

IN THE SUPREME COURT OF OHIO

AUTUMN HEALTH CARE OF  
ZANESVILLE, INC.,

Relator,

v.

OHIO ATTORNEY GENERAL MIKE  
DEWINE, et al.

Respondents.

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) CASE NO. 2013-1884  
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) Original Action in Mandamus  
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RELATOR AUTUMN HEALTH CARE OF ZANESVILLE, INC.'S MOTION TO  
STRIKE OR, IN THE ALTERNATIVE MOTION PURSUANT TO CIV. R. 56(F)

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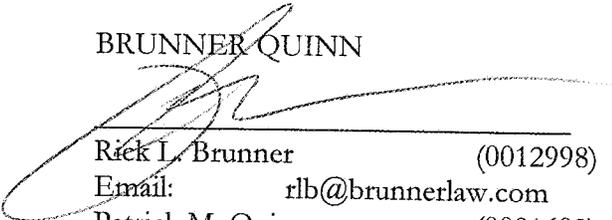
**RELATOR AUTUMN HEALTH CARE OF ZANESVILLE, INC.'S MOTION TO  
STRIKE OR, IN THE ALTERNATIVE MOTION PURSUANT TO CIV. R. 56(F)**

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Now comes Relator Autumn Health Care of Zanesville, Inc., by and through counsel, and respectfully moves this Court pursuant to Civ. R. 12(F) to strike the affidavits attached to Respondents' Motion for Judgment on the Pleadings for the reason that when reviewing a motion for judgment on the pleadings a court must limit its determination of the motion solely to the allegations in the pleadings and any writing attached to the pleadings.. In the alternative, and in event this Court decides to convert the Motion for Judgment on the Pleadings to a motion for summary judgment, Relator requests an extension pursuant to Civ. R. 56(F) to conduct discovery to refute the proffered evidentiary matter. A Memorandum in Support is attached.

Respectfully Submitted,

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*Attorneys for Relator*

## MEMORANDUM IN SUPPORT

### I. STATEMENT OF FACTS

On or about June 9, 2014, Respondents filed their Motion for Judgment on the Pleadings. In their Motion, as means of showing they have produced all responsive records, Respondents cite the affidavits of Erin Butcher-Lyden, Heather Coglianese, Cheryl Hawkinson and David Dokko. *See* Motion for Judgment on the Pleadings at pp. 12. These affidavits were not attached to Respondents' Answer to the Complaint. *See* Answer, generally.

### II. LAW AND ARGUMENT

#### A. Respondents cannot introduce evidence outside the pleadings without converting their Motion for Judgment on the Pleadings to a motion for summary judgment.

Respondents' Motion for Judgment on the Pleadings is based on Civ. R. 12) which does not permit evidence outside the pleadings.). Civ. R. 12(C) permits any party to move for judgment on the pleadings after the pleadings are closed but "within such time as not to delay the trial." *Rothchild v. Humility of Mary Health Partners*, 163 Ohio App.3d 751, 2005-Ohio-5481, 840 N.E.2d 258, ¶6 citing Civ. R. 12(C). The standard for ruling on a Civ. R. 12(C) motion is the same as that used for motions under Civ. R. 12(B)(6). *Id.* As for motions under Civ. R. 12(B)(6), when reviewing a motion for judgment on the pleadings a court must "limit its determination of [the] motion solely to the allegations in the pleadings and any writing attached to the pleadings." *Ferchill v. Beach Cliff Bd. of Trustees*, 162 Ohio App.3d 144, 2005-Ohio-3475, 832 N.E.2d 1238, ¶6. Like motions under Civ. R. 12(B)(6), the movant may not "rely on allegations or **evidence outside the complaint.**" (*emphasis supplied*). *Shamansky v. Massachusetts Fin. Serv. Co.*, 127 Ohio App.3d 400, 404, 713 N.E.2d 47 (10th Dist. 1998), citing *State ex rel. Boggs v. Springfield Local Sch. Dist. Bd. of Edn.*, 72 Ohio St.3d 94, 647

N.E.2d 788 (1995). Considering matters outside the pleadings is only permissible where the court treats the motion as one of summary judgment. *Id.*, citing *State ex rel. Scanlon v. Deters*, 45 Ohio St.3d 376, 544 N.E.2d 680 (1989).

