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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case Nos. 2016AP2082 AND 2017AP634

KATHLEEN PAPA and
PROFESSIONAL HOMECARE
PROVIDERS INC.,

Plaintiffs-Respondents,

v.

WISCONSIN DEPARTMENT OF
HEALTH SERVICES,

Defendant-Appellant.

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

SUBSTITUTE BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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INTRODUCTION

Respondents Kathleen Papa, a Medicaid-certified nurse, and Professional Homecare Providers, Inc. (PHP), a professional organization of nursing providers,[1] brought a Wis. Stat. § 227.40 declaratory judgment action challenging the validity of a specific portion of a Medicaid Provider Handbook—Topic #66—which it alleged appellant Department of Health Services (DHS) improperly uses to recover payments made to them. However, over the objection of DHS, the subsequent circuit court litigation grew beyond the bounds of a mere limited rule challenge into a general challenge to the scope of the DHS's legal authority to recover improper Medicaid payments. The case culminated in two court orders broadly enjoining DHS's statutory and regulatory authority to recover improper Medicaid payments, which undermine the agency's ability to carry out its state and federal obligations.

This appeal concerns the circuit court's September 27, 2016, order on the merits ("Final Order"), and its orders filed on March 24, 2017 ("Order for Supplemental Relief" and "Order for Costs and Attorney Fees").

The circuit court's Final Order, granting PHP summary judgment, must be reversed. Papa and PHP both lack standing because they each failed to allege an imminent threat to a legally protectable interest, and their case is not ripe because the record contains undeveloped facts. In addition, their Wis. Stat. § 227.40 rule challenge fails because DHS's guidance in its Handbook does not constitute a "rule" in the first instance. The supreme court has held that a Medicaid Handbook provision is not a "rule" if it

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[1] Unless otherwise noted, DHS will refer to Respondents Papa and PHP as "PHP" for ease of reference.

merely recites independently-authorized guidelines and policies. The challenged provision does just that. DHS has state and federal statutory and regulatory authority to recover the Medicaid payments PHP complains about—irrespective of the Handbook. Finally, the circuit court's declarations and injunctions exceed its remedial authority under Wis. Stat. § 227.40.

As to the Order for Supplemental Relief, it is in conflict with the supreme court's holding in *Madison Teachers, Inc. v. Walker*: while an appeal is pending, a circuit court may not issue an order that expands the scope of the order on appeal. Here, the supplemental order, among other things, enjoins DHS from using properly promulgated rules that the circuit court did not declare invalid. It improperly expanded the scope of the Final Order, which was already on appeal, and must be vacated.

The Order for Costs and Attorney Fees must be vacated because the order runs against DHS, a state agency, with no clear and express statutory authority to impose such monetary remedies. This violates sovereign immunity.

STATEMENT OF THE ISSUES

1. Did PHP present a justiciable controversy?

   The circuit court answered "Yes."

   This Court should answer "No."

2. Assuming this controversy is justiciable, does guidance from a section of DHS's Medicaid Provider Handbook constitute a "rule" subject to challenge in a Wis. Stat. § 227.40 declaratory judgment action?

   The circuit court answered "Yes."

   This Court should answer "No."

3. Assuming the circuit court properly held Topic #66 to be an unpromulgated rule, do the circuit court's other declarations and injunctions exceed the bounds of its remedial powers under Wis. Stat. § 227.40 and directly conflict with Wis. Stat. § 49.45(3)(f)?

   The circuit court answered "No."

   This Court should answer "Yes."

4. Must the circuit court's Order for Supplemental Relief be vacated because it improperly intrudes on this Court's jurisdiction over the appeal of the Final Order?

   The circuit court answered "No."

   This Court should answer "Yes."

5. Must the circuit court's Order on Attorney Fees and Costs be vacated because of the doctrine of sovereign immunity?

   The circuit court did not specifically address this issue.

   This Court should answer "Yes."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is unnecessary because the briefs, taken together, fully present the issues and relevant legal authority.

Publication of this Court's opinion is warranted because of the substantial and continuing public interest in the subject of this case.

STATEMENT OF THE CASE

I. Relevant legal background.

"Medicaid is a cooperative federal-state program through which the Federal Government provides financial assistance to States so that they may furnish medical care to needy individuals." *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 502 (1990). The Medicaid provisions and the implementing rules adopted by the federal Centers for Medicare and Medicaid Services (CMS) set out broad requirements concerning coverage, payment, recoupment, and other subjects, which every state must follow to receive federal matching funds. Wis. Stat. § 49.45(1). "[O]nce a state elects to participate [in Medicaid], it must abide by all federal requirements and standards as set forth in the Act." *Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dep't Health*, 699 F.3d 962, 977 (7th Cir. 2012) (alteration in original). In other words, the federal money a state receives comes with strings attached.

"To qualify for federal assistance, a State must submit to the [federal government] and have approved a 'plan for medical assistance,' § 1396a(a), that contains a comprehensive statement describing the nature and scope of the State's Medicaid program." *Wilder*, 496 U.S. at 502 (citing 42 C.F.R. § 430.10).

The Medicaid Integrity Program, 42 U.S.C. § 1396a(69), is administered by CMS. The law requires the states to have a program to audit participating entities' records to insure that proper payments are made under the Medicaid State Plan. 42 U.S.C. § 1396a(a)(42)(A). The states' Medicaid programs are subject to federal audits, as well. 42 U.S.C. § 1396a(a)(42)(A). Federal audits ensure that the states are recovering identified improper payments and refunding the federal share to CMS. 42 C.F.R. §§ 433.300–

433.322. If the federal government, pursuant to an audit of Wisconsin's enforcement program, determines that the state is not, or has not been, adequately fulfilling its obligations, CMS can withhold federal funds if it finds that the state "fail[ed] to actually comply with a Federal requirement," such as enforcing record-keeping requirements "regardless of whether the plan itself complies with that requirement." 42 C.F.R. § 430.35(c).

In Wisconsin, DHS is charged with responsibilities relating to fiscal matters, eligibility for benefits, and general supervision of the program. Wis. Stat. § 49.45(2). It is mandated to cooperate with federal authorities to obtain the best financial reimbursement available to the state from federal funds. Wis. Stat. § 49.45(2)(a)1. and 7. As the state Medicaid agency, DHS is required and authorized to set conditions of participation and reimbursement in contracts with providers, *see* Wis. Stat. § 49.45(2)(a)9., and is authorized to establish documentation requirements to verify provider claims for reimbursement, *see* Wis. Stat. § 49.45(3)(f). *See* 42 C.F.R. § 431.107(b). DHS is further authorized and required to audit and investigate as is necessary to verify the provision of services, the appropriateness of provider claims, and the accuracy of provider claims. Wis. Stat. § 49.45(3)(g)1.

In addition, and importantly here, DHS is mandated by the federal government to recover improper payments. These are monies improperly or erroneously paid, and overpayments made, to a Medicaid-certified provider. Wis. Admin. Code § DHS 107.02(2).[2] To carry out the federal

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[2] State law also authorizes DHS "to promulgate . . . rules as are consistent with its duties in administering [Medicaid]." Wis. Stat. § 49.45(10).

requirements,[3] a state statute requires DHS to recover money paid for services when a provider's documentation fails to verify the actual provision of services, the appropriateness of the provider's claim, or the accuracy of the provider's claim. Wis. Stat. § 49.45(3)(f)1.–2.

With Wis. Admin. Code § DHS 106.02, DHS carries out its statutory authority to recoup:

> *[DHS]* 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 [Medicaid] requirements.*

Wis. Admin. Code § DHS 106.02(9)(g). In addition, Wis. Admin. Code § DHS 108.02 describes DHS's recoupment methods and authority to recoup for overpayments:

> DEPARTMENTAL RECOUPMENT OF OVERPAYMENTS. (a) Recoupment methods. If [DHS] finds that a provider has received an *overpayment, including but not limited to erroneous, excess, duplicative and improper payments* regardless of cause, under the program, [DHS] may recover the amount of the overpayment by any of the following methods, at its discretion:
>
> . . .

