[Cite as *Clifton Care Ctr. v. Ohio Dept. of Job & Family Servs.*, 2013-Ohio-2742.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Clifton Care Center et al.,	:	
Appellants-Appellants,	:	
		No. 12AP-709
v.	:	(C.P.C. No. 12CVF04-4732)
Ohio Department of Job and Family Services,	:	(REGULAR CALENDAR)
	:	
Appellee-Appellee.	:	

D E C I S I O N

Rendered on June 27, 2013

Benesch, Friedlander, Coplan & Aronoff LLP, Roger L. Schantz and *Harry M. Brown*, for appellants.

Michael DeWine, Attorney General, and *Rebecca L. Thomas*, for appellee.

APPEAL from the Franklin County Court of Common Pleas

KLATT, P.J.

{¶ 1} Appellants, Clifton Care Center, City View Nursing & Rehabilitation Center, Falling Water Healthcare Center, Candlewood Park Healthcare Center, Aristocrat Berea Nursing Home, Greenbrier Health Center, Lake Point Health Care, Grande Pointe Healthcare Community, Pine Valley Care Center, Pebble Creek, Wyant Woods Care Center, Pine Grove Healthcare Center, Communicare at Waterford Commons, Crestwood Care Center, Riverside Nursing & Rehabilitation Center, Wood Glen Alzheimer's Community, Burlington House Nursing Home, and Regency Manor Rehab & Subacute Center, appeal from a judgment of the Franklin County Court of Common Pleas dismissing their appeal against appellee, the Ohio Department of Job and Family Services ("ODJFS"). For the following reasons, we affirm.

{¶ 2} ODJFS administers the Medicaid program in Ohio. Each appellant is a nursing facility that has entered into a provider agreement with ODJFS pursuant to R.C. 5111.22. A nursing facility must enter into a provider agreement to be eligible for the receipt of Medicaid funds in payment for services that a facility provides to a resident who is a Medicaid recipient. R.C. 5111.21.

{¶ 3} ODJFS conducted Medicaid compliance audits of appellants and determined that appellants owed ODFJS for Medicaid overpayments. ODJFS' Combined Proposed Adjudication Order Unit issued notices of opportunity for hearings to appellants that proposed to collect the overpayments from appellants. If appellants wished to dispute the proposed action, they had to request hearings pursuant to R.C. Chapter 119. As an alternative to the hearings, appellants could settle with ODFJS, pay an agreed-upon amount to reimburse ODJFS, and waive their rights to the hearings. Appellants indicated that they would enter into a settlement and sign waivers if ODJFS would review 539 fee-for-service claims that appellants had for Medicaid payment. ODJFS had not considered these 539 fee-for-service claims as part of the audit.

{¶ 4} The claims at issue arose from medical services that appellants provided to Medicaid recipients from 2002 to 2007. The claims included both crossover and therapy claims. Crossover claims are claims for payment for services provided to residents who are eligible for both Medicaid and Medicare benefits. Ohio Adm.Code 5101:3-1-05. Generally, after Medicare adjudicates and pays the claim, Medicaid pays any remaining amount due. *Id.* Therapy claims are claims for physical, occupational, and speech therapy services provided to Medicaid recipients.

{¶ 5} The Long Term Care Payment Unit of ODJFS reviewed the 539 claims. Based on that review, ODJFS paid some of the claims and denied others. Appellants asked ODJFS to reconsider its denial of 58 claims. ODJFS did so. In a letter dated March 30, 2012, Carolyn Thurman, chief of the Claims Reconciliation Section of ODJFS, informed appellants that ODJFS would not pay the 58 disputed claims because they were not timely submitted and/or the recipient of the medical service had not been deemed eligible for Medicaid. At the conclusion of the letter, Thurman represented that "[t]his is the final review and no further action(s) will be taken for these claims."

{¶ 6} On April 13, 2012, appellants filed a notice of appeal in the trial court. In their notice of appeal, appellants contended that the March 30, 2012 letter was a final

adjudication order that they could appeal under R.C. 5111.06 and 119.12. ODJFS moved to dismiss, arguing that the trial court lacked jurisdiction over the appeal and that appellants had failed to exhaust their administrative remedies. In a July 26, 2012 decision and entry, the trial court granted ODJFS' motion and dismissed the appeal.

{¶ 7} Appellants now appeal the July 26, 2012 judgment, and they assign the following errors:

> 1. The trial court erred in sustaining Appellee's Motion to Dismiss.
>
> 2. The trial court erred by considering the additional evidence submitted by Appellee.

{¶ 8} By their first assignment of error, appellants argue that the trial court had jurisdiction under R.C. 5111.06 and 119.12 to hear their appeal. We disagree.