If the court chooses to review matters outside the pleadings in rendering judgment, the motion is converted to one of summary judgment. *Id.* If the motion is converted to one of summary judgment, all parties must be given “reasonable opportunity to present all materials made pertinent to such a motion by Rule 56.” *Petrey v. Simon*, 4 Ohio St.3d 154, 155, 447 N.E.2d 1285 (1983). Notice must be given to the parties of the conversion to motion for summary judgment and the parties must be given an opportunity for discovery since summary judgment will “bring forward factual matters which may become relevant only in the summary judgment, and not the dismissal context.” *Id.* at 155. The *Petrey* court found that “[p]arties deserve a reasonable opportunity to demonstrate whether a genuine issue of fact exists” and that “[n]otice is a negligible burden whose virtues outweigh the ‘vice of unexpected conversion.’” *Id.*

To their Memorandum in Support of their Motion for Judgment on the Pleadings, Respondents attach four affidavits from Erin Butcher-Lyden, Heather Coglianese, Cheryl Hawkinson and David Dokko. *See* Motion for Judgment on the Pleadings at pp. 12. *See also* Exhibits 1-4 to Motion for Judgment on the Pleadings. Respondents use these affidavits as evidence to support their contention that they have provided records responsive to Relator’s public records request and that their burden under the Public Records Act has been satisfied. *Id.* What Respondents noticeably omitted from their affidavits were any statements of the scope or criteria of the respective searches claimed to have been performed for the public records requested by Relator and/or that the responses produced are complete. *Id.*, generally. The affidavits should be stricken from Respondents’ Memorandum in Support to their Motion for Judgment on the Pleadings.

**B. If the affidavits are to be introduced into evidence and Respondents’ Motion for Judgment on the Pleadings is converted into a motion for summary**

**judgment, Relator requests an extension pursuant to Civ. R. 56(F) for the opportunity to conduct discovery as to the affidavits.**

If Respondents' Motion for Judgment on the Pleadings is converted to a motion for summary judgment, Relator requests an extension to perform discovery pursuant to Civ. R. 56(F).

Civ. R. 56(F) states in relevant part:

Should it appear from the affidavits of a party opposing the motion for summary judgment that the party cannot for sufficient reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or discovery to be had or may make such other order as is just.

Pursuant to the Civ. R. 56(F), the court has two options in the event a party does not have adequate information with which to respond to a motion for summary judgment: (1) the court may refuse an application for judgment or (2) the court may order a continuance for additional discovery.

Ohio courts, and indeed this Court, have held that no party should be required to enter a motion opposing summary judgment before discovery has been completed. *Tucker v. Webb Corporation*, 4 Ohio St.3d 121, 122, 447 N.E.2d 100 (1983). Barring a non-moving party from completing discovery prior to responding to a motion for summary judgment forces him to respond to all claims in a motion for summary judgment without adequate information. *Id.* at 123. The non-moving party is then placed in the precarious position of couching all theories of the case without proper justification, or filing a motion for summary judgment himself, hoping he can preempt the movant's motion. *Id.* Neither of these options are in the interest of justice, with the *Tucker* court concluding that even the court is at a disadvantage for properly weighing the information when it stated "one cannot weigh evidence most strongly in favor of one opposing a motion for summary judgment when there is a dearth of evidence available in the first place." *Id.*

In the event Respondents' Motion for Judgment on the Pleadings is converted to a motion for summary judgment, Relator requests an extension pursuant to Civ. R. 56(F) in order to conduct