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[3] *See* 42 C.F.R. Part 433, Subpart F (§§ 433.300–322) – Refunding of Federal Share of Medicaid Overpayments to Providers.

> 3. Requiring the provider to pay directly to the department the amount of the overpayment.

Wis. Admin. Code § DHS 108.02(9).

In September 2011, CMS issued Publication 100-15 (Medicaid Integrity Program Manual)[4] as a reference tool for state Medicaid agencies and providers. This Manual provides information regarding the recovery of "improper payments," which are defined as:

> [A]ny payment that should not have been made or that was made in an incorrect amount under statutory, contractual, administrative, or other legally applicable requirement. Incorrect amounts include overpayments and underpayments. An improper payment includes any payment that was made to an ineligible recipient, payment for non-covered services, duplicate payments, payments for services not received, and payments that are for the incorrect amount. *In addition, when an Agency's review is unable to discern whether a payment was proper because of insufficient or lack of documentation, this payment must also be considered an improper payment.*

(Emphasis added.) *See also* 42 U.S.C. § 1320a-7k(d)(4)(B) ("overpayment" defined).

The Wisconsin Administrative Code also defines "non-covered service" as "a service . . . for which [Medicaid] reimbursement is not available, including a service for which prior authorization has been denied, a service listed as non-covered in ch. DHS 107, or a service considered to be medically unnecessary, *unreasonable or inappropriate*." Wis. Admin. Code § DHS 101.03(103).

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[4] This manual is not part of the record but may be found online at https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Internet-Only-Manuals-IOMs-Items, Chapter 1, sec. 1035 (last visited June 27, 2017).

Finally, the Legislature has authorized DHS to publish Medicaid guidance through handbooks. A portion of § DHS 108.02(4) explains the purpose of a handbook:

> [DHS] shall publish provider handbooks, bulletins and periodic updates to inform providers of changes in state or federal law, policy, reimbursement rates and formulas, departmental interpretation, and procedural directives such as billing and prior authorization procedures, specific reimbursement changes and items of general information.

Wis. Admin. Code § DHS 108.02(4). *See also* Wis. Admin. Code § DHS 101.03(141).

Within a section of a Medicaid Provider Handbook, under "Covered and Noncovered Services: Covered Services and Requirements," is "Topic #66," the original subject of this litigation, which 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.)[5]

In summary, in exchange for federal funding, the state agrees to provide health care to needy individuals, while complying with federal statutes, rules, guidance, and manuals having the force of law regarding many subjects,

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[5] Because the record numbers for Appeal Nos. 2017AP000634 and 2016AP002082 do not align after docket no. 41, in this brief "R." refers to the record of Appeal No. 2017AP000634. Also, DHS cites the blue docket numbers, not the red numbers.

including recoupment. And Wisconsin has enacted statutes and promulgated regulations giving DHS authority to recover improper Medicaid payments.

II. Statement of the facts.[6]

DHS administers the Medicaid program in Wisconsin. (R. 1:5 ¶ 7; R. 3 ¶ 7.) Medicaid providers enter into a contract with DHS to provide healthcare services to eligible Medicaid enrollees and to be paid for those services. (R. 1:5 ¶ 8; R. 3 ¶ 8.) DHS may audit Medicaid providers up to five years after payment was made, to verify actual provision of Medicaid services and the appropriateness and accuracy of claims. (R. 1:6 ¶ 12; R. 3 ¶ 12.) DHS's Office of Inspector General (OIG) is responsible for conducting audits of Medicaid providers. (R. 1:6 ¶ 13; R. 3 ¶ 13.) All Medicaid providers who have billed Medicaid within the past five years have the potential to be audited by OIG. Many PHP members have already been the subject of OIG audits. (R. 1:6 ¶ 14; R. 3 ¶ 14.)

PHP provides informational training and educational services to nurses in independent practice in the form of meetings, conferences, and other training opportunities "to promote quality nursing care and adherence to professional standards and state regulations." (R. 9:9.)

During audits of PHP members, OIG has sought to recover Medicaid funds based on a finding of noncompliance with a Medicaid Provider Update, a Handbook provision, an Administrative Code provision, or other standard or policy. OIG auditors have alleged that services were "non-covered,"

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[6] The facts are taken from allegations in PHP's complaint to which DHS admitted in its answer, and from PHP's proposed findings of fact in its circuit court summary judgment brief which DHS did not dispute.

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, or even years as "overpayments." (R. 9:9.)

According to PHP's Complaint, PHP members undergoing audits have had to invest time and resources to defend themselves against OIG's findings and recoupment attempts. (R. 9:10.)

III. Procedural history.

PHP brought an action against DHS under Wis. Stat. § 227.40(1) on December 14, 2015. (R. 1.) PHP challenged DHS's alleged "'statement of general policy' that DHS may recoup payment from Medicaid providers for covered services that have been provided, and for which Medicaid has reimbursed, if a post-payment audit finds that the services fail to meet all applicable program requirements." PHP attached a copy of "Topic #66" as that "statement of general policy." (R. 1:6 ¶ 15, Ex. A.)

On March 17, 2016, PHP filed a motion for summary judgment and supporting materials. (R. 8–19.) DHS filed its response brief and supporting materials on May 20, 2016 (R. 20–24). In its brief, DHS asked the court to grant it summary judgment. PHP filed its reply brief on May 27, 2016. (R. 26.) On June 3, 2016, the circuit court held oral argument on PHP's motion. (R. 64.) The parties then filed letters with attachments. (R. 27–28.)

On August 12, 2016, the circuit court issued an oral ruling, granting PHP's motion for summary judgment. The court held that PHP brought a justiciable controversy; declared that DHS exceeds its authority to recoup Medicaid payments using Topic #66; and declared that Topic #66 is a

rule not properly promulgated under Wis. Stat. § 227.10(1). (R. 63 Tr. 26:15–25, Aug. 12, 2016.)

Then, through a September 27, 2016, written order, the circuit court ordered three remedies.

First, it declared that DHS's authority under Wis. Stat. § 49.45(3)(f) and (2)(a)10. to recover payments from Medicaid providers is limited to claims for which either DHS is unable to verify from a provider's records that a service was actually provided or an amount claimed was inaccurate or inappropriate for the service that was provided.

Second, the court declared that DHS's policy of recouping payments for noncompliance with Medicaid program requirements, other than as legislatively authorized by Wis. Stat. § 49.45(3)(f), imposes a "perfection rule" that exceeds DHS's authority, and this recoupment policy, including the standards set forth in Topic #66, is a rule not properly promulgated under Wis. Stat. § 227.10(1).

Third, the court granted an injunction, enjoining DHS from applying or enforcing "the perfection rule." The court ordered that DHS may not recoup Medicaid payments made from 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.)[7]

DHS filed its notice of appeal on October 20, 2016. (R. 38.) This Court took appeal No. 2016AP2082.

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[7] The court did not specify what level or type of documentation is necessary to verify that services were provided.

On January 9, 2017, the circuit court record was electronically filed with this Court.

On January 12, 2017, PHP filed a motion for supplemental relief with the circuit court, or in the alternative, for contempt sanctions against DHS. A hearing was held on February 14, 2017. In an oral ruling, the court granted the motion for supplemental relief, but did not issue a finding of contempt. (R. 65:41, App. 198.)

In a written order dated March 23 and filed March 24, 2017 (the "Order for Supplemental Relief"), the circuit court granted PHP's motion for supplemental relief "[t]o restate and give effect to the declaratory judgment and injunction previously entered by [the] Court." (R. 55:1, App. 156) The order enjoined 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 (emphasis added), App. 157)

A separate Order for Costs and Attorney Fees directed DHS to pay PHP's costs and attorney fees ($25,284.50), associated with bringing the motion for supplemental relief, within 30 days. (R. 54, App. 155; 55, App. 156–57.)

