STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY
BRANCH 12

KATHLEEN PAPA AND
PROFESSIONAL HOMECARE
PROVIDERS, INC.,

Plaintiffs,

v. Case No. 15-CV-2403

WISCONSIN DEPARTMENT
OF HEALTH SERVICES,

Defendant.

**DEFENDANT'S BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUPPLEMENTAL RELIEF UNDER WIS. STAT. § 806.04(8) OR, ALTERNATIVELY, FOR SANCTIONS UNDER WIS. STAT. § 785.04**

## INTRODUCTION

Plaintiffs sought and obtained from this Court declaratory judgment regarding the statutory authority of defendant Wisconsin Department of Health Services (DHS) when conducting audits of Medicaid providers. This Court held that DHS may not recoup funds from providers of Medicaid services where "the documentation verifies that the services were provided." (Court's Order dated September 27, 2016, p. 7). Plaintiffs are now asking this Court to intervene in ongoing administrative agency actions, to predict the outcome of those proceedings, and then to determine whether that predicted outcome would violate the Court's order. Plaintiffs' proposed methodology would have this Court act prior to final

administrative action in these cases, and act without the benefit of a completed administrative record.

Plaintiffs are seeking unwarranted supplemental injunctive relief by asking this Court to enjoin (and, in essence, to render a substantive decision in) one ongoing administrative agency proceeding before the Division of Hearings and Appeals (DHA)[1] and four internal DHS cases. Plaintiffs' motion asks this Court to usurp the role and the authority of DHA and DHS, and to conclude, based on a few selected excerpts from the records of various pending administrative matters, that each of those proceedings must be dismissed.

The motion lacks any statutory or other legal basis. Rather, it is based solely on the "testimony" and unsupported legal conclusions of plaintiffs' attorney. Plaintiffs' motion must be denied.

## I. Plaintiffs' motion lacks foundation, is without basis in law, and is improperly based on selective excerpts from pending administrative proceedings.

In support of this motion, plaintiffs' counsel presents selective excerpts from the administrative records of five administrative proceedings as follows:

- Lori Kleinhans – Case No. ML-14-0109 – Plaintiffs' counsel provides a copy of the Proposed Decision of the administrative law judge (ALJ) dated June 23, 2015, as well as the agency's final Amended Decision dated November 8, 2016. The Amended Decision remanded the matter to DHS for further review to determine in what instances it can be determined that Ms. Kleinhans actually provided the care in question. The agency has made no determination in the remanded cases as of this date. Plaintiffs' counsel, however, has apparently concluded (and asks this Court to so conclude) that all of the services were actually provided.

[1] DHA is not, and has never been, a party to this matter.

- Lindsey Thompson – Case ID 201645881 – Plaintiffs' counsel provides a single document from this administrative proceeding, that being the "Notice of Intent to Recover" sent to Ms. Thompson dated September 15, 2016. The hearing in that matter has not been held as of this date. Plaintiffs' counsel asks this Court to usurp the agency's decision-making authority, and to conclude from that single document that all of the services were actually provided.

- Michele Klee – Case ID 201576513 – Plaintiffs' counsel provides a copy of the "Amended Notice of Intent to Recover" dated June 2, 2016, as well as plaintiffs' counsel's "Brief in Support of Motion for Summary Judgment" dated October 25, 2016. Also attached is the ALJ's Order denying the motion for summary judgment in which the ALJ notes that the motion fails for several reasons, including that it is "bereft of supporting affidavits, pleadings, depositions or answers to interrogatories, or even any other evidence." The order goes on to note that "[the] entire motion consists of mere assertions unsupported by no qualified or even attested, evidence at this present, and pre-hearing, status." A hearing was held in this matter on November 7, 2016, but no decision has been rendered as of this date. Plaintiffs ask this Court to intervene in this administrative proceeding and to grant their summary judgment motion that was rejected by the ALJ.

- Heidi Unke – Case ID 201374754 – Plaintiffs' counsel again provides a single document – the "Notice of Intent to Recover" dated April 13, 2015. No hearing has yet been. Plaintiffs' counsel, however, asks this Court to conclude, without the benefit of any factual record, that any services in question were provided and that the entire administrative proceeding should be dismissed.

- Nidra Moore – Case No. ML-15-0234 – Plaintiffs' counsel provides DHS's closing brief in this matter dated March 16, 2016. She also provides her letter to the ALJ dated September 28, 2016, in which she asserts that this Court's order in this matter is controlling as to Ms. Moore's case, and asks the ALJ to find in her favor. DHS's attorney's email to the ALJ is then also provided, in which he disagrees with plaintiffs' counsel's legal conclusion on that issue. No decision has been issued, yet plaintiffs' counsel asks this Court to usurp the ALJ's authority and to conclude (based on these three documents) that DHS is in violation of this Court's order.

Plaintiffs are asserting that this Court should blindly: (a) accede to plaintiffs' conclusions that all services in question were provided in all of these matters; and (b) enforce these conclusions by enjoining these administrative agency proceedings

and any and all relief, remedy, or sanctions that DHS might eventually order without allowing the administrative process to be completed. Plaintiffs' motion is without precedent or any legal basis whatsoever and should be denied.

