

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 12, 2016

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2015AP781

Cir. Ct. No. 2014CV2290

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

**DAPHNE F. EILAND, NEW BEGINNINGS CHILD CARE INC. C/O
DAPHNE F. EILAND, TONYA NEAL, T-MARIE'S MULTICULTURAL
CHILDCARE & LEARNING CENTER LLC C/O TONYA NEAL, CHERYL
MEEKS, SWEET ANGELS COMMUNITY CHILD CARE LLC C/O CHERYL
MEEKS, CARRIE WILLIAMS, CARRIE'S CHILD DEVELOPMENT CENTER
LLC C/O CARRIE WILLIAMS, IRMA JOHNSON-SMITH, LIFE'S
PRECIOUS GIFTS FAMILY CHILD CARE LLC C/O IRMA
JOHNSON-SMITH, PATRICIA ECHOLS, BLESSINGS LEARNING
ACADEMY, LLC C/O PATRICIA ECHOLS, ROSE PATTERSON, BABES IN
JOY LAND INC. C/O ROSE PATTERSON, BRENDA PITTMAN,
INFANT/TODDLER UNIVERSITY, LTD. C/O BRENDA PITTMAN, TAMMY
THOMPSON, TAMMY'S TOTS CHILD CARE CENTER C/O TAMMY
THOMPSON, STEPHANIE BURGESS AND SPARKLE'S CHILD CARE
CENTER, LLC C/O STEPHANIE BURGESS,**

PLAINTIFFS-APPELLANTS,

v.

ELOISE ANDERSON AND DEPARTMENT OF CHILDREN AND FAMILIES,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County:
CHRISTOPHER R. FOLEY, Judge. *Affirmed.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 PER CURIAM. This appeal stems from an order dismissing a class action brought against the Department of Children and Families and its secretary Eloise Anderson (collectively referred to as DCF). Daphne F. Eiland and the other appellants (hereafter collectively referred to as Eiland unless the context otherwise requires) are child care providers claiming that DCF took their private contracts with customers without just compensation and violated their substantive due process rights.¹ The circuit court dismissed Eiland’s amended complaint, and we affirm.

I. BACKGROUND

a. *Wisconsin Shares*

¶2 The State set forth a synopsis of the Wisconsin Shares program in its statement of the case. Much of that information is incorporated here.

¶3 The federal government gives the states block grants from the Child Care and Development Fund (CCDF) to subsidize child care services for low-income families. *See* 42 U.S.C. §§ 9858-9858q (2014). Participating states must give parents of eligible children the option either “[t]o enroll such child with a

¹ In the original complaint, Eiland and her child care facility were the only plaintiffs. The amended class action complaint added eighteen plaintiffs, nine individuals and their nine child care facilities. The additional plaintiffs do not allege facts or claims distinct from those asserted by Eiland.

child care provider that has a grant or contract for the provision of the service” or “[t]o receive a child care certificate.” 45 C.F.R. § 98.15(a)(2)(i), (ii). In other words, the state may either contract directly with providers or give certificates (also called vouchers) directly to families. This case involves child care vouchers.

¶4 A child care certificate is a check or other disbursement issued by the state to a parent “who may use such certificate only as payment for child care services.” 45 C.F.R. § 98.2. Child care certificates are issued directly to the parent. 45 C.F.R. § 98.30(c)(1). They are not “considered a grant or contract to a provider but shall be considered assistance to the parent.” 45 C.F.R. § 98.30(c)(6).

¶5 Wisconsin’s child care subsidy program, which is funded in part by the CCDF grant, is known as Wisconsin Shares. *See* WIS. STAT. § 20.437(2)(cm), (dz) (2013-14).² DCF implements Wisconsin Shares and is statutorily charged with promulgating rules establishing standards for the certification of child care providers and the quality of care. *See* WIS. STAT. § 49.155(1d)(a), (b).

¶6 Wisconsin Shares is generally administered by local child care administrative agencies. *See* WIS. STAT. § 49.155(3). In Milwaukee, the program is directly administered by DCF. *See* WIS. STAT. § 49.826(2).

¶7 The child care administrative agency is responsible for authorizing payment for services supplied by approved child care providers. WIS. ADMIN. CODE § DCF 201.04(1), (2g) (Feb. 2016).³ It is also responsible for providing

² All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

³ All references to the administrative code are to the February 2016 publication.

