

STATE OF WISCONSIN

CIRCUIT COURT  
BRANCH 12

WAUKESHA COUNTY

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KATHLEEN PAPA and  
PROFESSIONAL HOMECARE PROVIDERS, INC.

Plaintiffs,

Case No. 15-CV-2403

v.

WISCONSIN DEPARTMENT OF HEALTH  
SERVICES

Defendant.

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**BRIEF IN SUPPORT OF MOTION FOR SUPPLEMENTAL RELIEF  
UNDER WIS. STAT. § 806.04(8) OR FOR REMEDIAL SANCTIONS UNDER  
WIS. STAT. § 785.04(1)**

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In its final Order granting the Plaintiff's motion for summary judgment in this case, the Court ruled that:

The Department of Health Services' authority under Wis. Stat. §§ 49.45(3)(f) and 49.45(2)(a)10 to recover payments from Medicaid providers is limited to claims for which either (1) the Department is unable to verify from a provider's records that a service was actually provided; or (2) an amount claimed was inaccurate or inappropriate for the service that was provided.

Order, p. 6. The Court further ruled that "[t]he Department's policy of recouping payments for noncompliance with Medicaid program requirements, other than as legislatively authorized by Wis. Stat. § 49.45(3)(f), as described above, imposes a 'Perfection Rule' which exceeds the Department's authority." *Id.* Pursuant to this

declaration of law, the Court issued an injunction prohibiting the Department from “applying or enforcing the Perfection Rule.” The Court ordered that:

The Department may not recoup Medicaid payments made to Medicaid-certified providers for medically necessary, statutorily covered benefits provided to Medicaid enrollees, based solely on findings of the provider’s noncompliance with Medicaid policies or guidance where the documentation verifies that the services were provided.

*Id.*, p. 6-7.

The Department filed a notice of appeal from this Court’s final Decision and Order. However, an appeal does not generally stay the execution or enforcement of the judgment order appealed from. Wis. Stat. § 808.07 (1). The Department has not filed a motion with either this Court or the Court of Appeals to stay this Court’s decision pending appeal. See Wis. Stat. § 808.07(2)(a). The Decision and Order remain in effect and enforceable.

The Department is not complying with the Court’s declaratory judgment and injunction. The Department has continued to apply the “Perfection Rule,” i.e., to seek the recoupment of Medicaid payments from providers based solely on the provider’s noncompliance with Medicaid policies or guidance, even though the provider’s documentation verifies that the services were provided. The Department has pursued, and continues to pursue, such recoupment from private duty nurses providing services to patients enrolled in Medicaid.

The Plaintiffs seek to protect the members of Professional Homecare Providers, Inc. (“PHP”) from the Department’s continued actions in contravention of this Court’s Order. The Plaintiffs originally brought this declaratory judgment action to protect the

interests of PHP's members from the Department's unlawful recoupment actions. Complaint, ¶ 1; see generally *Metro. Builders Ass'n of Greater Milwaukee v. Vill. of Germantown*, 2005 WI App 103, ¶ 14, n. 3, 282 Wis. 2d 458, 467, 698 N.W.2d 301, 306 (an association has standing to assert claims of its members). The Court's Order granting relief to the Plaintiffs has failed to deter the Department's continued efforts to recoup Medicaid payments from PHP members in excess of its statutory authority. The Plaintiffs ask the Court to enforce its Order by ordering supplemental relief under Wis. Stat. § 806.04(8), including damages, or remedial sanctions under Wis. Stat. § 785.04(1), or both, against the Department.

**A. Examples of the Department's Ongoing Recoupment Actions in Violation of this Court's Decision and Order**

The Department apparently has made no changes in its recoupment practices against Medicaid providers to conform to this Court's Decision and Order. Following are examples of the Department's recoupment actions against PHP members in violation of the Court's declaratory judgment and injunction and the Wisconsin Statutes.

**1. The Department's final decision ordering Nurse Lori Kleinhans to repay Medicaid payments based on her incomplete documentation of nursing services.**

On November 8, 2016, three days after the Court issued its final Order in this case, the Department issued a final administrative decision<sup>1</sup> that authorized

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<sup>1</sup> The Department issued a final administrative decision that rejected the proposed decision issued by the Administrative Law Judge finding that Kleinhans was entitled to full reimbursement. (Welsh. Aff. ¶ 8, Ex. C)

recoupment from Lori Kleinhans for nursing services she provided to a child with complex health needs from May 1, 2011 to July 31, 2012.<sup>2</sup> Welsh Aff., ¶ 8, Ex. D, p. 2. As noted in the decision, the amount subject to recoupment represents “an entire year’s work as a private duty nurse for one patient.” *Id.*, p. 5.