## II. Plaintiffs' motion is barred because the procedures specified by Wis. Stat. Chapter 227 are the referenced petitioners' exclusive remedy.

Wisconsin Stat. ch. 227 provides that any "[a]dministrative decisions which adversely affect the substantial interests of any person, whether by action or inaction, whether affirmative or negative in form, are subject to review as provided in this chapter . . .". Wis. Stat. § 227.52. This method of review is exclusive. Controlling precedent holds that judicial review provided by Wis. Stat. ch. 227 for review of administrative decisions is exclusive. *See*, *e.g.*, *State ex rel. 1st Nat. Bank v. M & I Peoples Bk.*, 82 Wis. 2d 529, 540-46, 263 N.W.2d 196 (1978) (statutory remedy under Wis. Stat. ch. 227 is exclusive; special proceeding seeking *quo warranto* remedy cannot be substituted); *Board of Regents v. Wisconsin Pers. Comm.*, 103 Wis. 2d 545, 550-51, 309 N.W.2d 366 (Ct. App. 1981) (where statutory method of review is prescribed for administrative proceeding, statutory remedy is generally exclusive). *See also Turkow v. DNR*, 216 Wis. 2d 273, 576 N.W.2d 288 (Ct. App. 1998) (A declaratory judgment action is improper when the plaintiff did not pursue available remedies under Wis. Stat. ch. 227).

Plaintiffs' motion is premature in that no formal decisions or final actions have been taken by DHS with respect to the five referenced petitioners. No funds have been recouped and no final decisions have been rendered by DHS with respect to the five referenced petitioners. Having said that, however, to the extent

petitioners are challenging the agency's conduct in any respect, the plaintiffs' demand for supplemental relief and/or sanctions in the ongoing administrative proceedings is barred because their Chapter 227 remedy is exclusive.

## III. Plaintiffs' motion is barred because the petitioners have not exhausted their administrative remedies under chapter 227.

The five referenced petitioners cannot bring their disputes in the circuit court through a declaratory judgment action by the plaintiffs (which is closed and currently on appeal) until they have first exhausted their administrative remedies. Wisconsin Stat. ch. 227 is their exclusive remedy. It provides the sole mechanisms by which administrative agency decisions may be reviewed and challenged. *See* Wis. Stat. § 227.52. "Thus, 'where there is a specific procedure for review of administrative action and for court review of the administrative decision, the remedy before the administrative agency must be pursued *prior* to resort to judicial remedies.'" *Jackson County Iron Co. v. Musolf*, 134 Wis. 2d 95, 101, 396 N.W.2d 323 (1986), quoting *Castelaz* v. *Milwaukee*, 94 Wis. 2d 513, 532, 289 N.W.2d 259 (1980) (emphasis in *Jackson County Iron Co.* case).

The state's consent to suit against its agencies is set forth in Wis. Stat. ch. 227, and constitutes the exclusive method for judicial review of agency determinations. *Jackson County Iron Co.*, 134 Wis. 2d at 101-03; *Kosmatka v. DNR*, 77 Wis. 2d 558, 567, 253 N.W.2d 887 (1977); *see also Kegonsa Joint Sanitary Dist. v. City of Stoughton*, 87 Wis. 2d 131, 145-46, 274 N.W.2d 598 (1979) ("the general rule that ch. 227 procedures provide the exclusive method of review of administrative action"). As the courts have stated, "case law has established that

the legislative intent was to limit judicial review to 'final orders of the agency.'" *Sierra Club v. Wisconsin Dept. of Natural Resources*, 2007 WI App 181, ¶ 13, 304 Wis. 2d 614, 736 N.W.2d 918 (footnote omitted), citing *Pasch v. DOR*, 58 Wis. 2d 346, 353, 206 N.W.2d 157 (1973); *see also Waste Management of Wis., Inc. v. DNR*, 128 Wis. 2d 59, 90, 381 N.W.2d 318 (1986) (Wis. Stat. § 227.52 (formerly Wis. Stat. § 227.15) limits judicial review to "agency actions which are final").

In the five administrative proceedings referenced in plaintiffs' motion, no final decisions have been issued by DHS, and there has been no recoupment of any funds from the petitioners. Petitioners have not, therefore, exhausted their administrative remedies at this point. These matters are not ripe for review by *any* court, the basic rationale of the "ripeness" doctrine being "to prevent courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Lister v. Bd. of Regents of the Univ. of Wis. System*, 72 Wis. 2d 282, 309, 240 N.W.2d 610 (1976).

Here, there are no final agency actions subject to judicial review. The plaintiffs cannot bring a motion for relief (supplemental or otherwise) on behalf of the referenced petitioners in *any* circuit court until the agency has issued some sort of final order as to those petitioners.

## IV. Plaintiffs are requesting supplemental relief that goes far beyond the Court's September 27, 2016, Order in this matter.

