

COURT OF APPEALS  
MUSKINGUM COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

AUTUMN HEALTH CARE OF  
ZANESVILLE, INC.

Plaintiff-Appellant

-VS-

CAROL TODD, ET AL.

## Defendants-Appellees

JUDGES:

Hon. W. Scott Gwin, P.J.

Hon. Sheila G. Farmer, J.

Hon. John W. Wise, J.

Case No. CT2014-0020

## OPINION

CHARACTER OF PROCEEDING:

Appeal from the Court of Common  
Pleas, Case No. CH2013-0376

**JUDGMENT:**

Affirmed

DATE OF JUDGMENT:

November 21, 2014

APPEARANCES:

For Plaintiff-Appellant

## For Defendants-Appellees

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*Farmer, J.*

{¶1} Appellant, Autumn Health Care of Zanesville, Inc., owns and operates a skilled nursing home facility. On July 21, 2010, May 26, 2011, October 30, 2011, and April 27, 2012, employees of the Ohio Department of Health, appellees herein, surveyed the facility to determine if it was in compliance with the federal requirements for nursing homes participating in the Medicare/Medicaid programs. Based upon the surveys, appellant received numerous citations.

{¶2} Thereafter, appellant entered into a Systems Improvement Agreement with CMS, an agency with the U.S. Department of Health and Human Services, to remain in compliance with state and federal requirements.

{¶3} Additional citations were issued on June 3, 2013 pursuant to video surveillance logs. Appellant was found in breach of the Systems Improvement Agreement.

{¶4} On August 29, 2013, appellant filed a complaint for declaratory judgment, seeking a declaration that appellees violated its rights to due course of law and equal protection under the Ohio Constitution. On September 30, 2013, appellees filed a motion to dismiss. On October 1, 2013, appellees filed a motion to stay discovery pending resolution of the motion to dismiss. By order filed October 7, 2013, the trial court stayed discovery.

{¶5} A hearing on pending motions was held on March 6, 2014. By journal entry filed March 7, 2014, the trial court granted appellees' motion and dismissed the complaint.

{¶6} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶7} "THE TRIAL COURT HAD SUBJECT MATTER JURISDICTION OVER AUTUMN'S CLAIM FOR DECLARATORY RELIEF, AND THE COMPLAINT STATED A CLAIM UPON WHICH RELIEF MAY BE GRANTED. THE TRIAL COURT THEREFORE ERRED IN DISMISSING THE COMPLAINT."

II

{¶8} "THE TRIAL COURT ERRED IN STAYING DISCOVERY WITHOUT NOTICE TO THE PARTIES AND WITHOUT PROVIDING AUTUMN AN OPPORTUNITY TO RESPOND TO APPELLEES' MOTION TO STAY DISCOVERY."

I

{¶9} Appellant claims the trial court erred in granting appellees' motion to dismiss. We disagree.

{¶10} In its appellate brief at v, appellant argues the following seven issues:

1. Does a court of common pleas possess jurisdiction to adjudicate declaratory judgment claims?

2. Can immunity under R.C. §9.86 bar a claim for declaratory relief against a state employee?

3. What kind of injury is sufficient to show standing?

4. Do actions in declaratory judgment require exhaustion of administrative remedies?

5. For a claim in declaratory judgment is whether the Due Course of Law or Equal Protection Provisions of the Ohio Constitution are self-executing relevant?

6. In conducting a Civ. R. 12(B)(6) analysis, may a trial court consider matters outside the pleadings?

7. Where a trial court's entry is ambiguous, should a dismissal be with or without prejudice?

{¶11} Our standard of review on a Civ.R. 12(B)(6) motion to dismiss is de novo. *Greeley v. Miami Valley Maintenance Contractors, Inc.*, 49 Ohio St.3d 228 (1990). A motion to dismiss for failure to state a claim upon which relief can be granted is procedural and tests the sufficiency of the complaint. *State ex rel. Hanson v. Guernsey County Board of Commissioners*, 65 Ohio St.3d 545, 1992-Ohio-73. Under a de novo analysis, we must accept all factual allegations of the complaint as true and all reasonable inferences must be drawn in favor of the nonmoving party. *Byrd. v. Faber*, 57 Ohio St.3d 56 (1991).

{¶12} Appellant filed its complaint against fourteen employees of the Ohio Department of Health and two Jane Does I-V. The complaint sought declaratory relief, alleging appellees failed to provide appellant due course of law and equal protection under the Ohio Constitution:

59. Plaintiff prays for a judgment declaring as follows:

59.1 That Defendants in dealing with Plaintiff in connections with Exhibits 1 through 7 to the Plaintiff's Complaint failed to provide and afford Plaintiff with due course of law and equal protection of law under the Ohio Constitution,

59.2 That all surveys of Autumn Healthcare Zanesville of an "F" rating be declared void, affording Plaintiff due course of law and equal protection of the law in accordance with the Ohio Constitution or in the alternative,

59.3 That this Court declare what constitutes due course of law and equal protection of law under the Ohio Constitution in Defendants dealing with Plaintiff.

