

**BEFORE THE COMMISSIONER OF THE TENNESSEE  
DEPARTMENT OF FINANCE AND ADMINISTRATION**

IN THE MATTER OF: )  
 )  
 [REDACTED], ) APPEAL to the DIVISION OF  
Appellant. ) TENNCARE  
 )  
 ) Appeal # [REDACTED]  
 )

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**RESPONSE TO MOTION TO DISMISS BASED ON RES JUDICATA  
AND CONTINGENT MOTION UNDER RULE 60.02 TO CORRECT MISTAKE**

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[REDACTED], Appellant, files this Response to Motion to Dismiss Based on Res Judicata as follows:

**Facts**

Appellant incorporates by reference the facts stated in Appellant’s Consolidated Statement of Facts for All Responses to TennCare Motions, filed August 1, 2022.

**Argument**

TennCare’s Motion should be denied. It’s entire argument is that this case is not the same case and that Appellant started a different case where Appellant is making the same argument. This is the SAME case and is no different room any other case that makes its way to the same appellate court for a second time.<sup>1</sup>

Judge Ren’s Order concluded, holding the March 29, 2022 hearing was:

Decided in favor of Petition and is GRANTED, in part, and REMANDED to TennCare for further processing pursuant to the findings in this Order.

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<sup>1</sup> A Lexis search for “what is remand” yielded 10,000+ results among Tennessee cases. A search of “appeal after remand” yielded 610 cases. The most recent case, decided July 28, 2022 is *Lacy v. Meharry Gen. Hosp.*, 2022 Tenn. App. LEXIS 294. The opinion begins with “This is Plaintiff’s second appeal of this action.” More relevant, legal mistakes, which Appellant contends occurred during the first fair hearing may always be corrected. Rule 59 of the Tennessee rules of Civil Procedure would have allowed Judge Ren to correct the mistake had a motion been filed after the first hearing. This Court can correct the mistake now because the matter is not final and is again before it. However, even if the Court believed this is a different case, Appellant contends Rule 60.02 permits this Court, on motion, to correct even final judgments within one year where a mistake occurred.

TennCare SHALL review Petitioner's entire case and reconsider her eligibility for LTSS Institutional Medicaid benefits, excluding the value of the UAI Co. life insurance policy as of October 28, 2021. Should TennCare require additional information, TennCare shall request such information from Petitioner, Mr. [REDACTED], and Ms. [REDACTED], in writing, and said individuals are strongly encouraged to cooperate with TennCare and timely provide any requested information pursuant to the instructions in any request. TennCare SHALL provide Petitioner Mr. [REDACTED] and Ms. [REDACTED] with written notice of its determination and full appeal rights for Petitioner shall attach to said determination. Should Petitioner be found eligible for LTSS Institutional Medicaid benefits, TennCare SHALL grant said benefits with an effective date in compliance with applicable law. Nothing in this Order shall affect Petitioner's current QMB coverage, nor shall it preclude Petitioner from submitting a new application for LTSS Institutional Medicaid benefits.

(See pages 46-47 of Notice of Hearing).

TennCare believes, citing *res judicata*, Judge Ren's Order precludes re-examination of the issues in this appeal. Parsing Judge Ren's Order, it does not prevent re-examination of the issue. Rather, it invites it. Judge Ren's Order:

- a. **Remands** the case;
- b. **Requires** TennCare to review the entire case;
- c. **Requires** TennCare **to reconsider** Mrs. [REDACTED]'s eligibility for LTSS Institutional Medicaid benefits;
- d. **Allows** TennCare to request and consider additional information;
- e. **Requires** TennCare to provide **written notice of its determination**;
- f. **Grants** Mrs. [REDACTED] **full appeal rights**;
- g. **Requires** TennCare to **grant benefits with an effective date in compliance with applicable law**.

Judge Ren's Order is similar to the order discussed in *P. R. Mallory & Co. v. Ramsey*, 566 S.W.2d 859 (Tenn. 1978). There, in a worker's compensation case, the Tennessee Supreme Court stated: "Neither do we find any merit in the contention of the employer that the trial court, upon remand, was without authority to reopen his original decree and award benefits for temporary total disability. The necessary effect of the remand was to reopen the adjudication of permanent partial disability which the trial court had awarded in its original decree." Similarly, Judge Ren's remand expressly directed TennCare to reconsider Appellant's eligibility for LTSS Institutional Medicaid in light of the entire case and any additional information it might request. After re-determining her eligibility, TennCare was directed to give Appellant written notice of its

redetermination, awarding eligibility with an effective date in compliance with applicable law, and Appellant had full appeal rights.