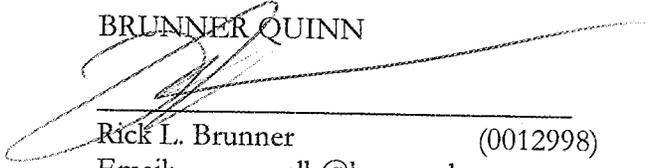
discovery and to properly defend a motion for summary judgment. In their Motion for Judgment on the Pleadings, Respondents attach four affidavits from Erin Butcher-Lyden, Heather Coglianesi, Cheryl Hawkinson and David Dokko. *See* Motion for Judgment on the Pleadings at pp. 12. *See also* Exhibits 1-4 to Motion for Judgment on the Pleadings. As stated above, Respondents have omitted from their affidavits any statements of the search performed for the public records requested by Relator and that the responses produced are complete. *Id.*, generally. Relator's primary issue in requesting a writ of mandamus is not that Respondents failed to produce any public records from the request but that Respondents have failed to produce all records that surely exist responsive to their request. *See* Complaint at ¶¶6, 7, 8. The press conference that forms the basis of Relator's Complaint occurred June 6, 2013, however, none of Respondents' responses contain any correspondence, memoranda, or meeting minutes of the convening of three agencies and the Attorney General of Ohio concerning the press conference. *Id.* That a press conference involving these parties occurred, without planning, is unlikely. Relator therefore requests the opportunity to depose the affiants to the Motion for Judgment on the Pleadings as to the extent of their search and to depose the parties involved in the press conference as to the correspondence and memoranda they received prior to the press conference. Relator should be given the opportunity to gather evidence in support of its Complaint prior to this Court rendering summary judgment.

### **III. CONCLUSION**

Relator Autumn Health Care of Zanesville, Inc. respectfully requests that this Court strike the affidavits to Respondents' Motion for Judgment on the Pleadings since Civ. R. (C) prohibits introducing evidence when deciding judgment on the pleadings. If this Court wishes to introduce the affidavits as evidence, Relator requests the opportunity to conduct discovery and provide evidence in opposition to the affidavits.

Respectfully Submitted,

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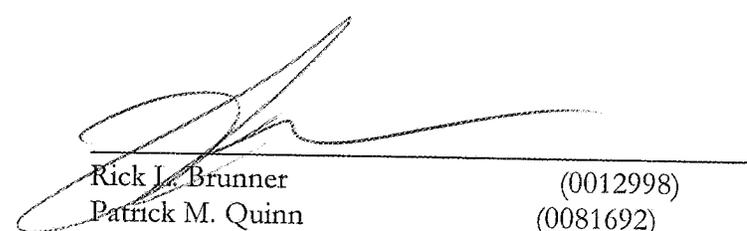
Facsimile: (614) 241-5551

*Attorneys for Relator*

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the foregoing was served upon the following via regular mail on June 19, 2014.

Kristopher J. Armstrong  
Erin Butcher-Lyden  
Assistant Attorney General  
Constitutional Offices Section  
30 East Broad Street, 16<sup>th</sup> Floor  
Columbus, Ohio 43215  
*Counsel for State Respondents*

  
Rick L. Brunner (0012998)

Patrick M. Quinn (0081692)



General Mike DeWine, Medicaid Fraud Chief Keesha Mitchell, AAG Jordan Finegold and other AG Medicaid Fraud staff in which ODH's assistance was requested in their pursuit of protecting the elderly residing in Ohio's nursing homes." *See* Exhibit A at pp. 2.

5. In spite of requesting Respondent Attorney General Mike DeWine's schedule as it relates to nursing home issues in the public records request, our office did not receive any correspondence, memoranda, schedules or other documents relating to the meeting November 30, 2012 with Respondent Attorney General Mike DeWine.

6. The memorandum stated that there were three meetings "between AG Medicaid Fraud and DQA (Jodi Govern, Dustin Ellinger, Kathryn Kimmet)" on January 23, 2013, February 11, 2013 and April 30, 2013. According to the memorandum, these meetings discussed "two (2) facilities – one of which is a current Special Focus Facility (SFF)." *See* Exhibit A at pp. 2.

7. In spite of these listed meetings being within the time frame of listed in the public records request and in spite of requesting records that would entail the minutes, correspondence and/or other memoranda related to these meetings, our office did not receive any documents related to these meetings.

8. The memorandum stated that in communicating with Medicaid Fraud, that the Medicaid Fraud Unit had "video evidence demonstrating that Resident X is not receiving care at Autumn of Zanesville and that they would provide us with their review logs if doing so would lead to 'serious' deficiencies being cited that might lead to termination from the Medicare/Medicaid program." *See* Exhibit A at pp. 2.

9. In spite of requesting public records that would fall within the purview of the communications between Medicaid Fraud and ODH like those listed in the memorandum

promising a finding of "serious deficiencies," our office did not receive any documents with these communications.

10. This memorandum leads our office to believe that additional records exist which were not produced pursuant to the public records request.

11. It is highly unlikely that all these meetings took place with no one making notes or no one sending any emails to set up the meeting.

