



FH
[REDACTED]

**STATE OF WISCONSIN
Division of Hearings and Appeals**

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

DECISION

MGE/149023

PRELIMINARY RECITALS

Pursuant to a petition filed April 29, 2013, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Manitowoc County Department of Human Services [“County”] in regard to Medical Assistance [“MA”], a Hearing was held via telephone on June 19, 2013. With the agreement of petitioner the record of the June 19th Hearing was held open until August 16, 2013 for the submission of post-Hearing briefs.

The issue for determination is whether the County is precluded from making the argument it now seeks to make.

There appeared at that time via telephone the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Petitioner's Representative:

Attorney Alison Petri
22 Maritime Dr
P O Box 2225
Manitowoc, WI 54221-2225

Respondent:

Department of Health Services
1 West Wilson Street
Madison, Wisconsin 53703

By: Attorney Steven J. Rollins, Corporation Counsel
Manitowoc County
1010 South 8th Street
Manitowoc, WI 54220

OTHER PERSONS PRESENT:

Lori Baranczyk, ESS
Deb Williquette, ES Supervisor

ADMINISTRATIVE LAW JUDGE:
 Sean P. Maloney
 Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]; 70 years old) is a resident of Manitowoc County.
2. Petitioner applied with the County for institutional MA on November 15, 2012; the County denied petitioner's November 15, 2012 institutional MA application by a *Negative Notice* dated November 16, 2012; the County denied petitioner's application because after an investigation, examination of documents, and consultation with a state policy analyst, it concluded that, although certain assets were not available to petitioner, petitioner had divested those assets. Exhibits #4 & #6; See also, Exhibits #1, #2, #3 & #5.¹
3. On December 24, 2012 petitioner filed an appeal of the County's November 16, 2012 denial with the Division of Hearings and Appeals ["DHA"]; that appeal was assigned appeal # MDV/146155 and a Hearing was held on January 30, 2013; at that Hearing the County argued that the assets in question had been divested; County representatives testified that the assets in question were not available and that the divestment was the only basis for the penalty against petitioner. Exhibit #6; audio recording of January 30, 2013 Hearing at 7:30, 28:30 & 29:20.
4. Following the January 30, 2013 Hearing DHA issued a *Decision*, dated March 7, 2013, in MDV/146155; that *Decision* involved the same parties (petitioner and the County) as the present appeal (MGE/149023); *Decision* MDV/146155 concluded that the assets in question were not divested. DHA Case No. MDV/146155 (Wis. Div. Hearings & Appeals March 7, 2013) (DHS). Exhibit #6.
5. *Decision* MDV/146155 is a final judgment on the merits; the County did not ask for a rehearing of *Decision* MDV/146155 or appeal it to Circuit Court.
6. By a manual *Positive Notice* dated March 15, 2013 the County approved petitioner's November 15, 2012 institutional MA application with a start date of October 2012, rather than it an earlier start date, because it concluded that the assets in question (the same assets that were the subject of *Decision* MDV/146155) were available assets. Exhibit #7.
7. On April 29, 2013 petitioner filed an appeal of the County's March 15, 2013 *Positive Notice* with DHA because he contends that the assets in question were not available and that the start date for his institutional MA should be before October 2012; that appeal, which is the subject of this *Decision*, was assigned appeal # MGE/149023 and a Hearing was held on June 19, 2013; the County now argues that the assets in question (the same assets that were the subject of *Decision* MDV/146155) were available assets; the underlying facts in *Decision* MDV/146155 and in this matter (MGE/149023) are identical.

DISCUSSION

The legal doctrine of claim preclusion (formerly known as *res judicata*) provides that a final judgment on the merits bars parties from relitigating any claim that arises out of the same relevant facts, transactions, or occurrences. Ordinarily a final judgment is conclusive in all subsequent actions as to all matters which

¹ Exhibit numbers are the numbers assigned by petitioner's attorney to the exhibits attached to her April 29, 2013 opening brief.

were litigated or which might have been litigated in the former proceedings.² The following factors must be present:

- (1) an identity between the parties or their privies in the prior and present suits;
- (2) prior litigation resulted in a final judgment on the merits by a court with jurisdiction; and,
- (3) identity of the causes of action in the two suits.

Sopha v. Owens-Corning Fiberglas Corp., 230 Wis. 2d 212, 233-234, 601 N.W.2d 627 (1999); See also, *Northern States Power Co. v. Bugher*, 189 Wis.2d. 541, 550-551, 525 N.W.2d. 723 (1995).

As outlined in the above *Findings of Fact*, all of these factors are present in this case. Therefore, the County is precluded from making the argument it now seeks to make (that the assets in question are available assets).

