated this 4th day of March, 2020.

/s/Diane M. Welsh

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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, including 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 4th day of March, 2020.

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