{¶13} Appellant's complaint seeks jurisdiction under Article 1, Sections 2 and 16, of the Ohio Constitution.

{¶14} Article I, Section 2, of the Ohio Constitution is the equal protection clause and states: "All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the General Assembly."

{¶15} Article I, Section 16, of the Ohio Constitution is the due course of law clause and states: "All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and

shall have justice administered without denial or delay. Suits may be brought against the state, in such courts and in such manner, as may be provided by law."

{¶16} In the March 7, 2014 journal entry dismissing the action, the trial court did not specify which issue or issues it based its decision on.

{¶17} In their motion to dismiss filed September 30, 2013, appellees argued proper jurisdiction was vested in the Ohio Court of Claims pursuant to Article 1, Section 16, of the Ohio Constitution ("[s]uits may be brought against the state, in such courts and in such manner, as may be provided by law") and R.C. 2743.03 which states:

(A)(1) There is hereby created a court of claims. The court of claims is a court of record and has exclusive, original jurisdiction of all civil actions against the state permitted by the waiver of immunity contained in section 2743.02 of the Revised Code and exclusive jurisdiction of the causes of action of all parties in civil actions that are removed to the court of claims. The court shall have full equity powers in all actions within its jurisdiction and may entertain and determine all counterclaims, cross-claims, and third-party claims.

(2) If the claimant in a civil action as described in division (A)(1) of this section also files a claim for a declaratory judgment, injunctive relief, or other equitable relief against the state that arises out of the same circumstances that gave rise to the civil action described in division (A)(1) of this section, the court of claims has exclusive, original jurisdiction to hear and determine that claim in that civil action. This division does not

affect, and shall not be construed as affecting, the original jurisdiction of another court of this state to hear and determine a civil action in which the sole relief that the claimant seeks against the state is a declaratory judgment, injunctive relief, or other equitable relief.

(3) In addition to its exclusive, original jurisdiction as conferred by division (A)(1) and (2) of this section, the court of claims has exclusive, original jurisdiction as described in division (F) of section 2743.02, division (B) of section 3335.03, and division (C) of section 5903.02 of the Revised Code.

{¶18} R.C. 2743.02(F) states:

A civil action against an officer or employee, as defined in section 109.36 of the Revised Code, that alleges that the officer's or employee's conduct was manifestly outside the scope of the officer's or employee's employment or official responsibilities, or that the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner shall first be filed against the state in the court of claims that has exclusive, original jurisdiction to determine, initially, whether the officer or employee is entitled to personal immunity under section 9.86 of the Revised Code and whether the courts of common pleas have jurisdiction over the civil action. The officer or employee may participate in the immunity determination proceeding before the court of claims to determine

whether the officer or employee is entitled to personal immunity under section 9.86 of the Revised Code.

{¶19} R.C. 9.86 states the following:

Except for civil actions that arise out of the operation of a motor vehicle and civil actions in which the state is the plaintiff, no officer or employee shall be liable in any civil action that arises under the law of this state for damage or injury caused in the performance of his duties, unless the officer's or employee's actions were manifestly outside the scope of his employment or official responsibilities, or unless the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner.

{¶20} Appellees argue the complaint failed to state a claim upon which relief may be granted as appellant failed to allege actions outside the scope of their employment or affirmative responsibilities or acted with a malicious purpose, in bad faith, or in a wanton or reckless manner.

{¶21} In its complaint filed August 29, 2013, appellant alleged the following:

9. The Defendants have or had certain duties at the time of the circumstances below set forth, to conduct certain inspections and reviews of the business practices and the operations of the Plaintiff in Muskingum

County, Ohio and as a licensee under Chapter 3721 of the Ohio Revised Code.

10. In their interactions and dealing with Plaintiff, Defendants are required to afford Plaintiff and ensure that Plaintiff receives due course of law and equal protection of the law pursuant to Article 1, §16, §19, §1 and §2 of the Ohio Constitution.

{¶22} Appellant argues it was seeking a remedy pursuant to R.C. Chapter 2721, the Declaratory Judgment Act, and in particular, R.C. 2721.02(A) which states the following:

Subject to division (B) of this section, courts of record may declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding is open to objection on the ground that a declaratory judgment or decree is prayed for under this chapter. The declaration may be either affirmative or negative in form and effect. The declaration has the effect of a final judgment or decree.