On March 24, 2017, the same day the circuit court issued its two post-judgment orders, DHS filed with this Court its opening brief and separate appendix in appeal No. 2016AP2082.

Then, on April 5, 2017, DHS filed an amended notice of appeal as to the circuit court's post-judgment orders of March 24, 2017. This Court took appeal No. 2017AP0634.

On April 13, 2017, PHP moved to dismiss appeal No. 2016AP2082 or to strike DHS's opening brief. On April 19, 2017, DHS moved to consolidate the two appeals. On April 25, 2017, the Court denied the motion to dismiss and granted the motion to consolidate appeal Nos. 2016AP2082 and 2017AP0634.

On April 14, 2017, pursuant to Wis. Stat. § 809.12, DHS moved the circuit court for an order staying its Final Order, the Order for Supplemental Relief, the Order for Costs and Attorney Fees, and the April 3, 2017, Bill of Costs and Judgment. (Stay Mtn. App. 101–02.) A hearing was held on May 16, 2017. (Stay Mtn. App. 122–68.) At the conclusion of oral argument, the court denied DHS's motion in an oral ruling. (Stay Mtn. App. 167.) On May 26, 2017, the court issued a written order. (Stay Mtn. App. 169.) DHS then filed its motion to stay with this Court on June 20, 2017, along with supporting materials.

STANDARDS OF REVIEW

Standing presents a question of law this Court reviews de novo. *Metro. Builders Ass'n of Greater Milwaukee v. Vill. of Germantown*, 2005 WI App 103, ¶ 12, 282 Wis. 2d 458, 698 N.W.2d 301. "Determining whether a suit is . . . ripe is a legal inquiry separate and distinct from determining whether to grant or deny declaratory relief on the merits." *Olson v. Town of Cottage Grove*, 2008 WI 51, ¶ 32 n.5, 309 Wis. 2d 365, 749 N.W.2d 211. This Court reviews a circuit court's determination that a case is ripe de novo. *Id.* ¶ 32.

This Court reviews whether an administrative rule exceeds statutory authority de novo. *Seider v. O'Connell*, 2000 WI 76, ¶ 25, 236 Wis. 2d 211, 612 N.W.2d 659. And whether an agency's action constitutes a rule under Wis.

Stat. ch. 227 is de novo review, as well. *Homeward Bound Servs., Inc. v. Office of the Ins. Comm'r*, 2006 WI App 208, ¶ 27, 296 Wis. 2d 481, 724 N.W.2d 380.

An appellate court also reviews a circuit court's decision on summary judgment independently. Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Juneau Cty. Star-Times v. Juneau Cty.*, 2013 WI 4, ¶ 25 n.11, 345 Wis. 2d 122, 824 N.W.2d 457.

ARGUMENT

I. This case does not present a justiciable controversy.

To reach the merits, a court must be presented with a justiciable controversy. *Loy v. Bunderson*, 107 Wis. 2d 400, 409, 320 N.W.2d 175 (1982). A controversy is justiciable when four requirements are met, but only two are relevant here. *Id.* "The third requirement is often expressed in terms of standing." *Chenequa Land Conservancy, Inc. v. Vill. of Hartland*, 2004 WI App 144, ¶ 12, 275 Wis. 2d 533, 685 N.W.2d 573. And the fourth requirement is "ripeness." *Olson*, 309 Wis. 2d 365, ¶¶ 29, 40. Here, Respondents' case is not justiciable because they lack standing and their claims are not ripe.

A. Papa and PHP lack standing.

Kathleen Papa and PHP lack standing to bring this Wis. Stat. § 227.40 action. Neither this nurse nor this organization has shown that the alleged rule interferes with or impairs, or threatens to interfere with or impair, any of their legal rights or privileges. As a result, the circuit court erred in finding the case justiciable and its decision should be vacated.

1. The legal standard for standing in this action.

"'Standing' is a concept that restricts access to judicial remedies to those who have suffered some injury because of something that someone has either done or not done." *Munger v. Seehafer*, 2016 WI App 89, ¶ 48, 372 Wis. 2d 749, 890 N.W.2d 22 (citation omitted). "[T]o have standing to bring a declaratory judgment action, a party must have 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. "Abstract injury is not enough." *Fox v. DHSS,* 112 Wis. 2d 514, 525, 334 N.W.2d 532 (1983). "The plaintiff must show that he 'has sustained or is immediately in danger of sustaining some direct injury' as the result of the challenged official conduct and the injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical.'" *Id.* (quoting *Los Angeles v. Lyons,* 461 U.S. 95, 101–02 (1983)). Put more succinctly, "plaintiffs must show that they suffered, or were threatened with, an injury to an interest that is legally protectable." *Krier v. Vilione,* 2009 WI 45, ¶ 20, 317 Wis. 2d 288, 766 N.W. 517 (citing *Chenequa Land Conservancy,* 275 Wis. 2d 533, ¶ 16). "The purpose of the requirement of standing is to ensure that a concrete case informs the court of the consequences of its decision." *Carla S. v. Frank B.*, 2001 WI App 97, ¶ 5, 242 Wis. 2d 605, 626 N.W.2d 330.

"Standing in a ch. 227, Stats., review of an administrative rule depends on whether the challenger comes within the statute authorizing judicial review." *Wis. Hosp. Ass'n v. Nat. Res. Bd.*, 156 Wis. 2d 688, 700–01, 457 N.W.2d 879 (Ct. App. 1990). The portion of this statute regarding standing states:

> The court shall render a declaratory judgment in the action only when it appears from the complaint and the supporting evidence that the rule or its threatened application interferes with or impairs, or threatens to interfere with or impair, the legal rights and privileges of the plaintiff.

Wis. Stat. § 227.40(1).

In this Wis. Stat. § 227.40 declaratory judgment action, neither Papa nor PHP suffers, or is about to suffer, an injury to a legally protectable interest. Thus, they lack standing to prosecute this Wis. Stat. § 227.40 action.

2. Papa lacks standing.

Papa is a past president of PHP and is certified by Wisconsin Medicaid to provide home-based nursing care to children and adults. These facts do not confer standing to bring this Wis. Stat. § 227.40 action.

In determining standing on a motion for summary judgment, a court must first review the plaintiff's complaint, and if there is no allegation of an injury in fact, dismissal of the plaintiff and her claims is required. *See Munger*, 372 Wis. 2d 749, ¶ 49.

Here, the Complaint reveals that Papa failed to plead factual allegations establishing that she suffers, or is about to suffer, any recoupment demand by DHS using Topic #66. Papa alleged that she is a Medicaid certified nurse who has an independent practice in Wisconsin, providing in-home nursing services to Medicaid enrollees. (R. 1:4–5 ¶¶ 2, 9, App. 144–46.) Papa has billed Medicaid within the last five years and obtained reimbursement from DHS after billing. (R. 1:6 ¶¶ 10, 14, App. 146.) She has the potential to be audited by OIG, which is responsible for conducting audits for DHS. (R. 1:6 ¶¶ 12–14, App. 146.) But she did not allege that she has been subject to an audit or has been subject to recoupment—ever. DHS's use of Topic #66 to seek

recoupment for Medicaid payments is foreign to her personally. Without alleging any current or threatened injury, Papa cannot bring a Wis. Stat. § 227.40 claim against DHS for its application of Topic #66 as a basis for recoupment. Papa does not have standing.

Notwithstanding that her insufficient complaint is fatal to her claim, *see Munger*, 372 Wis. 2d 749, ¶ 53, her affidavit filed on summary judgment is no help to her either. In fact, it confirms that she is not a proper plaintiff. Papa still did not claim ever to have been subject to an OIG audit or recoupment demand, let alone one based on DHS's use of Topic #66. (R. 11.) She merely claimed that she is "hesitant to provide independent nursing care to Medicaid enrollees" because of the possibility of DHS recouping payments. (R. 11:3 ¶ 16.) Without any evidence that DHS is going to make an imminent recoupment demand against her, she has shown no injury to a legally protectable interest.