Wisconsin Shares vouchers to “eligible parents.” Sec. DCF 201.04(2)(a). “A voucher shall be in writing and shall authorize a parent to obtain child care services stipulated in that voucher from [an authorized] provider.” Sec. DCF 201.04(2)(a)l.b. DCF issues the payments to authorized child care providers. WIS. STAT. § 49.155(3m)(a); Sec. DCF 201.04(2)(i).

¶8 Under the administrative rules, DCF may “[r]efuse to issue payments to the provider” if the provider does the following:

submits false, misleading, or irregular information to a child care administrative agency or [DCF] or if a child care provider fails to comply with the terms of the [Wisconsin Shares] program in s. 49.155, Stats., or this chapter and the provider fails to provide to the satisfaction of the department an explanation for the noncompliance.

WIS. ADMIN. CODE § DCF 201.04(5)(c).

¶9 DCF has another rule that prohibits a child care provider from recouping withheld subsidy payments from the low-income parents of the children who were in its care:

If the department refuses to issue payment based on a provider’s violation of a requirement in this chapter, the provider may not hold the parent liable for payment other than the copayment and any amount that the parent agreed to above the department’s maximum reimbursement rate if the parent relied on an approved authorization for care for his or her child to receive care from the provider.

WIS. ADMIN. CODE § DCF 201.04(5)(f).

¶10 Any child care provider who wants to contest DCF’s refusal to issue a child care payment may request departmental review. WIS. ADMIN. CODE § DCF 201.07(1)(c). A provider who files a timely request for departmental review

will be given a contested case hearing under WIS. STAT. ch. 227. Sec. DCF 201.07(4).

b. *The underlying action.*

¶11 Eiland owned and operated a child care facility in Milwaukee. Nearly all of her customers used vouchers to pay for child care services. Eiland alleges that she requested DCF to pay the amounts stated in the vouchers and DCF refused. Pursuant to WIS. ADMIN. CODE § DCF 201.04(5)(f), Eiland could not recover the voucher amount from the low-income parents. Consequently, she filed a class action on behalf of herself and other child care providers DCF allegedly refused to pay.

¶12 Eiland's first three causes of action were takings claims. Specifically, she alleged that by refusing to pay the plaintiffs, by claiming the plaintiffs owe overpayments, and by claiming the plaintiffs owe negative adjustments, "[WIS. ADMIN. CODE §] DCF 201.04(5)(f) takes the property of providers—the contracts between plaintiffs and their customers—for public use without just compensation." Eiland's fourth cause of action was a substantive due process claim. She alleged WIS. ADMIN. CODE § DCF 201.04(5)(f), which prohibits plaintiffs from collecting the voucher amount from low-income parents, violates the plaintiffs' fundamental liberty and property interest in contracting with customers to provide child care services.

¶13 DCF filed a motion to dismiss the four causes of action on their merits. Additionally, DCF argued that the case should be dismissed because a suit against it is barred by sovereign immunity.

¶14 The circuit court concluded there was not an unconstitutional taking and there was no merit to Eiland’s substantive due process claim.⁴

¶15 Eiland appeals the circuit court’s order dismissing her amended complaint.

II. DISCUSSION

a. *Eiland does not assert a valid takings claim.*

¶16 Eiland alleged in her amended complaint that by refusing to pay the plaintiffs, by claiming the plaintiffs owe overpayments, and by claiming the plaintiffs owe negative adjustments, “[WIS. ADMIN. CODE §] DCF 201.04(5)(f) takes the property of providers—the contracts between plaintiffs and their customers—for public use without just compensation.”

¶17 We independently review a circuit court’s decision to grant a motion to dismiss for a complaint’s failure to state a claim. *See Rainbow Springs Golf Co. v. Town of Mukwonago*, 2005 WI App 163, ¶8, 284 Wis. 2d 519, 702 N.W.2d 40. In doing so, “we accept the truth of all alleged facts and all inferences one might reasonably draw from those facts. We independently review all legal conclusions. Whether or not a taking has occurred calls for a legal conclusion.” *Id.* (citations omitted).

¶18 The Wisconsin Constitution and the United States Constitution, made applicable to the states through the Fourteenth Amendment, provide that the

⁴ The circuit court did not address whether the class should be certified under WIS. STAT. § 803.08.

government may not “take” a person’s private property for public use without providing just compensation. *See* U.S. CONST. amend. V; WIS. CONST. art. I, § 13 (“The property of no person shall be taken for public use without just compensation therefor.”). “An unconstitutional taking occurs when (1) a property interest exists; (2) the property interest has been taken; (3) the taking was for public use; and (4) the taking was without just compensation.” *Wisconsin Med. Soc’y, Inc. v. Morgan*, 2010 WI 94, ¶38, 328 Wis. 2d 469, 787 N.W.2d 22.