The Department ordered recoupment due to “incomplete documentation and incomplete medical orders” maintained by Kleinhans. The Department faulted Kleinhans’ use of photocopied templates in her daily nursing notes, which the Department described as an “archaic and idiosyncratic system of recording the patient’s treatment and vital signs.” Welsh Aff., Ex. D, p. 8. As the Department found, Kleinhans has a disability resulting from a “grievous injury” to her right hand during a domestic violence incident thirty years ago, limiting her ability to write and type. Welsh Aff., Ex. D, p. 7. To accommodate this disability, Kleinhans developed a set of photocopied templates “bearing prewritten case notes, tasks and observations, based upon the petitioner’s experience with this relatively stable minor patient,” which she amended and annotated to document her daily nurse visits. *Id.*

The decision recognized that Kleinhans “did indeed provide all of the hours of service billed in the test period” and that there was no “allegation of fraud... or that the services provided were somehow deficient.” *Id.* at 8, 10. Nonetheless, the Department

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<sup>2</sup> As summarized in the Department’s decision, the child, then a toddler, “has congenital hypotonia [muscle weakness], a history of respiratory failure, a gastrostomy installed since January, 2010, and a tracheostomy installed since April, 2010. She requires the use of two Devilbiss suction machines, a nebulizer, feeding pump, IV line and pole, humidifier, pulse oximeter, and apnea monitor,” several medications, and “was then bowel and bladder incontinent, and limited in endurance and ambulation skills.” Welsh Aff., Ex. D, p. 2.

states that “[p]roper record keeping is a condition of reimbursement” and that the Department was authorized to “recoup payments previously made when a provider *solely fails* to maintain the appropriate documentation.” *Id.* (emphasis added).

The Department, recognizing that Kleinhans “may face severe financial hardship in repaying an amount that roughly represents an entire year’s work” and that there was no allegation of fraud, directed that “in this matter only,” auditors should allow Kleinhans’ claims “[w]here the Department can determine that the petitioner actually provided care,” resolving reasonable doubt in favor of Kleinhans. The Department has not yet informed Kleinhans of the amended recoupment amount.

The Department’s decision is fundamentally inconsistent with this Court’s declaration and injunction regarding the statutory limits on the Department’s ability to recoup payments. These statutory limits are not a matter left to the Department’s discretion. Kleinhans has incurred substantial costs in defending herself against the Department’s overzealous and unlawful recoupment action and may incur additional costs in seeking judicial review of the Department’s ultimate decision.

**2. The Department continues to issue Notices of Intent to Recover that are inconsistent with the Court’s Order and injunction.**

The Department issued a Notice of Intent to Recover<sup>3</sup> the amount of \$8,613.82 from Nurse Lindsey Thompson on September 15, 2016, covering an audit period of May through June, 2015. Welsh Aff., ¶ 9, Ex. E. The Notice, which states the basis for the

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<sup>3</sup> A notice of intent to recover is the first step in the Department’s action to recoup overpayments to providers. See Wis. Admin. Code § DHS 108.02(9)(b).

Department's recoupment of amounts paid to the provider for healthcare services, did not allege that Ms. Thompson was reimbursed for nursing services that she did not actually provide or that she received an inappropriate amount for those services. *Id.* Rather, the Department seeks to recoup payments for full shifts of nursing services based on alleged omissions or discrepancies in Thompson's documentation, such as an outdated physician signature on the Plan of Care (the physician must review and sign the Plan of Care every 62 days); a perceived lack of correlation in documentation of gastrostomy tube site care, gastrostomy tube flushes, and normal saline orders in various records (the Plan of Care, nurse notes, medication record, and treatment records); the absence of a written prescription for Cetrizine, a common antihistamine that Thompson administered to the patient a number of times during her nursing shifts; and the absence of narrative nursing notes where care was documented using flow sheets.<sup>4</sup> *Id.* There is no allegation that Thompson failed to provide the nursing services for which she was paid or that she was paid an excessive amount for such services.

The Inspector General issued the Notice more than a month after this Court made its oral ruling in the declaratory judgment action, pending the final order. The Department has not terminated its recoupment action or amended its Notice, which conflicts with the Court's written Decision and Order.

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<sup>4</sup> In November, Thompson, by counsel, submitted additional documentation to rebut the findings (Welsh Aff. ¶ 11).

**3. The Department is proceeding to administrative hearings on Notices of Intent to Recover that are based solely on imperfect documentation.**

This Court ruled that the Department may not recoup Medicaid payments made to Medicaid-certified providers for medically necessary, statutorily covered benefits provided to Medicaid enrollees, based solely on findings of the provider's noncompliance with Medicaid policies or guidance where the documentation verifies that the services were provided. Despite this Order, the Department has refused to withdraw or amend Notices based on documentation flaws that it previously issued to nurses in independent practice. As a result, nurses have had to prepare for administrative hearings, pay legal fees, and face uncertain results during the administrative hearing process.