{¶ 9} "Jurisdiction" refers to a court's " 'statutory or constitutional power to adjudicate the case.' " *Pratts v. Hurley*, 102 Ohio St.3d 81, 2004-Ohio-1980, ¶ 11, quoting *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 89 (1998). Courts of common pleas only have "such powers of review of proceedings of administrative officers and agencies as may be provided by law." Ohio Constitution, Article IV, Section 4; *see also Springfield Fireworks, Inc. v. Ohio Dept. of Commerce*, 10th Dist. No. 03AP-330, 2003-Ohio-6940, ¶ 17. Thus, courts of common pleas lack jurisdiction to review actions of administrative agencies unless R.C. 119.12 or some other specific statutory authority grants it. *Total Office Prods. v. Dept. of Adm. Servs.*, 10th Dist. No. 05AP-955, 2006-Ohio-3313, ¶ 12; *accord Univ. of Toledo v. Ohio State Emp. Relations Bd.*, 10th Dist. No. 11AP-834, 2012-Ohio-2364, ¶ 9 ("A court of common pleas has power to review proceedings of administrative agencies and officers only to the extent the law so grants."). Whether a court of common pleas possesses subject-matter jurisdiction is a question of law, which appellate courts review de novo. *Courtyard Lounge v. Bur. of Environmental Health*, 10th Dist. No. 10AP-182, 2010-Ohio-4442, ¶ 5.

{¶ 10} R.C. 119.12 allows "[a]ny party adversely affected by any order of an agency issued pursuant to an adjudication" to appeal to a court of common pleas. Not all state instrumentalities are agencies for R.C. 119.12 purposes. R.C. 119.01(A) defines "agency," and includes:

> [A]ny official, board, or commission having authority to promulgate rules or make adjudications in the civil service

> commission, the division of liquor control, the department of taxation, the industrial commission, the bureau of workers' compensation, the functions of any administrative or executive officer, department, division, bureau, board, or commission of the government of the state specifically made subject to sections 119.01 to 119.13 of the Revised Code, and the licensing functions of any administrative or executive officer, department, division, bureau, board, or commission of the government of the state having the authority or responsibility of issuing, suspending, revoking, or canceling licenses.

Pursuant to this definition, an agency is subject to R.C. Chapter 119 if: (1) the administrative agency is named in R.C. 119.01(A), (2) the functions of the administrative agency are specifically made subject to R.C. 119.01 to 119.13, or (3) the administrative agency has issued, suspended, revoked, or cancelled a license. *Plumbers & Steamfitters Joint Apprenticeship Commt. v. Ohio Civ. Rights Comm.*, 66 Ohio St.2d 192, 193 (1981); *Springfield Fireworks* at ¶ 19; *ABT v. Ohio Expositions Comm.*, 110 Ohio App.3d 696, 699 (10th Dist.1996).

{¶ 11} Here, the parties agree that the only way ODJFS might qualify as an agency is if appellants' appeal arises from a function of ODJFS that is specifically made subject to R.C. 119.01 to 119.13. For ODJFS to so qualify, the legislative intent to make ODJFS' actions subject to R.C. Chapter 119 must be clear. *Springfield Fireworks* at ¶ 28. To establish clear legislative intent, both parties direct us to R.C. 5111.06, which states:

> (B) Except as provided in division (D) of this section and section 5111.914 of the Revised Code, the department shall do either of the following by issuing an order pursuant to an adjudication conducted in accordance with Chapter 119. of the Revised Code:
>
> * * *
>
> (2) Take any action based upon a final fiscal audit of a provider.
>
> (C) Any party who is adversely affected by the issuance of an adjudication order under division (B) of this section may appeal to the court of common pleas of Franklin county in accordance with section 119.12 of the Revised Code.

{¶ 12} Based on R.C. 5111.06(B)(2) and (C), we concur with the parties that R.C. Chapter 119 applies to any action ODJFS takes based on a final fiscal audit. Thus, we

must examine whether appellants appealed to the trial court from an action based on a final fiscal audit.

{¶ 13} Although statute does not define "final fiscal audit," regulation does. Pursuant to Ohio Adm.Code 5101:6-50-01(A)(7), a "final fiscal audit" is "a medicaid report of examination or a medicaid final settlement." Unfortunately, neither statute nor regulation explains what a Medicaid report of examination or a Medicaid final settlement is. Despite this lack of definition, appellants assert in their reply brief that the March 30, 2012 letter constitutes a Medicaid final settlement. We find this argument disingenuous in light of appellants' prior recognition of the "fact that ODJFS failed to issue an audit report accompanied by a * * * report of final settlement." Appellants' Memorandum in Opposition to Motion to Dismiss, at 9; Appellants' Brief, at 13. A party may not change its theory of the case and present new arguments for the first time on appeal. *State ex rel. Gutierrez v. Trumbull Cty. Bd. of Elections*, 65 Ohio St.3d 175, 177 (1992); *Zawahiri v. Alwattar*, 10th Dist. No. 07AP-925, 2008-Ohio-3473, ¶ 11, 17-18. Yet, this is exactly what appellants have done. Appellants' assertion of a new, inconsistent argument is particularly egregious because they waited until their reply brief to raise it. A party may not advance new arguments in its reply brief. *Am. Fiber Sys., Inc. v. Levin*, 125 Ohio St.3d 374, 2010-Ohio-1468, ¶ 21. Thus, we refuse to consider appellants' belated, contradictory argument that the March 30, 2012 letter is a Medicaid final settlement.