¶19 Here, Eiland defines her property interest as “the contracts between plaintiffs and their customers.” Because the State concedes that this satisfies the first inquiry in the takings analysis, we move to the second inquiry and determine whether the property interest has been taken.

¶20 The crux of Eiland’s argument on appeal is that she did not agree to provide child care services in exchange for vouchers; rather, she agreed to provide child care services in exchange for money. Because nearly all of her customers relied on vouchers to pay for child care, she asserts “[i]t naturally follows that if DCF fails or refuses to pay, [her] customers should be responsible for the bills.” According to Eiland, WIS. ADMIN. CODE § DCF 201.04(5)(f) makes her contracts with customers unenforceable when DCF refuses to pay.

¶21 As set forth above, WIS. ADMIN. CODE § DCF 201.04(5)(f) establishes a no-liability-for-parents rule by providing that if DCF refuses payment to a provider, the provider cannot seek recovery of the subsidized value of child

care services from the parents.⁵ This code provision is part of the statutory and regulatory structure that authorizes DCF to pay Eiland for the child care services she provides to low-income families. If the child care provider complies with the rules, DCF issues payments. If the child care provider violates the rules or fails to comply with the terms of the Wisconsin Shares program, DCF can refuse to issue payments and the provider is prohibited from turning to the low-income parent. WIS. ADMIN. CODE § DCF 201.04(5)(c), (f).

¶22 There are no allegations in the amended complaint as to the specific terms of Eiland’s contracts with her customers. However, even if we accept that the terms of Eiland’s contracts with her customers are as she implies—namely, that her customers promised to pay the subsidized value of child care services in the event DCF withheld payment—those terms would be in direct violation of the rules governing the Wisconsin Shares program. The State submits that such a provision would be illegal and unenforceable, and Eiland does not develop a coherent argument rebutting the State’s position. *See Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed admitted).

¶23 We conclude Eiland has failed to meet her burden of proving beyond a reasonable doubt that DCF’s refusal to pay and its claims that she owes overpayments and negative adjustments, pursuant to the applicable statutory and regulatory framework of the Wisconsin Shares program, amounted to an

⁵ WISCONSIN ADMIN. CODE § DCF 201.04(5)(f) allows a provider to recoup “the copayment and any amount that the parent agreed to above the department’s maximum reimbursement rate if the parent relied on an approved authorization for care for his or her child to receive care from the provider.” Here, however, Eiland does not seem to be arguing that the parents agreed to pay amounts *above* DCF’s maximum reimbursement rate.

unconstitutional taking of her property interest in the contracts she had with her customers. *See Skow v. Goodrich*, 162 Wis. 2d 448, 450, 469 N.W.2d 888 (Ct. App. 1991) (“Statutes and regulations carry a heavy presumption of constitutionality and the challenger has the burden of proving unconstitutionality beyond a reasonable doubt.”). Consequently, we need not address the remaining inquiries in the takings analysis.

b. *Eiland does not assert a valid substantive due process claim.*

¶24 Eiland’s substantive due process claim also fails. In her amended complaint, she alleged that “[p]laintiffs have fundamental liberty and property interests in contracting with customers to provide child care services.” She contends “[WIS. ADMIN. CODE §] DCF 201.04(5)(f) is not rationally related to any legitimate state interest” and “is not substantially related to health[], safety or welfare of the public.”

¶25 Because we have already analyzed Eiland’s constitutional takings claim and concluded that it failed, we decline the invitation to conduct an analysis under the general notion of substantive due process. *See Al Ghashiyah v. McCaughtry*, 230 Wis. 2d 587, 599, 602 N.W.2d 307 (Ct. App. 1999) (“A claim for relief which alleges a substantive due process violation, but which involves allegedly unlawful acts by governmental agents that are specifically addressed by other constitutional protections, should be analyzed under the more particular amendment rather than under ‘the more generalized notion of substantive due process.’”) (citation omitted; one set of quotation marks omitted); *see also Stop the Beach Renourishment, Inc. v. Florida Dep’t of Env’tl. Prot.*, 560 U.S. 702, 721 (2010) (“The first problem with using Substantive Due Process to do the work of the Takings Clause is that we have held it cannot be done.”).

¶26 The circuit court properly dismissed Eiland's amended complaint. Accordingly, we affirm.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