Papa lacks standing. The circuit court should have dismissed her.

3. PHP lacks standing.

PHP also lacks standing. This organization has not alleged facts, or submitted evidence, revealing any current impairment or threatened impairment to any legally protectable interest related to Topic #66.

An organizational plaintiff like PHP may have standing in two different ways. The first way is to bring suit on its own behalf. This is called "organizational standing." *Munger*, 372 Wis. 2d 749, ¶ 53 (citing *Warth v. Seldin*, 422 U.S. 490, 511 (1975)). PHP must show "that it has suffered an injury to its own interests." *Id.* It has not.

PHP's complaint is devoid of factual allegations that it suffers, or is about to suffer, any injury to its own interests. Instead, the complaint only makes allegations about its

"members." (*E.g.,* R. 1:3, 7–8 ¶¶ 1, 17, 24, 29–30, App. 143, 147–48.) In fact, PHP did not allege that it is a Medicaid provider itself. And on summary judgment, the affidavit of PHP's current president contains no such statement. (R. 12.) Like the complaint, her affidavit makes claims only about past actions by DHS to its individual members. Given the lack of factual allegations and testimony concerning any injury to PHP itself, PHP does not have standing under an "organizational" theory.

Second, "[a]n organization 'has standing to sue in its own name if it alleges facts sufficient to show that a member of the organization would have had standing to bring the action in his own name.'" *Munger*, 372 Wis. 2d 749, ¶ 49 (quoting *Wisconsin's Envtl. Decade, Inc. v. Public Serv. Comm'n,* 69 Wis. 2d 1, 20, 230 N.W.2d 243 (1975)). Put another way, "[a]n organizational plaintiff may have standing to bring suit . . . on the behalf of one or more of its members." *Id.* ¶ 53. This is referred to as "associational standing." *Id.* (quoting *Warth,* 422 U.S. at 511). PHP likely asserts standing of the "associational" kind.

But this theory does not confer standing upon PHP either. PHP wholly failed to demonstrate that at least one of its members would have had standing to bring the action in her own name. *Id.* ¶ 54.

PHP's complaint is devoid of any alleged ongoing or imminent injury to a legally protectable interest to one of its members. The complaint alleges that PHP members have been subject to audits and DHS sought the recovery of Medicaid payments for services provided based on noncompliance with "either a Medicaid Provider Update, the online Medicaid Provider Handbook, a provision of the Administrative Code *or* other standards deemed applicable by an OIG auditor." (R. 1:7 ¶ 17, App. 147 (emphasis added).) This statement does not allege DHS's specific use of Topic #66. And this, and the other allegations like this, not

only concern the past but are vague as to any member too. There is no allegation that any specific PHP member is currently being audited. There is no allegation that any specific PHP member is now subject to any recoupment demand by DHS using Topic #66. Neither is there an allegation that any audit or recoupment demand upon any PHP member is threatened or imminent. It is true that a plaintiff does not have to wait for an *actual* injury to bring a Wis. Stat. § 227.40 claim, but there still must be at least a threatened one. There is none here. The allegations in the complaint do not show any PHP member to be "directly affected by the issue in controversy." *Lake Country Racquet*, 259 Wis. 2d 107, ¶ 17.

A plaintiff must successfully allege standing in its complaint or face dismissal of its claims on summary judgment, irrespective of its summary judgment filings. *See Munger*, 372 Wis. 2d 749, ¶ 54–56. PHP's failure to allege any anticipatory injury to a legally protectable interest to one of its members, independent of any allegedly suffered by Papa, "is fatal" to its claim. *Id.* ¶ 53.

But even if the Court looks at PHP's summary judgment filings on which the Final Order was based, the evidence does not confer standing. PHP member nurses Unke, Steger, and Goss filed affidavits stating that they provide services to Medicaid patients. They state that they were subject to audits that ended sometime in 2014, and in March 2015 OIG sought to recoup Medicaid payments. (R. 13 ¶¶ 1–2, 5–7; R. 14 ¶¶ 1–2, 4–7; R. 15 ¶¶ 1–2, 4–8.) But they did not submit any documentation showing OIG's recoupment demand and the bases for it, and—importantly

here—did not even mention Topic #66.[8] As a result, they did not demonstrate any current or imminent injury at summary judgment.

PHP member Zuhse-Green filed an affidavit as well, stating that she provides nursing care and bills Medicaid for her services. She too was subject to an audit, and, at some unspecified date, based on an unspecified provision of the Handbook, OIG sought recoupment for Medicaid payments. But she produced documentation and OIG reversed the audit findings. (R. 16 ¶¶ 1–2, 4, 7–8, 15; R. 24 ¶¶ 7(d)–(f), 8.) Thus, there is no ongoing audit of Zuhse-Green and there never was any post-audit demand for recoupment by DHS alleging a violation of Topic #66. Zuhse-Green has failed to show any injury to establish standing for PHP.

At summary judgment PHP's affiants[9] may have provided evidence of past audits and past demands for recoupment, but they did not show any threatened or imminent audit or recoupment by DHS using Topic #66. PHP did not show any member to have had standing.

"Under sec. 227.40(1), a person who can establish that he or she has a legal right that is threatened or impaired by the rule has standing to challenge it." *Richards v. Cullen*, 152 Wis. 2d 710, 713, 449 N.W.2d 318 (Ct. App. 1989). Because neither Papa nor PHP established a threat or impairment to a legally protectable interest, they lack standing. This resolves the appeal in DHS's favor.

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[8] PHP's counsel claims that these PHP members are still subject to recoupment. (R. 26:11 n.4.) But even if true, her statement cannot take the place of a witness statement and is not evidence. *See Merco Distrib. Corp. v. O & R Engines, Inc.,* 71 Wis. 2d 792, 795–96, 239 N.W.2d 97 (1976).

[9] The other affidavits PHP filed do not help secure standing because the affiants are not PHP members. (R. 17–19.)

B. This case is not ripe.

Irrespective of standing, this appeal can be dismissed on the fourth justiciability ground: it is not ripe for adjudication.

Ripeness "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). The facts should not be contingent or uncertain. *Id.* at 695. 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, 484 N.W.2d 626.

The Wisconsin Supreme Court has found cases not ripe for adjudication in similar, although not identical, Wis. Stat. § 806.04 declaratory judgment actions. In *Miller Brands-Milwaukee*, for example, the supreme court held that the declaratory judgment action should have been dismissed as not ripe because it was based on "hypothetical" facts. 162 Wis. 2d at 695. There, the plaintiff filed a complaint and subsequent affidavit that mirrored the complaint. The defendant state agency asserted that the facts were insufficient to permit a declaratory judgment. The supreme court agreed, stating that "the facts of this case are too shifting and nebulous for the invocation of the remedy of declaratory judgment." *Id.* at 697.

That is exactly the case here. PHP wants this Court to declare Topic #66 an unpromulgated rule, and improperly adjudicate the scope of DHS's Medicaid recoupment authority, without a developed set of facts upon which DHS seeks recoupment against any PHP member.

PHP's complaint generally alleges that "OIG auditors have alleged that services provided by Plaintiff PHP's

members were 'non-covered services' due to alleged documentation shortcomings, resulting in 'overpayments' that, at times, constitute everything the PHP member was paid for weeks, months, or even years at a time." (R. 1:7 ¶ 24, App. 147–48.) The complaint further alleges that "OIG auditors have sought to recoup funds from Medicaid-certified nurses because the nurse provided extra care, above and beyond what was on the Plan of Care." (R. 1:8 ¶ 27, App. 148.) It also alleges—this time actually relying on Topic #66—that "OIG auditors have claimed that Medicaid-certified nurses must pay back their earnings for entire shifts of work because a physician did not timely sign and return a written order to the nurse, after the nurse relied on a verbal order to administer necessary healthcare to a patient." (R. 1:8 ¶ 28, App. 148.)