{¶ 14} Nevertheless, the operative question remains: does the March 30, 2012 letter represent an action taken because of a final fiscal audit? To answer that question, we must consider the Medicaid payment structure for nursing facilities. Generally, nursing facilities receive two types of Medicaid reimbursement: a per resident, per day rate and fees for certain services not factored into the per resident, per day rate. *Meadowbrook Care v. Ohio Dept. of Job & Family Servs.*, 10th Dist. No. 06AP-871, 2007-Ohio-6534, ¶ 13. The per resident, per day rate is paid on a prospective basis, and it covers certain costs, including direct care, ancillary and support, tax, and reasonable capital costs. R.C. 5111.222; 5111.231; 5111.24; 5111.242; 5111.25. ODJFS calculates the per resident, per day rate using information from nursing facilities' annual cost reports. *Id.* Nursing facilities recover fees for services not covered by the per resident, per day rate by submitting claims for payment after providing the service. *Meadowbrook Care* at ¶ 13;

Ohio Adm.Code 5101:3-1-19. These fee-for-service claims include the crossover and therapy claims at issue in this case.

{¶ 15} ODJFS can conduct different types of audits of nursing facilities' records. ODJFS may audit the annual cost reports that the nursing facilities must submit. R.C. 5111.26; 5111.27. Alternatively, ODJFS may conduct a "days audit" whereby ODJFS determines whether the nursing facility actually provided each resident care for the number of days the facility claimed to have provided such care. *Meadowbrook Care* at ¶ 18. Third, ODJFS may audit a nursing facility to determine Medicaid compliance if ODJFS suspects fraud or waste. Ohio Adm.Code 5101:3-1-27.

{¶ 16} Here, the March 30, 2012 letter could have only resulted from the third type of audit because that type of audit alone covers the fee-for-service claims at issue. Cost report audits and days audits examine the records relevant for determining the per resident, per day reimbursement rate. ODJFS audits records relevant to payment of fee-for-service claims, like appellants' crossover and therapy claims, under Ohio Adm.Code 5101:3-1-27. An audit under that section is:

> [A] formal postpayment examination, made in accordance with generally accepted auditing standards, of a medicaid provider's records and documentation to determine program compliance, the extent and validity of services paid for under the medicaid program and to identify any inappropriate payments.

Ohio Adm.Code 5101:3-1-27(B)(1).

{¶ 17} ODJFS did not conduct a post-payment examination of the records supporting appellants' fee-for-service claims. Rather, it reviewed (and re-reviewed) those claims to determine whether to pay or deny them. Since ODJFS never paid the claims at issue, it could not audit them. ODJFS considered the claims merely to facilitate appellants' acquiescence to the results of an audit; the review of the claims was not part of the audit itself.

{¶ 18} Because the March 30, 2012 letter did not result from an audit, it cannot constitute an action taken based upon a final fiscal audit. Consequently, appellants cannot appeal the March 30, 2012 letter under R.C. 5111.06 and 119.12.

{¶ 19} In their final argument under their first assignment of error, appellants argue that barring them from pursuing an R.C. 119.12 appeal would deny them due process of law. Generally, decisions of administrative agencies are always subject to

review because to provide otherwise would deny a litigant its due process rights. *Carney v. School Emp. Retirement Sys. Bd.*, 39 Ohio App.3d 71, 72 (10th Dist.1987). This constitutional mandate, however, does not allow a litigant the right to an R.C. 119.12 appeal. Pursuant to Article IV, Section 4 of the Ohio Constitution, absent statutory authority permitting a court of common pleas to review an administrative action, no right to appeal via R.C. 119.12 exists. *ABT* at 701. Thus, while appellants may have a right to judicial review of ODJFS' denial of their crossover and therapy claims, they do not have a right to appeal that denial under R.C. 119.12. *Id.* at 701-02.

{¶ 20} In sum, we conclude that ODJFS' denial of appellants' crossover and therapy claims is not a determination of an agency from which appellants may bring an R.C. 119.12 appeal. We therefore overrule appellants' first assignment of error.

{¶ 21} By appellants' second assignment of error, they argue that the trial court erred in considering the affidavit testimony attached to ODJFS' motion to dismiss and the reply to appellants' memorandum contra. We disagree. "A trial court has authority to consider any pertinent evidentiary materials when determining its own jurisdiction." *Nemazee v. Mt. Sinai Med. Ctr.*, 56 Ohio St.3d 109, 111, fn. 3 (1990). Accordingly, we conclude that the trial court could consider the affidavit testimony, and we overrule appellants' second assignment of error.

{¶ 22} As a final matter, we must address ODJFS' motion to strike or disregard new arguments in appellants' reply brief. Although it is improper to raise new arguments in a reply brief, we have dealt with this matter in our analysis. We deny ODJFS' motion.

{¶ 23} For the foregoing reasons, we overrule appellants' two assignments of error, and we affirm the judgment of the Franklin County Court of Common Pleas.

Motion denied; judgment affirmed.

SADLER and DORRIAN, JJ., concur.