Exceptions to the doctrine of claim preclusion, confined within proper limits, may occur when the policies favoring preclusion of a second action are trumped by other significant policies. Claim preclusion is a principle of public policy applied to render justice, not to deny it. *Sopha v. Owens-Corning Fiberglas Corp.*, 230 Wis. 2d at 236. This is a narrow exception to the doctrine and applies when a second action, through no fault of the person seeking the exception, is necessary in the interest of justice. *Id.*, at 237-238.

The County had the opportunity at the Hearing for MDV/146155 to make the argument it now seeks to make. It could have argued that the assets were divested and, in the alternative, that the assets, if not divested, were available assets. It did not.³ Additionally, the County did not ask for a rehearing of *Decision* MDV/146155 or appeal it to Circuit Court. The County chose not to make all the arguments it could have made in MDV/146155. The County chose not to ask for a rehearing and chose not to appeal to Circuit Court. It cannot be said, therefore, that a second action is necessary through no fault of the County's.

The County argues that claim preclusion does not apply because *Decision* MDV/146155 "changed the underlying facts when it stated, as a conclusion of law based on the specific facts of the case, that the money placed in the attorney's trust account was not a divestment . . ." *Manitowoc County's Response Brief*, dated August 1, 2013 [County's Brief], page 3. First, there has been no change in the underlying facts in this matter. As the County itself points out, *Decision* MDV/146155's conclusion that there was not divestment is a conclusion of law -- not a factual determination. The underlying facts in *Decision* MDV/146155 and in this matter (MGE/149023) are identical. Second, the County cites no precedential legal authority for the proposition that claim preclusion does not apply if there is a significant change in the underlying facts.⁴

² Administrative Decisions may carry preclusive effect. See, *Froebel v. Meyer*, 13 F.Supp.2d 843, 858, 47 ERC 1359 (E.D.Wis. 1998) rehearing and rehearing en banc denied by *Froebel v. Meyer*, 217 F.3d 928, 934, 50 ERC 2102, 30 Env'tl. L. Rep. 20,746 (7th Cir.(Wis.) 2000) cert. denied by *Froebel v. Meyer*, 531 U.S. 1075, 121 S.Ct. 769, 148 L.Ed.2d 669, 69 USLW 3318, 69 USLW 3449, 69 USLW 3456, 51 ERC 2152 (2001); See also, *Acharya v. American Fed'n of State, County & Mun. Employees*, 146 Wis.2d 693, 697, 432 N.W.2d 140 (Ct.App.1988); and, *Patzer v. Board of Regents of the Univ. of Wis. Sys.*, 763 F.2d 851, 858 (7th Cir.1985) ("In general, a judgment affirming an administrative decision is res judicata as to the claims adjudicated, no less than a judgment entered after a trial on the merits.").

³ In fact, the County's position at that time is that the assets in question were not available. It now seeks to change that position and argue that the assets were available.

⁴ The County cites a DHA Decision from the year 2000 -- but DHA Decisions have no precedential value. County's Brief, page 2, footnote 8.

The County also argues that claim preclusion does not apply “because public policy disfavors the disposal of assets for the purpose of becoming eligible for medical assistance [footnote omitted].” County’s Brief, page 3. This misses the point. The type of disposal of assets that is disfavored is the divestment of assets. See, Wis. Stat. § 49.453(2)(a) (2011-12); See also, Wis. Admin. Code § DHS 103.065(4)(a) (December 2008); *Medicaid Eligibility Handbook* 17.2.1 et. seq. It has already been determined that petitioner has not divested assets. See, DHA Case No. MDV/146155 (Wis. Div. Hearings & Appeals March 7, 2013) (DHS). Exhibit #6.

CONCLUSIONS OF LAW

The County is precluded, by the legal doctrine of claim preclusion, from making the argument it now seeks to make.

NOW, THEREFORE, it is

ORDERED

That this matter be REMANDED to the County, that the assets in question (the same assets that were the subject of *Decision* MDV/146155) were not available assets, and that, within 10 days of the date of this *Decision*, that the County reprocess petitioner’s November 15, 2012 institutional MA application and issue all institutional MA benefits for which petitioner is otherwise eligible.

REQUEST FOR A REHEARING

This is a final administrative decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a rehearing. You may also ask for a rehearing if you have found new evidence which would change the decision. Your request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

To ask for a rehearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST." Your request for a rehearing must be received no later than 20 days after the date of the decision. Late requests cannot be granted.

The process for asking for a rehearing is in Wis. Stat. § 227.49. A copy of the statutes can be found at your local library or courthouse.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be served and filed with the appropriate court no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

For purposes of appeal to circuit court, the Respondent in this matter is the Department of Health Services. After filing the appeal with the appropriate court, it must be served on the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson

Street, Madison, Wisconsin 53703. A copy should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to the Circuit Court is in Wis. Stat. §§ 227.52 and 227.53.

Given under my hand at the City of Madison,
Wisconsin, this 26th day of August, 2013

\sSean P. Maloney
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on August 26, 2013.

Manitowoc County Department of Human Services
Division of Health Care Access and Accountability
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