For example, the Department issued a Notice of Intent to Recover \$12,115.26 dollars from Nurse Michele Klee, covering the audit period of December 2014 through February 2015. The vast majority of the Department's findings relate to shortcomings in Klee's documentation of services she provided to a child and the fact that Klee's respiratory care skills certification had expired. *See* Welsh Aff., ¶ 12, Ex. F. Klee moved for summary judgment before the administrative hearing scheduled for November 7, contending that she held all certifications required under the Medicaid program and that, despite the alleged documentation errors, the Department did not allege Klee did not provide the services for which she was reimbursed, citing this Court's Order. Welsh Aff., ¶ 13, Ex. G.

The administrative law judge conducting the administrative hearing for the Department rejected Ms. Klee's motion and took great umbrage at her citation of this Court's Order, stating:

The petitioner's attorney bizarrely seeks to bootstrap a circuit court declaratory judgment ruling in an unrelated Medical Assistance case that did not even concern an extant MA provider recovery action, to the proposition that DHS is enjoined from pursuing virtually any MA provider recovery against any provider, in perpetuity. This is simply poppycock. Frankly, what counsel is doing citing to this unpublished circuit court order in an unrelated case in an administrative hearing proceeding is the proverbial 'sound and fury signifying nothing.' If Attorney Welsh actually believes that this MA recovery action is enjoined by the so-called *Papa* decision in Waukesha County Case No. 15-CV-2403, I strongly suggest that she obtain a court order specifically enjoining this hearing, and this tribunal, prior to November 7, 2016.

Welsh Aff. ¶ 14, Ex. H. The case proceeded to an administrative hearing on November 7, 2016 and is awaiting a proposed decision by the ALJ. Ms. Klee incurred costs in defending herself in the administrative action that she would have avoided if the Department had complied with this Court's Order.

Similarly, the Department refused to withdraw its Notices of Intent to Recover seeking to recoup payments made to four nurses providing care to the same patient, including \$58,449.73 from Nurse Heidi Unke. Welsh Aff., ¶15, Ex. I. The basis for the proposed recoupment is alleged shortcomings in the nurses' documentation of the administration of medications, specifically a "lack of correlation" among the medication administration record, the record of treatment, and the nurse's clinical notes. Welsh Aff., ¶ 15, Ex. I. The Department does not allege that Ms. Unke failed to administer the medications in question or that she failed to provide skilled nursing care to the patient.

*Id.* Nonetheless, it seeks to recoup from Unke every penny she received for numerous full shifts of nursing services provided to a patient with complex medical needs based on minor discrepancies in the records documenting the administration of medication. Unke and three other nurses who provided care to the same patient are awaiting an administrative hearing to determine the outcome of the Department's recoupment effort. Ms. Unke has incurred additional legal fees due to the Department's refusal to withdraw the Notice, and will incur additional fees as the matter proceeds to hearing.

This last example may sound familiar to the Court; the Plaintiffs submitted evidence of the Department's recoupment action against Unke and the other nurses involved in this case to this Court to support their declaratory judgment claim. *See Unke Aff.*<sup>5</sup>; *see also Rothfelder Aff., Ruede Aff., Goss Aff., Steger Aff.*

**4. The Department argued that this Court's Decision and Order do not apply to a pending administrative review involving recoupment based solely on a nurse's failure to countersign a form.**

The Department seeks to recoup \$7,675.60 from Nurse Nidra Moore, covering all of the payments she received for providing skilled nursing services from June through December 2012. The Department did not allege that Ms. Moore did not provide the services for which she was reimbursed. Rather, its recoupment effort is based entirely on her failure to counter-sign the care plan attachment. *Welsh Aff.*, ¶ 16, Ex. J.

An administrative hearing was held on February 16, 2016 and Moore is awaiting a proposed decision by the administrative law judge. On September 28, 2016, Ms.

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<sup>5</sup> The affidavit was submitted in support of the Plaintiffs' motion for summary judgment and is resubmitted with this motion for the Court's convenience.

Moore's attorney filed a statement of additional legal authority discussing the relevance of this Court's Decision and Order in this case. Welsh Aff., ¶ 17, Ex. K. In response, the Department's attorney contends that this Court's decision does not control the recoupment action against Moore. Welsh Aff., ¶ 18, Ex. L.