12. The existence of the attachment demonstrates that someone was most likely taking notes at these meeting that resulted in the attached.

13. We have uncovered one email through another source that indicates emails were used to set up these meetings, a copy of which is attached hereto as Exhibit B.

14. Petitioner needs to depose the affiants proffered by the respondents to see what the scope of the inquiry was and whether they came across or were aware of the attachments to this affidavit and what was done to look for the same.

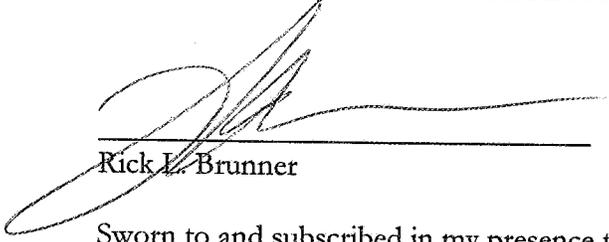
15. We need to depose the creators/writers of the attachments to see what inquiries were made of related documents and what documents might exist.

16. There may be additional depositions needed along the way.

17. If we receive cooperation I think we could complete discovery in 6 to 8 weeks time.

18. I respectfully request that the Court delay ruling on the pending Motion for Judgment on the Pleadings where Respondents have attached affidavits until Relator is able to take the depositions of the persons providing affidavits attached to the Motion for Judgment on the Pleadings and the parties named in the above memorandum who have information on existing records not produced to Relator.

FURTHERMORE AFFIANT SAYETH NAUGHT.

  
\_\_\_\_\_  
Rick E. Brunner

Sworn to and subscribed in my presence this 19<sup>th</sup> day of June, 2014.

  
\_\_\_\_\_  
Notary Public



Jennifer Blankenship  
Notary Public, State of Ohio  
My Commission Expires 07-21-2018

Exhibit A

## Autumn Healthcare of Zanesville

- May 13, 2013 - ODH begins its second standard survey as required by the Systems Improvement Agreement (SIA).
  - Autumn Healthcare of Zanesville entered into a Systems Improvement Agreement with CMS and ODH on June 8, 2012 as a result of being identified as a Special Focus Facility (SFF) in December 2008 and receiving 14 deficiencies, including one deficiency constituting actual harm on April 27, 2012. The SIA is similar to a "last chance agreement."
- May 15, 2013 – Ohio Attorney General's Office, Health Care Fraud, provides ODH with logs of its video surveillance conducted at facility.
- May 21, 2013 – Preliminary findings during survey: a number of deficiencies have been identified, (verbal abuse, quality of care, nutrition and unnecessary medications) including a deficiency constituting actual harm.
  - CMS has directed ODH to discuss the preliminary findings of this survey with Region V staff prior to conducting the exit conference with the facility.
  - A deficiency constituting actual harm will cause immediate termination from the Medicare/Medicaid Program based upon the terms of the SIA. If this happens, ODH will determine whether to revoke the license.

CMS - ?

federal issue —

9 spots

JS Take resident off Re waiver —  
Reserve to stay

⑥

Discharge non-payment  
Accept WAIVER

ALL

## PROJECTED TIMELINE FOR AUTUMN HEALTHCARE OF ZANESVILLE

- June 3, 2013 – ODH conducted survey exit conference with facility
- June 4, 2013 – ODH mails survey report (CMS Form 2567) and notice letter (recommending 60 day termination) faxed and certified-mailed to facility. Proposed license revocation letter faxed and certified-mailed to facility.
- June 6, 2013 – CMS sends notice of termination letter (no appeal rights)
- June 6, 2013 through August 2, 2013 - Informal Dispute Resolution (IDR) process per ORC 3721.022 and OAC 3701-63-02 (provider has 10 days to request the IDR process) and CMS review provided for in the Systems Improvement Agreement
- July 5, 2013 – Last day for facility to request a hearing on proposed license revocation
- July 17, 2013 – Last day for CMS to publish public notice of termination in local newspaper
- By Mid July 2013 – Aging and Medicaid to convene relocation team
- August 2, 2013 – Termination of certification
- September 2, 2013 – Last day for Medicare/Medicaid reimbursement (last Medicare/Medicaid resident must be out)
- Fall 2013 – Chapter 119 hearing on proposed license revocation
- Late Fall 2013 – Hearing officer issues report and recommendation on proposal to revoke license
- End of 2013 – Director issues final order on revocation
- Fifteen days after receipt of final order – Last day for facility to appeal the final order to common pleas court