But PHP's summary judgment filings do not expand on these vague, general allegations. Rather, they reiterate the same ambiguities. No nurse testified in detail about any alleged "documentation shortcomings." No nurse testified about the matter regarding the lack of physician's written order for nursing services. And no nurse testified about the specifics of the nursing services provided beyond the patient's Plan of Care, such as whether the services were ever prescribed by a physician. And because the nurses did not submit any exhibits, there are no documents showing their Medicaid claims and no documents showing DHS recoupment demands.[10] In short, there are no DHS notices of recovery showing the bases upon which it made the demands upon which the Final Order was based. Without these crucial documents, this circuit court issued an advisory

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[10] Before DHS may recover any improper payments, it must provide specific written notice to the provider. Wis. Admin. Code § DHS 108.02(9)(b).

opinion based on undeveloped facts. That decision was forbidden under the justiciability doctrine.

There were no specific allegations or evidence submitted at summary judgment to establish developed facts showing any of DHS's recoupment demands and their bases against any PHP members. There are only the quintessential hypothetical facts that the supreme court has held to be insufficient to fulfill the ripeness requirement. Because the case was not ripe, the Final Order should be reversed and summary judgment granted to DHS.

C. PHP's submission of selected documents from separate administrative proceedings did not make this a justiciable controversy.

1. PHP's submission of selected documents at summary judgment did not create a justiciable controversy.

PHP also submitted an affidavit of counsel on summary judgment which made reference to two administrative matters regarding DHS's recoupment efforts against Medicaid-certified nurses, and attached two documents from the administrative records. (R. 10:2–3, 10:125–38.) These selective excerpts from the *Moore* and *Milazzo* matters—a single brief and a DHS decision—do not make this case a justiciable controversy.[11]

One problem with these filings is that neither Moore nor Milazzo testified that she is a PHP member. Indeed, neither submitted an affidavit like the other PHP members

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[11] Those administrative matters are *In the Matter of Sandra K. Milazzo*, ML-13-0020 (Wis. Dep't of Health Services) and *In the Matter of Nidra S. Moore, RN,* ML-15-0234 (Wis. Div. Hearings and Appeals,). (R. 10:2–3, 10:125–38.) It is not clear from the record the procedural postures of these matters.

did. An affidavit of counsel is insufficient to confer standing for PHP.

Also, the case before this Court is *not* an appeal, by way of a Wis. Stat. § 227.52 judicial review proceeding, of either the *Moore* or *Milazzo* matter. This is an appeal of PHP's Wis. Stat. § 227.40 declaratory judgment rule challenge to Topic #66. The *Moore* and *Milazzo* matters are separate and distinct administrative agency proceedings and subject to judicial review themselves. (*See, e.g.*, R. 10:134; Wis. Stat. §§ 227.52 and 227.53.) This matters because in *Kosmatka v. DNR*, 77 Wis. 2d 558, 253 N.W.2d 887 (1977) the supreme court held that a declaratory judgment action is not proper when a plaintiff circumvents the exclusive means for judicial review of an agency decision provided in Wis. Stat. ch. 227. That is what PHP is attempting to do here by hijacking two matters from the administrative agency level and using them in its own Wis. Stat. § 227.40 declaratory judgment proceeding.

This matters for the purpose of ripeness because "if another act can be taken to remove contingencies and doubt, it should be taken to make the action proper." *Miller Brands-Milwaukee*, 162 Wis. 2d at 695 (quoting *State ex rel. Lynch v. Conta,* 71 Wis. 2d 662, 675, 239 N.W.2d 313 (1976)). In *Cholvin v. Wisconsin Department of Health & Family Services*, 2008 WI App 127, 313 Wis. 2d 749, 758 N.W.2d 118, the petitioner did just that. Cholvin challenged a DHFS instruction used by county screeners in determining applicants' functional eligibility to participate in the Medicaid program. *Id.* ¶ 1. In a ch. 227 judicial review challenge of DHFS's decision denying her eligibility in the program, she also argued that the instruction was an unpromulgated rule. *Id.* ¶¶ 1, 8–11. This placed sufficient undisputed facts before the circuit court to determine two legal issues: (1) Cholvin's eligibility for the program; and (2) the validity of the rule.

Here, the other act in which "contingencies and doubt" can be removed is for Milazzo or Moore to complete their administrative agency hearing process and then challenge the agency decisions to the courts, raising the issue of the validity of Topic #66 therein. *See* Wis. Stat. § 227.40(2)(e); Wis. Stat. § 227.52; Wis. Admin. Code § 108.02(9)(e); *Habermehl Elec., Inc. v. State Dep't of Transp.*, 2003 WI App 39, ¶ 15, 260 Wis. 2d 466, 659 N.W.2d 463 (person may bring Wis. Stat. § 227.40 declaratory action to challenge validity of a rule or challenge validity through a Wis. Stat. § 227.52 action). Such litigation would place certain, not hypothetical, facts before the courts. PHP's inclusion of two documents from the *Moore* and *Milazzo* matters do not make this case a justiciable controversy.

2. PHP's post-judgment submission of selected documents do not create a justiciable controversy.

After the court issued its Final Order and DHS appealed, PHP filed a motion for supplemental relief, along with an affidavit of counsel. This affidavit stated that it was counsel's understanding that five of her clients, whom she represented in ongoing administrative proceedings, were private duty nurses and PHP members. (R. 45:1–2.) Counsel attached several documents from administrative proceedings in which DHS initiated actions to recover improper Medicaid payments, including a proposed decision in an administrative hearing, a final decision in an administrative hearing, a notice of intent to recover by DHS, and an amended notice of intent to recover. (R. 45.) These documents, however, cannot establish a justiciable controversy.

Most importantly, PHP did not file these documents in support of its summary judgment motion. As a result, the circuit court could not have considered them in finding a

justiciable controversy and granting PHP summary judgment. DHS knows of no case law holding that a plaintiff can establish a justiciable controversy through a post-judgment motion. In fact, just the opposite is true. *Munger* teaches that a party's failure to put forth sufficient allegations to establish standing *in its complaint* is fatal to its claim. 372 Wis. 2d 749, ¶ 53.

Moreover, these documents provide further support for DHS's position that this instant case is not ripe. Assuming the nurses named in PHP counsel's affidavit are PHP members, the documents reveal that PHP has many other opportunities to sufficiently develop facts, remove contingencies and doubt, and bring a ripe controversy (i.e., bring a Wis. Stat. § 227.52 judicial review proceeding after completion of administrative proceedings) challenging the validity of Topic #66 before the courts. PHP's post-judgment filings were simply too late to save its action from being non-justiciable.

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Because there was no justiciable controversy here, the circuit court's Final Order should be reversed and all subsequent orders vacated.

II. PHP's Wis. Stat. § 227.40 rule challenge fails from the outset because the challenged portion of the Medicaid Provider Handbook is not a "rule."

After finding a justiciable controversy, the circuit court declared Topic #66 to be a "rule" that DHS did not promulgate. This holding in its Final Order is erroneous because Topic #66 is simply a synthesis of statutes and promulgated rules. On this basis, summary judgment should have been granted to DHS.

1. Topic #66 merely summarizes statutes and properly promulgated rules.

PHP brings a rulemaking challenge under Wis. Stat. § 227.40 contesting the validity of DHS's "statement of general policy," found in a Medicaid Provider Handbook as "Topic #66." As the party bringing the challenge, it bears the burden. *Wis. Realtors Ass'n v. Pub. Serv. Comm'n of Wis.*, 2015 WI 63, ¶ 64–67, 363 Wis. 2d 430, 451–52, 867 N.W.2d 364. Because this challenged section of the Handbook is not a "rule" in the first instance, PHP cannot meet its burden and its Wis. Stat. § 227.40 challenge fails.