**B. Supplemental relief and/or remedial sanctions are necessary to protect the PHP members from the Department's continued actions in violation of this Court's Decision and Order.**

The Plaintiffs submit that the Defendant's continued pursuit of recoupment against nurses in contravention of this Court's Order constitute a contempt of court. A finding of contempt and imposition of remedial sanctions is appropriate to preserve the effectiveness of this Court's judgment, which expressly enjoined the Department from pursuing such recoupments. Alternatively, or in addition to finding the Department in contempt, this Court should grant supplemental relief to the Plaintiffs, including damages, to ensure that the Court's judgment is effectuated.

The Department's actions have injured PHP members, who have expended money, time, and energy to defend themselves in administrative proceedings. They will be further injured if this Court takes no action to enforce its Decision and Order. Members of PHP face substantial additional damages if the Department issues final administrative decisions ordering them to return payments they received for providing days, weeks, and months of nursing services to Medicaid patients.

The Court retains its authority to grant further relief in a declaratory judgment action while the case is on appeal:

Authority of a court to grant relief pending appeal.

(a) During the pendency of an appeal, a trial court or an appellate court may:

1. Stay execution or enforcement of a judgment or order;
2. Suspend, modify, restore or grant an injunction; or
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 (emphasis added).

“An order or judgment which requires specific conduct (either to do, or to refrain from, specific actions) can be enforced by contempt.” *Carney v. CNH Health & Welfare Plan*, 2007 WI App 205, ¶ 17, 305 Wis. 2d 443, 459, 740 N.W.2d 625, 632. If a court finds contempt under Wis. Stat. § 785.01(1)(b) has occurred, then the court must consider Wis. Stat. § 785.04(1), which provides for remedial sanctions. *Id.*, ¶ 24. The sanctions may include “money sufficient to compensate a party for a loss ... as [a] result of a contempt” or “[a]n order designed to ensure compliance.” *Id.*, citing Wis. Stat. § 785.04 (1)(a) and (d).

Wis. Stat. § 806.04(8) likewise authorizes the Court to grant supplemental relief based on a declaratory judgment “whenever necessary or proper.” Wis. Stat. § 806.04(8). If the court deems a petition for further relief “sufficient,” the court “shall, on reasonable notice, require any adverse party whose rights have been adjudicated by the declaratory judgment or decree, to show cause why further relief should not be granted forthwith.” *Id.*

Supplemental relief under Wis. Stat. §806.04(8) may include costs and attorney’s fees. *See Elliott v. Donahue*, 169 Wis. 2d 310, 324, 485 N.W.2d 403, 409 (1992) (holding that

attorney's fees may be recovered under Wis. Stat. §806.04(8)). Likewise, the court may award damages "in a proper case for declaratory relief, where the court has entered a decree adjudicating the rights of parties and where the granting of relief in the form of damages may be predicated on that determination of rights." *F. Rosenberg Elevator Co. v. Goll*, 18 Wis. 2d 355, 363, 118 N.W.2d 858, 862 (1963); *see also Westport Ins. Corp. v. Appleton Inc.*, 2010 WI App 86, ¶ 82, 327 Wis. 2d 120, 170, 787 N.W.2d 894, 920 (upholding order granting insured's post-trial request for damages pursuant to Wis. Stat. § 806.04(8)).

After an appeal is pending, the circuit court may not take any action that significantly alters its judgment. *Madison Teachers, Inc. v. Walker*, 2013 WI 91, ¶ 21, 351 Wis.2d 237, 839 N.W.2d 388 (holding that circuit court's issuance of an injunction after an appeal was filed from a declaratory judgment action improperly expanded the scope of the original judgment). The Plaintiffs do not seek to amend or expand the injunction originally ordered by the Court, but rather to enforce the existing declaratory judgment and injunction.

The Plaintiffs ask this court to order the Department to pay damages sufficient to compensate PHP members Klee, Thompson, Kleinhans, Unke, and Moore for the costs they have incurred, including attorney's fees, since the entry of this Court's final Decision and Order on September 27, 2016, to defend themselves against the Department's recoupment efforts in contravention of the Court's Order in this case. Plaintiffs further request that this Court order the Department to pay the Plaintiffs' costs and attorney's fees in prosecuting this motion. Additionally, Plaintiff moves for

the Court to order the Department to pay a forfeiture of \$2,000 for each day that the Department's contempt continues, pursuant to Wis. Stat. § 785.04 (1)(c).

These remedial sanctions appear to be necessary to induce the Department to comply with this Court's judgment and injunction. The requested relief does not expand the scope of this Court's judgment. Rather, it seeks to enforce the original declaratory judgment and injunction through appropriate remedial sanctions.

For all the reasons stated above, the Department should be ordered to show cause as to (1) why its conduct, as outlined in Part A, above, is not in contempt of this Court's judgment and (2) why further relief, as requested herein, should not be granted forthwith.

Dated this 12th day of January, 2017.

PINES BACH LLP

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