

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

November 14, 1996

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

NOTICE

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

No. 95-2869

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

CALLI A. MARTZ,

Petitioner-Appellant,

v.

**STATE OF WISCONSIN DEPARTMENT OF HEALTH AND
SOCIAL SERVICES, BUREAU OF HEALTH CARE
FINANCING,**

Respondent-Respondent.

APPEAL from a judgment of the circuit court for Adams County:
DUANE H. POLIVKA, Judge. *Affirmed.*

Before Eich, C.J., Dykman, P.J., and Robert D. Sundby, Reserve
Judge.

PER CURIAM. Calli Martz appeals from a judgment affirming a decision of the Department of Health and Social Services. After prevailing in a dispute with the Bureau of Health Care Financing, Martz moved for costs and attorney's fees under § 227.485, STATS. DHSS denied her motion on grounds

that the Bureau took a substantially justified position in the dispute. The trial court affirmed that ruling, and so do we.

Martz suffers from a disease that prevents her from metabolizing protein. The medically necessary treatment for her condition includes a diet based on food products comprised of basic food that is extensively processed to remove protein.

Martz receives Medical Assistance (MA), but the Bureau refused to pay for the food products she consumes in her treatment. The Bureau contended that MA does not cover food. Martz contended, and DHSS agreed in its decision on the dispute, that the products were instead food replacement products that are covered by MA. *See* WIS. ADM. CODE § HSS 107.10(2)(c). DHSS concluded that the prohibition on MA coverage for food "does not extend to extreme medical conditions which require diets based on special types of food items that can normally only be conveniently obtained through pharmacies at prices approaching, or exceeding, those paid for prescription medications." However, DHSS also found that the Bureau's position had a reasonable basis in law and fact "because federal law does not include food in MA covered services, and the items of question do carry strong resemblance to food." The latter ruling is the subject of this appeal.

One who prevails over a state agency in a contested administrative proceeding may recover costs incurred in the proceeding if the agency takes a position that is not substantially justified. Section 227.485(3), STATS. Substantially justified means "having a reasonable basis in law and fact." Section 227.485(2)(f). The agency bears the burden of showing its position is substantially justified. *Sheely v. DHSS*, 150 Wis.2d 320, 337, 442 N.W.2d 1, 9 (1989). When an agency uses its expertise in deciding the issue, we will defer to the agency's conclusions if they are reasonable, even if we disagree with them. *Id.* at 338, 442 N.W.2d at 9-10.

DHSS reasonably concluded that the Bureau's position was substantially justified. The Bureau relied on the undisputed legal premise that MA does not pay for food. Factually, it contended that expensive, highly processed and medically necessary food products are, nevertheless, still food. DHSS concluded, to the contrary, that through processing they instead became

food "replacements." The issue is not easily resolved by reference to the applicable state and federal statutes and regulations. In its decision, DHSS plainly struggled in its attempt to distinguish between food and food replacements, ultimately resorting to statutory and regulatory intent. Under those circumstances, the Bureau could, with substantial justification, argue for one of two reasonable interpretations of highly ambiguous laws.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.