Wisconsin Stat. § 227.01 defines "rule":

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

Wis. Stat. § 227.01(13). *See also Cholvin,* 313 Wis. 2d 749, ¶ 22.

DHS "rules" exist in the administrative code, but DHS also issues guidance that does not fall within this definition, and therefore, does not need to be promulgated. In *Tannler v. Wisconsin Department of Health & Social Services,* 211 Wis. 2d 179, 564 N.W.2d 735 (1997), the Wisconsin Supreme Court distinguished "rules" that are subject to the administrative rulemaking requirements from—as relevant here—Medicaid policies and guidance. *Id.* at 187–88. The court held that "[DHS] may use policies and guidelines to assist in the implementation of administrative rules provided they are consistent with state and federal legislation governing [Medicaid]. As long as the document simply recites policies and guidelines, without attempting to

establish rules or regulations, use of the document is permissible." *Id.* (citing Wis. Stat. § 49.45(34)).

Like the Medicaid handbook provision challenged in *Tannler*, Topic #66 "simply recites policies and guidelines, without attempting to establish rules or regulations." 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. 10:124.)[12] Because this handbook topic does not attempt to *establish* rules or regulations, but rather simply *recites* policies and guidelines, *Tannler* controls the outcome. Topic #66 is not a "rule" and DHS may continue to use it without promulgating it.

The following chart makes clear that DHS's guidance simply recites state law. The left column tracks the language of the handbook provision and the middle column cites the statutes and promulgated rules in support. For added support, the third column provides DHS's authority to recoup under federal law:

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[12] Medicaid providers may access the full handbook on-line at https://www.forwardhealth.wi.gov.

Topic #66 language.	State statutory and admin. code provisions.	Federal laws.
For a covered service to meet program requirements,	§ DHS 106.02: "Providers shall comply with the following general conditions for participation as providers . . . ." § DHS 107.02(2) and (2)(a) state that services that fail to meet program requirements or state or federal statutes, rules and regulations are not reimbursable by Medicaid.	42 U.S.C. § 1396a; 42 C.F.R. § 430.0; 42 C.F.R. Part 440 Subpart A; 42 C.F.R. Part 440 Subpart B.
the service must be provided by a qualified Medicaid-enrolled provider	§ DHS 106.02(1): "A provider shall be certified."	42 U.S.C. § 1396a(a)(30)(A); 42 C.F.R. §§ 455.410; 455.412; 447.45(f).
to an enrolled member.	§ DHS 106.02(2): reimbursement for covered services only. § DHS 106.02(3): recipient of services was eligible to receive Medicaid benefits.	42 U.S.C. § 1396a(a)(19); 42 C.F.R. 447.45(f).
In addition, the service must meet all applicable program requirements	§ DHS 106.02(4): shall be reimbursed only if the provider complies with applicable state and federal procedural requirements.	42 U.S.C. § 1396a(a)(30)(A); 42 C.F.R. §§ 456.1–.6; 431.960(c).
including, but not limited to, medical necessity,	§ DHS 106.02(5): shall be reimbursed only for services that are appropriate and medically necessary for the condition of the recipient.	42 C.F.R. § 440.230.
prior authorization,	§ DHS 107.03(9): any service requiring prior authorization (PA) for	42 C.F.R. § 440.230.

	which PA is denied or for which PA was not obtained prior to the provision of the service is not a covered service for Medicaid. § DHS 107.12(2)(a): prior authorization is required for all private duty nursing services.	
claims submission,	§ DHS 106.03(2)(b): claims shall be submitted in accordance with the claims submission requirements. § DHS 107.02(2)(h): services that fail to meet timely submission of claims requirements are not Medicaid reimbursable.	42 U.S.C. § 1396a(a)(37); 42 C.F.R. §§ 447.45(d)(1); 455.18.
prescription	Wis. Stat. § 49.46(2)(b)6.g.: nursing services require a physician's prescription to be Medicaid covered. § DHS 107.12(1)(c): private duty nursing services shall be provided only when prescribed by a physician.	42 C.F.R. § 440.80.
and documentation requirements.	Wis. Stat. § 49.45(3)(f). § DHS 107.02(2)(e) and (f): services for which records are not kept or other documentation failure are not Medicaid reimbursable. § DHS 107.12(4)(d) private duty nursing services that were provided but not documented are not covered services.	42 U.S.C. § 1396a(a)(27).

Topic #66 is just a tool to collect the statutory requirements and promulgated administrative rules regarding DHS's authority to recover improper Medicaid payments. It is a synthesis of the above-referenced statutes and promulgated rules, providing a reference aid for DHS staff. It does not set forth law-like pronouncements and is "not intended to have the effect of law." *Cty. of Dane v. Winsand,* 2004 WI App 86, ¶ 11, 271 Wis. 2d 786, 679 N.W.2d 885. Every phrase of the Handbook topic is *explicitly* grounded in Wisconsin statutes and properly

promulgated administrative code provisions—none of which PHP challenges here.

Because Topic #66 is not a "rule," PHP's action fails in the first instance.

2. Wisconsin Stat. § 49.45(3)(f) provides DHS authority to recover improper Medicaid payments.

PHP's premise—that Topic #66 improperly expands DHS's recoupment authority—also is flawed because, irrespective of Topic #66, Wis. Stat. § 49.45(3)(f) provides DHS with authority to recover Medicaid payments for services not actually provided and for claims that are inappropriate or inaccurate.

The circuit court declared that DHS exceeds the scope of its statutory authority to recoup Medicaid payments when it follows the statutory and administrative rules that are summarized in this Handbook provision. (R. 35; R. 55.) The court's orders not only exceed the limits of its statutory authority to declare the validity of a rule, but they also misread the plain language of Wis. Stat. § 49.45. A correct reading of Wis. Stat. § 49.45 shows that DHS's recoupment practices within the bounds of its statutory authority.

Wisconsin Stat. § 49.45(3)(f) reads in pertinent part:

> 1. Providers of services under this section shall maintain records as required by the department for verification of provider claims for reimbursement. The department may audit such records to verify actual provision of services *and the appropriateness and accuracy of claims.*

> 2. The department may deny any provider claim for reimbursement *which cannot be verified under subd. 1. or may recover the value of any payment made to a provider which cannot be so verified.*

Wis. Stat. § 49.45(3)(f)1.–2.

Because of this language—again, which PHP does not challenge—PHP members are required to "maintain records as required by [DHS] for verification of provider claims for reimbursement." Wis. Stat. § 49.45(3)(f)1. And DHS has authority to audit these records "to verify the actual provision of services and the appropriateness and accuracy of the claims." *Id.* Then, only after reasonable notice and opportunity for hearing, *see* Wis. Stat. § 49.45(2)(a)10, may DHS "recover the value of any payment made to a provider which cannot be so verified." Wis. Stat. § 49.45(3)(f)2. In other words, subsection (3)(f)2. gives DHS the power to recover Medicaid payments when DHS cannot verify from the provider's records: (1) that actual services were provided; and (2) that the claims on which the payments were based are appropriate and accurate. Topic #66 simply carries out the existing state statute.

Based on the plain language of Wis. Stat. § 49.45(3)(f), DHS is authorized to recover the value of a payment where a Medicaid provider's records do not verify the appropriateness and accuracy of the provider's claim. Despite this "appropriateness and accuracy of claims" language in the statute, the circuit court enjoined DHS from recouping a provider's Medicaid payments on any basis other than that the services were not actually provided. Medical services provided by someone not qualified or licensed are not "appropriate," nor are services "appropriate" when they are not provided as required under other Medicaid rules,

such as those requiring a physician's prescription.[13] The circuit court's orders effectively ignore the "appropriateness and accuracy of the claims" language in Wis. Stat. § 49.45(3)(f)1.–2. This ruling was erroneous based on the plain text of the statute.

3. State and federal regulations provide DHS with authority to recover improper Medicaid payments, including claims that the provider cannot verify with documentation.