June 4, 2013

Autumn Healthcare of Zanesville

May 30, 2013

UPDATE

- ODH remains on-site today . ODH received a complaint about Autumn this morning which will have to be investigated prior to exiting.
- Once CMS approves the written survey report, we will conduct the exit conference with the facility. At this point, we believe the earliest this will occur will be on Monday , June 3.
  - The exit conference will consist of discussion of general areas of concern and the residents involved.
  - We will not be discussing the scope and severity of the deficiencies or the source of the information (i.e. video surveillance logs) supporting the cited deficiencies.
- Due to the Systems Improvement Agreement, ODH will be teleconferencing with CMS to discuss who will be sending the survey report (2567) to the facility. CMS is the issuer of the termination notice.
- DQA will also be preparing an order proposing revocation of the license for the Director's signature.

*Keasha Mitchell  
Medicare Fraud*

*Trus — Pure Strategy  
- Communications*

*Schulze —  
Bonnay  
Schulze*

*Julis  
Jim  
Bev.  
Jan  
Murtia*

*cc: Bonnay  
John  
Ted*

- On November 30, 2012, Ted Wymyslo, Lance Himes, Melissa Bacon, Rachel Belenker, Becky Maust and Jodi Govern met with Ohio Attorney General Mike DeWine, Medicaid Fraud Chief Keesha Mitchell, AAG Jordan Finegold, and other AG Medicaid Fraud staff in which ODH's assistance was requested in their pursuit of protecting the elderly residing in Ohio's nursing homes. Dr. Wymyslo pledged cooperation and specifically that DQA staff would meet with Medicaid Fraud staff on a periodic basis.
- Meetings between AG Medicaid Fraud and DQA (Jodi Govern, Dustin Ellinger, Kathryn Kimmet)
  - January 23, 2013
  - February 11, 2013
  - April 30, 2013
- Discussions included:
  - ODH/DQA
    - Survey Process
    - Special Focus Facility Program (federal)
    - DQA agreed to send a copy of all letters proposing a civil money penalty (CMP) – imposed for harm deficiencies (federal)
    - Minimum Data Set (MDS) requirements for facilities
  - Medicaid Fraud
    - Focus on two (2) facilities – one of which is a current Special Focus Facility (SFF)
    - Placement of hidden cameras focusing on a couple of residents in each facility (with their consent) after talking with the residents and their families about care concerns
    - Trying to show poor quality of care & falsification of medical records (medical records say nutrition/hydration/necessary treatment are being provided that video evidence does not support)
- Latest communication from Medicaid Fraud
  - On May 1, requested a copy of Autumn of Zanesville's (SFF) Systems Improvement Agreement (SIA) with CMS and ODH
  - Said that they have video evidence demonstrating that Resident X is not receiving care at Autumn of Zanesville and that they would provide us with their review logs if so doing would lead to "serious" deficiencies being cited that might lead to termination from the Medicare/Medicaid program
- May 8, 2012 – DQA discusses matter with CMS (Chicago Regional Office)
  - CMS said that ODH should request the review logs and specific resident names from the AG while making no representation as to what the outcome would be
  - CMS said they would discuss with CMS Central Office (Baltimore)

## Exhibit B

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**From:** Jill Del Greco  
**Sent:** Wednesday, June 05, 2013 12:48 PM  
**To:** Lisa Peterson Hackley; Ann O'Donnell; Keesha Mitchell; Jordan Finegold  
**Subject:** RE: First draft  
**Attachments:** image001.png

Tessie over at ODH isn't sure if Wymslow will be able to make it. If it is not him it will be Assistant Director Ann Harnish. She also thought it might be good to have the Department of Aging out there to talk about residents rights and what to do if you think your nursing home is in violation, etc.

---

**From:** Lisa Peterson Hackley  
**Sent:** Wednesday, June 05, 2013 12:25 PM  
**To:** Ann O'Donnell; Keesha Mitchell; Jordan Finegold; Jill Del Greco  
**Subject:** First draft

All –

Attached is a first draft. Looking for feedback.



Lisa Peterson Hackley  
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Office of Ohio Attorney General Mike DeWine  
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