Plaintiffs' motion for contempt and supplemental relief must be denied for a threshold reason. 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 has no jurisdiction to alter the judgment. Here, plaintiffs are requesting supplemental relief in the form of an order enjoining five ongoing administrative proceedings. Plaintiffs do not want the Court to simply enforce its September 27, 2016, Order, which stated that DHS may not recoup funds from Medicaid providers once it has been determined that the services were actually provided; they now want this Court to halt the entire audit and hearing process prior to final decisions being rendered as to whether recoupment or any other remedial actions[2] are warranted.

If the Court were now to issue a broad order enjoining numerous ongoing administrative proceedings in which no final decisions ordering recoupment have even been rendered, it would improperly expand the original judgment and interfere not only with the administrative process, but with appellate jurisdiction, as well. Such action by this Court is precluded by *Madison Teachers*. Thus, it would be highly improper for this Court to grant the relief plaintiffs seek in the form requested. Plaintiffs' motion must be denied.

## V. Plaintiffs' motion must be denied because DHS is not in contempt of any directive order of this Court.

Notwithstanding that this Court does not have the authority to grant the supplemental relief requested because it expands the scope of the judgment on

[2] This Court stated in its September 27, 2016, Order that DHS has the authority to take actions other than recoupment pursuant to, *inter alia*, Wis. Stat. §§ 49.45(2)12 and 13. (Order, p. 4). The supplemental relief being requested by plaintiffs would, in essence, foreclose DHS from taking any action, whatsoever.

appeal, there also can be no contempt because the September 27, 2016, Order of this Court cannot form the basis for the alleged contempt.

Under Wis. Stat. § 785.01(1)(b), "contempt of court" means "intentional . . . [d]isobedience, resistance, or obstruction of the authority, process or order of a court." Plaintiffs' motion for contempt and supplemental relief must be dismissed because DHS is not violating any directive order. The Order issued by this Court barred DHS from recouping funds from a Medicaid provider where "the documentation verifies that the services were provided." (September 27, 2016, Order, p. 7). That order does not specify (nor could it, given that no specific set of facts was before the Court) the level of documentation necessary to conclude whether the services in question were actually provided. Such a determination must, of necessity, be made on a case-by-case basis, based on the facts of a particular matter. Even then, the parties might disagree as to whether the documentation is sufficient, in which case the non-prevailing party can seek judicial review pursuant to the procedures under Wis. Stat. Chapter 227, as noted above.

Absent a specific, universal standard as to what level of documentation is necessary in order to determine whether any given services were provided, and absent a full and complete record of an administrative proceeding by which to make such a determination, it cannot be concluded that DHS is in contempt and no hearing to show cause is either appropriate or necessary.

Moreover, "contempt of court" is defined by Wis. Stat. § 785.01(1)(b) as "*intentional* . . . [d]isobedience, resistance or obstruction of the authority, process or

order of a court" (emphasis added). Here, because no final decisions have been rendered in the five referenced administrative proceedings and because no dollars have been recouped from any of the five referenced petitioners, there cannot be any intentional conduct by DHS, nor does plaintiffs' motion cite any evidence of intentional conduct by any specific DHS official. Absent final decisions in these proceedings (and without reviews of the full administrative records) it would be grossly premature to label any conduct by DHS as contemptuous. Thus, plaintiffs' allegations do not even suggest "contempt" under the statutes. Plaintiffs' motion for sanctions should be denied.

## VI. Plaintiffs' request for damages on behalf of the five referenced petitioners must be denied because damages are not available in a Chapter 227 proceeding and because a party cannot seek attorney fees and costs until after an administrative proceeding is concluded or until after circuit court review of an agency decision.

Plaintiffs' motion improperly seeks "damages" in the form of costs and attorney fees the five referenced petitioners have incurred in their ongoing administrative proceedings since September 27, 2016. Aside from the fact that damages are not ordinarily available in a Chapter 227 proceeding[3], the statutory remedies for claiming attorney fees and costs in a Chapter 227 proceeding are found at Wis. Stat. §§ 227.485 and 814.245. Those statutes allow a prevailing party to seek attorney fees and costs following the *conclusion* of either the administrative proceeding (§227.485) or *after* receiving a favorable decision following circuit court review (§814.245). Neither has happened here. Therefore, any motion by plaintiffs

to recover attorney fees or costs on behalf of the five referenced petitioners with respect to those petitioners' ongoing administrative proceedings is premature and must be denied.

## CONCLUSION

Plaintiffs' motion improperly asks this Court to intervene in ongoing administrative proceedings in which no final decisions have been rendered and no dollars have been recouped. Plaintiffs' request has no basis in law and would improperly expand the Court's final judgment while this case is pending before the Court of Appeals. Plaintiffs' request that the Court unilaterally halt administrative agency proceedings based on nothing but the plaintiffs' counsel's subjective assertions regarding the merits of the underlying agency proceedings is without precedent and is without basis in law or fact. Plaintiffs' motion and all of plaintiffs' requests for relief should be denied.

Respectfully submitted this 27th day of January 2017.

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Electronically signed by:
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[3] *See Kegonsa Joint Sanitary Dist. v. City of Stoughton*, 87 Wis. 2d 131, 146-48, 274 N.W.2d 598, 605-06 (1979) (footnotes omitted).

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