In addition to the statute, DHS's recoupment authority also is established by rules, such as Wis. Admin. Code §§ DHS 108.02(9)(a) and 106.02(9)(g). These rules have the force of law, and notably, are not being challenged by PHP. They provide further basis for DHS's recovery actions.

Wisconsin Admin. Code § DHS 108.02(9)(a) states: "If [DHS] finds that a provider has received an overpayment, including but not limited to erroneous, excess, duplicative and improper payments regardless of cause, under the program, [DHS] may recover the amount of the overpayment." In addition, Wis. Admin. Code § DHS 106.02 supplies further support for DHS's recovery authority. It reads, in part: "[DHS] may refuse to pay claims and *may recover previous payments made on claims where the provider fails or refuses to prepare and maintain records*." Wis. Admin. Code § DHS 106.02(9)(g). For private duty nurses, such documentation includes progress notes and clinical notes. Wis. Admin. Code § DHS 105.19(7)(f) and (g). Importantly, progress notes must be "posted as frequently as necessary to clearly and accurately document the

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[13] All private duty nursing services must be prescribed by a physician to be a covered and reimbursable benefit. Wis. Stat. § 49.46(2)(b)6.g.; Wis. Admin. Code § DHS 107.12(1)(c).

[patient's] status and services provided." Wis. Admin. Code § DHS 105.19(7)(f). And clinical notes must be created the same day as the service provided. Wis. Admin. Code § DHS 105.19(7)(g). Also, Wis. Admin. Code § DHS 105.19(2) requires that such services be provided under a plan of care that a physician must review and sign at least every 62 days.[14]

DHS would be not only fiscally irresponsible and in violation of federal law to permit a payment to stand to a nurse who fails to maintain proper records, but blind to the protection of patient health and safety.

Contrary to PHP's legal position, existing regulations already establish that a payment may be subject to recoupment based on a Medicaid provider's insufficient documentation.

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Because the challenged portion of the Medicaid Provider Handbook is not a "rule" as defined by Wis. Stat. § 227.01(13), PHP's Wis. Stat. § 227.40 declaratory judgment rule challenge should have been dismissed from the outset.

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[14] The circuit court, during its oral ruling denying DHS's motion to stay the orders, suggested that providers may create records *after* a DHS audit "to meet the criteria in the statute." (Stay Mtn. App. 164–65 (Tr. May 16. 2017 at 43–44).) This statement conflicts with these above-cited administrative code provisions, which were not challenged by PHP.

III. The circuit court's remedies against DHS, other than its declaration that Topic #66 is an unpromulgated rule, exceed the bounds of its powers under Wis. Stat. § 227.40.

The circuit court issued a Final Order which, apart from declaring Topic #66 an umpromulgated rule, included a declaration as to the scope of DHS's statutory authority to recoup Medicaid payments and an injunction prohibiting DHS from taking certain actions. It also issued a declaration and an injunction in its Order for Supplemental Relief. These remedies are not permitted by Wis. Stat. § 227.40.

A. The declarations regarding DHS's statutory authority to recoup Medicaid payments improperly expanded the scope of PHP's Wis. Stat. § 227.40 rule challenge.

Despite PHP's clearly challenging only Topic #66 in its complaint, in briefing it expanded its Wis. Stat. § 227.40 action into a challenge of DHS's general Medicaid payment recoupment policy and practice. And the circuit court's Final Order followed suit by issuing a declaration concerning DHS's statutory authority. Neither the text of Wis. Stat. § 227.40 nor case law supports this outcome.

Wisconsin Stat. § 227.40 is the vehicle to challenge a specific agency "rule." Wis. Stat. § 227.40(1). This "rule" may be a section of the administrative code. Indeed, Wis. Stat. § 227.40(5) requires the Legislature's joint committee on administrative rules to be served with a copy of the complaint. Wis. Stat. § 227.40(5). And when a rule is declared invalid, the court is required to send notice to the Legislative Reference Bureau (LRB), which then must insert an annotation of that judicial determination "in the Wisconsin administrative code." Wis. Stat. § 227.40(6). In addition, case law teaches that Wis. Stat. § 227.40 permits a

challenge to "rule" that was not, but should have been, promulgated. *See generally*, *Cholvin*, 313 Wis. 2d 749.

But in no case—as far as DHS can tell—can Wis. Stat. § 227.40 be used to challenge a state agency's statutory authority, as PHP does here. So not only is PHP foreclosed from challenging a topic in a Medicaid Handbook because it is not a "rule," but it also may not challenge DHS's more general authority to recoup improper Medicaid payments under Wis. Stat. § 227.40.

But even if PHP could proceed in such a way, it would not matter here because Wis. Stat. § 49.45(3)(f) provides DHS with authority to recover Medicaid payments for services not actually provided and for claims that are inappropriate or inaccurate. Further, properly promulgated rules, such as Wis. Admin. Code §§ DHS 108.02(9)(a) and 106.02(9)(g)—which again, PHP does not challenge here—supply DHS with the power to recover "erroneous, excess, duplicative and improper payments regardless of cause" and "payments made on claims where the provider fails or refuses to prepare and maintain records . . . for purposes of disclosing, substantiating or otherwise auditing the provision, nature, scope, quality, appropriateness and necessity of services," respectively.

Finally, the circuit court appeared to opine that OIG should impose the sanctions in Wis. Admin. Code § DHS 106.065 rather than seek recoupment from PHP member nurses. (R. 35:5, 63, Tr. 18–20, 24–25, Aug. 12, 2016, App. 125–27, 131–32.) But Wis. Admin. Code § DHS 106.09(1) expressly states that nothing in ch. 106 "shall preclude [DHS] from pursuing monetary recovery from a provider at the same time action is initiated to impose sanctions." The Legislature entrusted DHS, not the courts, with the discretion whether to pursue these different remedies simultaneously.

In short, the circuit court's declaration over DHS's statutory authority to recoup Medicaid payments went too far.

B. The injunctions against DHS exceeds the bounds of its remedial powers under Wis. Stat. § 227.40.

Not only was the circuit court's declaration wrong on the merits and beyond the bounds of its power, its injunctions were also improper.

As explained above, Wis. Stat. § 227.40 permits the court to declare a rule invalid. Wis. Stat. § 227.40(4)(a). The statute permits the court to take only one more action: "send an electronic notice to the [LRB] of the court's determination as to the validity or invalidity of the rule." Wis. Stat. § 227.40(6). The law does not mention any injunction.

Case law holds that to obtain injunctive relief a party "generally must show that the injunction is necessary to prevent irreparable injury." *Kohlbeck v. Reliance Const. Co.*, 2002 WI App 142, ¶ 13, 256 Wis. 2d 235, 647 N.W.2d 277. Also, the party "must show that no adequate legal remedy is available, i.e., that the injury cannot be compensated by damages." *Id.* "These common law requirements may be modified by statute." *Id.* ¶ 14. If a statute does not include entitlement to injunctive relief, courts must not find one. *Id.*

Here, the circuit court went far beyond the remedial scope of Wis. Stat. § 227.40. In addition to issuing a declaration and approving a letter by PHP counsel to the LRB, the court issued injunctions. (R. 35:6, 35:7, 55:1, 55:2, App. 106–07, 157–58.) This latter remedy is impermissible as a matter of law.

Moreover, there is no evidence in the record that PHP met the necessary requirements for obtaining injunctive

relief in the first place. PHP's summary judgment briefs and filings prior to the Final Order and Order for Supplemental Relief contain no discussion of irreparable injury or lack of an adequate remedy at law. (R. 9, 26, 27, 31.)