On remand TennCare did nothing Judge Ren Ordered. It did not review Appellant's entire file and grant benefits with an effective date in compliance with applicable law. Instead, on May 10, 2022, TennCare did exactly what you might expect someone to do when they treat people like numbers – it cut and pasted the date from Judge Ren's Order without considering whether an earlier eligibility date was appropriate under applicable law. TennCare's Notice of Hearing, page 214-215.

On July 25, 2022, Appellant filed a Supplemental Response, calling the Court's attention to *Chamberlin v. Kijakazi*, 2022 U.S. Dist. LEXIS 131045 (W.D. Mo. July 25, 2022) and attaching a copy of that decision. Appellant contends Chamberlin, is relevant and persuasive because TennCare cannot impose eligibility criteria more stringent than the SSI program.

Notwithstanding TennCare's motion, Appellant is doing exactly what Judge Ren said she could do in exercising her appeal rights. She is also doing what the Notice of Decision states: “Do you think we made a mistake? If so you can file an appeal. When you appeal you're asking to tell your side to a judge or hearing office. It's called a fair hearing.” (Page 215) (Emphasis added).

First, this is the same case on appeal; it is not a “second suit” as described in Section 3.18 of the Notice of Hearing.<sup>2</sup> Judge Ren's remand Order required TennCare to “review Petitioner's entire case and reconsider her eligibility for LTSS Institutional Medicaid benefits” and “grant said benefits with an effective date in compliance with applicable law.” As in *Chamberlin*, Appellant contends TennCare did not follow the spirit of Judge Ren's instruction on remand.

It is ironic that the notice of decision being appealed at least gives lip-service to Judge Ren's Order, while the Notice of Hearing argues that Judge Ren's holding that

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<sup>2</sup> TennCare cites *Drummond v. Com'r of Social Sec.*, 126 F3d 837 (6th Cir. 1997) and *Richardson v. Tennessee Bd. of Dentistry*, 913 S.W. 2d 446 (1995) in support of its res judicata argument. In *Drummond*, the applicant filed her first benefits application on July 6, 1987. It was denied, although the ALJ found that Drummond was unable to perform her past work but retained a residual functional capacity ("RFC") for "sedentary" work. Drummond filed a second application for benefits on October 14, 1988. Following denial of her second application, Drummond appealed and argued that the first ALJ's determination that she was limited to sedentary work must be followed by the second ALJ based on the principles of *res judicata*. The case was remanded with instructions that the agency should determine whether res judicata is applicable against the Secretary. So *Drummond* literally involved two different actions between the same parties. *Richardson*, at footnote 11, states “As noted in the quotation from Massengill, the doctrines of res judicata and collateral estoppel are very similar. Res judicata bars litigation if a second suit involves the same parties and the same cause of action that was determined in the first action. Collateral estoppel prevents identical parties from relitigating in a different action issues determined in a previous suit. As such, *Richardson* does not support application of *res judicata* when the matter is remanded, an agency re-determination is made, and the same case is again appealed.

Appellant has “full appeal rights for Petitioner shall attach to said determination” does not.

### **Contingent Rule 60.02 Motion to Correct a Mistake**

Appellant does not believe the prior Order was a final Order that allows TennCare to plead res judicata. As such, TennCare’s Motion should be denied. However, out of an abundance of caution, Appellant moves pursuant to Rule 60.02 that she be granted relief and that the prior decision be set aside because the effective date of Appellant’s coverage was incorrect as a matter of law. The prior decision was issued not more than one year ago.

Respectfully submitted this 1<sup>st</sup> day of August, 2022.

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**CERTIFICATE OF SERVICE OF  
RESPONSE TO MOTION TO DISMISS BASED ON RES JUDICATA**

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The undersigned hereby certifies that this day true and correct copies of the foregoing Appellant's Response was sent as follows:

VIA Email: amos.bailey@tn.gov  
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VIA Email: talley.a.olson@tn.gov  
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VIA FAX to 844-563-1728  
And VIA Email: Appeals.Clerk.TennCare@tn.gov  
TennCare Eligibility Appeals Clerk  
P.O. Box 305240  
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with copy to:  
Hon. Christie R. Taylor via email at:  
christie.1.Taylor@tn.gov

Respectfully submitted this 1<sup>st</sup> day of August, 2022.

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