Also, the injunctions are inconsistent with the circuit court's own declaration and the statute. The court recognized that under Wis. Stat. § 49.45(3)(f) and (2)(a), DHS has the authority to recover payments from Medicaid providers for which either DHS is "unable to verify from provider's records that a service was actually provided, *or an amount claimed was inaccurate or inappropriate for the service provided.*" (R. 35:6, App. 106) (emphasis added.) This language predominantly tracks Wis. Stat. § 49.45(3)(f)1.–2. But then the injunction limits the declaration—and statute—by preventing DHS from recovering payments even when the provider's documentation does not verify "the appropriateness and accuracy of claims." Wis. Stat. § 49.45(3)(f)1. (R. 35:6–7, App. 106–07.)

Because the circuit court's injunctions exceed the scope of its remedial authority under Wis. Stat. § 227.40, PHP did not prove that an injunction was necessary, and the injunctions directly conflict both with the circuit court's own declaration and law, they must be vacated.

IV. The Order for Supplemental Relief must be vacated because it improperly intrudes on this Court's jurisdiction over the appeal of the Final Order.

As an independent reason to vacate the Order for Supplemental Relief, it improperly expands the circuit court's Final Order and thus intrudes on this Court's jurisdiction over the appeal.

In *Madison Teachers, Inc. v. Walker*, 2013 WI 91, ¶¶ 2, 18–21, 351 Wis. 2d 237, 893 N.W.2d 388, the Wisconsin Supreme Court held that, once an appeal has been filed and

the record is transmitted to the court of appeals, the circuit court may not alter the judgment on appeal. Such action by the circuit court is an impermissible interference with the appellate court's jurisdiction. *Id.*

Here, that is exactly what happened. The Final Order enjoins DHS's "policy of recouping payments for noncompliance with Medicaid program requirements," which the Court characterized as an unpromulgated "Perfection Rule," including Topic #66. [15] (R. 35:6.) The Order for Supplemental Relief, however, (1) enjoins DHS from issuing notices of intent to recover Medicaid funds if the findings of the initial audit appear to indicate that the services in question were provided and the provider was paid an appropriate amount, "notwithstanding that an audit identified other errors or noncompliance with Department policies *or rule*"; and (2) enjoins DHS from furthering *any* agency action, including an administrative proceeding, in which the defendant seeks to recoup Medicaid funds from any Medicaid provider, if the provider's records verify that the services were provided, "notwithstanding that an audit identified other errors or noncompliance with the Department policies *or rules*." (R. 55, App. 156–57 (emphasis added).) For example, Wis. Admin. Code §§ DHS 106.02(9)(f) and (g) and 107.02(2)(e) allow recoupment of improper Medicaid payment based on a provider's failure to meet all documentation and record-keeping guidelines. Without naming these specific rules, the Supplemental Order has effectively halted them, even though the Final Order did not address them (R. 35:6, 35:7) and PHP did not challenge them.

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[15] PHP's complaint made no mention of any "perfection rule." (R. 1.)

The Order for Supplemental Relief is invalid because it improperly expands the Final Order and thereby intrudes on the appellate jurisdiction of this Court. This Court must vacate it.

V. The Order for Costs and Attorney Fees must be vacated based on sovereign immunity.

Finally, the circuit court awarded PHP its costs and attorney fees incurred in bringing its motion for supplemental relief against DHS. This payment was the supplemental relief. This Order for Costs and Attorney Fees must be vacated based on the doctrine of sovereign immunity.

The circuit court cited Wis. Stat. § 808.07 as the basis for its novel ruling. (Stay Mtn. App. 165 (Tr. May 16, 2017, 44); R. 55, App. 156–57.) The specific statutory provision that the circuit court cited states:

> (2) Authority of a court to grant relief pending appeal.
>
> (a) During the pendency of an appeal, a trial court or an appellate court may:
>
> . . . . .
>
> 3. Make any order appropriate to preserve the existing state of affairs or the effectiveness of the judgment subsequently to be entered.

Wis. Stat. § 808.07(2)(a)3. The text of this statute does not expressly permit a court to award costs and attorney fees for a post-judgment motion. Neither does Wis. Stat. § 806.04(8), which the circuit court also cited, contain such express language.[16] (R. 55, App. 156–57.) Under the doctrine of

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[16] As stated above, *see supra* n.27, PHP did not bring the action challenging Topic #66 pursuant to Wis. Stat. § 806.04.

sovereign immunity, these statutes do not permit a monetary award against DHS.

Sovereign immunity derives from the Wisconsin Constitution, art. IV, § 27: "The legislature shall direct by law in what manner and in what courts suits may be brought against the state." This means that the state enjoys sovereign immunity and cannot be sued without its consent.[17] *PRN Assocs. LLC v. State Dep't of Admin.*, 2009 WI 53, ¶ 51, 317 Wis. 2d 656, 766 N.W.2d 559. The Legislature must clearly and expressly waive the state's immunity. Consent will not be implied. *Townsend v. Wis. Desert Horse Assoc.*, 42 Wis. 2d 414, 421, 167 N.W.2d 425 (1969). If no consent is given and the defense is properly raised, sovereign immunity deprives the court of personal jurisdiction over the state. *Lister v. Bd. of Regents of Univ. of Wis. Sys.*, 72 Wis. 2d 282, 291, 240 N.W.2d 610 (1976). It is the plaintiff's burden to prove jurisdiction once sovereign immunity has been raised as a defense. *State v. Advance Mktg. Consultants, Inc.*, 66 Wis. 2d 706, 712–13, 225 N.W.2d 887 (1975).

From this foundation, the supreme court has long held that express statutory authority is required to tax costs and attorney fees against the state. *Martineau v. State Conservation Comm'n*, 54 Wis. 2d 76, 79, 194 N.W.2d 664 (1972). In *Department of Transportation v. Wisconsin Personnel Commission*, 176 Wis. 2d 731, 738, 500 N.W.2d 664 (1993), the supreme court held that, despite attorney fees language appearing in the statute, because the statute did not explicitly reference the state, sovereign immunity did not authorize imposition of fees against the state agency.

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[17] A state agency (here, DHS) is the state for purposes of sovereign immunity. *Lindas v. Cady*, 142 Wis. 2d 857, 861, 419 N.W.2d 345 (Ct. App. 1987) ("An action against a state agency is an action against the state.").

This circuit court's holding that DHS must pay PHP attorney fees and costs conflicts with case law requiring that the text of Wis. Stat. § 808.07(2)(a)3. would need to *clearly and expressly* permit an order of attorney fees and costs against the State. *Dep't of Trans.*, 176 Wis. 2d at 738. The plain language of Wis. Stat. § 808.07(2)(a)3. explicitly authorizes no award of attorney fees at all, much less against the State. In no way was DHS put on notice that it could be forced to pay attorney fees as a form of supplemental relief in defense of a post-judgment motion brought under Wis. Stat. § 808.07(2)(a)3.[18]

This Court must vacate the circuit court's Order for Costs and Attorney Fees.

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[18] After the appeals were filed, the circuit court opined that "*the broad brush* of 808.07(2)" gave it the authority to award attorney fees against DHS. (Stay Mtn. App. 165 (Tr. May 16, 2017, 44) (emphasis added).) This reasoning conflicts with the case law cited above.

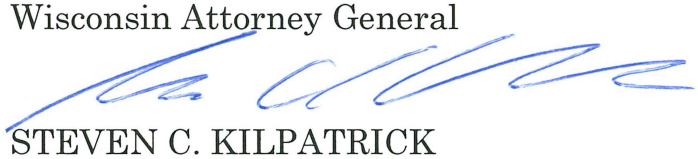
CONCLUSION

Defendant-Appellant 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 29th day of June, 2017.

Respectfully submitted,

BRAD D. SCHIMEL
Wisconsin Attorney General



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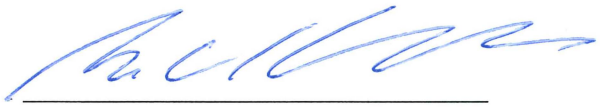
CERTIFICATION

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 10,996 words.

Dated this 29th day of June, 2017.



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 29th day of June, 2017.

STEVEN C. KILPATRICK
Assistant Attorney General

APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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STEVEN C. KILPATRICK
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