{¶23} Appellant did not request a monetary award, but sought a declaration that the actions of appellees, the state employees, denied them due course of law and equal protection under the Ohio Constitution. Appellant argues appellees conducted five surveys and exceeded the scope of their employment by issuing citations that were arbitrary and unrelated to the health and safety of the residents. Because R.C. Chapter

2721 vests exclusive jurisdiction for declaratory relief in the Court of Common Pleas, appellant argues removal to the Court of Claims would be improper.

{¶24} Appellees argue there exists a special statutory proceeding available to challenge their actions and findings. Under R.C. Chapter 3721 (Rest Homes and Nursing Homes) and R.C. Chapter 119 (Administrative Procedure), Ohio has a comprehensive procedure that affords appellant due course of law and equal protection. R.C. 3721.03(B) states the following:

(B) The director of health shall enforce the provisions of sections 3721.01 to 3721.13 and 3721.99 of the Revised Code and may issue orders to secure compliance with the provisions of these sections and the rules adopted under them. The director may hold hearings, issue subpoenas, compel testimony, and make adjudications.

The director may issue an order revoking a license in the event the director finds, upon hearing or opportunity afforded pursuant to Chapter 119. of the Revised Code, that any of the following apply to a person, county home, or district home licensed under section 3721.07 of the Revised Code:

- (1) Has violated any of the provisions of Chapter 3721. of the Revised Code or rules adopted by the director under it;
- (2) Has violated any order issued by the director;
- (3) Is not, or any of its principals are not suitable, morally or financially to operate such an institution;

(4) Is not furnishing humane, kind, and adequate treatment and care;

(5) Has had a long-standing pattern of violations of this chapter or the rules adopted under it that has caused physical, emotional, mental, or psychosocial harm to one or more residents.

Upon the issuance of any order of revocation, the person whose license is revoked, or the county home or district home that has its license revoked, may appeal in accordance with Chapter 119. of the Revised Code.

{¶25} R.C. Chapter 119 provides for administrative hearings and appeals. As stated by the Supreme Court of Ohio in *Kazmaier Supermarket, Inc. v. Toledo Edison Co.*, 61 Ohio St.3d 147, 153 (1991), "this court has recognized that where the General Assembly has enacted a complete and comprehensive statutory scheme governing review by an administrative agency, exclusive jurisdiction is vested within such agency."

{¶26} Appellees argue appellant has failed to exhaust its administrative remedies under R.C. Chapters 3721 and 119.

{¶27} The record before this court reflects an R.C. 119 administrative appeal on the issues sub judice is pending in the Court of Common Pleas of Muskingum County, Case No. CF 2014-0314. See, Plaintiff's October 10, 2014 Civ.R. 60 (B) Motion, Exhibit 3 attached; Defendants' October 17, 2014 Motion to Stay Briefing.

{¶28} Appellant, while conceding the administrative remedies have not been exhausted, nevertheless argues that a declaratory judgment action is separate and distinct and the constitutional challenges to appellees' actions are viable.

{¶29} " 'The essential elements for declaratory relief are (1) a real controversy exists between the parties, (2) the controversy is justiciable in character, and (3) speedy relief is necessary to preserve the rights of the parties.' " *Aust v. Ohio State Dental Bd.*, 136 Ohio App.3d 677, 681 (10th Dist.2000). The question is, does appellant presently have a justiciable claim? We respond in the negative.

{¶30} For any claim, even non-monetary, there has to be an injury or a definite decision on the rights and duties of the parties. Without a full venting of the administrative remedies, there cannot be an enforceable right, as Ohio requires exhaustion of administrative remedies. We find reinforcement for this in appellant's federal case, *Autumn Health Care of Zanesville, Inc. v. U.S. Dept. of Health & Human Services*, 959 F.Supp.2d 1044 (S.D.Ohio 2013). In the federal case, appellant argued violations of state and federal constitutional due process. The U.S. District Court reasoned that the constitutional claims were collateral to the administrative process and required exhaustion of the administrative remedies, and dismissed the complaint for lack of subject matter jurisdiction. *Id.* at 1052-1053.

{¶31} All of the complaints levied against appellees in this case are subject to administrative review. Until and when the administrative review is complete, there is no justiciable claim or subject matter jurisdiction.

{¶32} Although appellant has assigned various other arguments in support of reversal as cited above, we find under Ohio case law and the administrative process,

we need not address the other issues save for the issue of whether the dismissal was with prejudice.

{¶33} The dismissal we are affirming rests on the failure to exhaust administrative remedies and the present availability of a justiciable claim. We find such a dismissal relates to subject matter jurisdiction and is otherwise than on the merits; therefore, the dismissal is without prejudice under Civ.R. 41(B)(4)(a).

{¶34} Assignment of Error I is denied.

## II

{¶35} Appellant claims the trial court erred in staying discovery. Given the dismissal for lack of subject matter jurisdiction, we find this assignment to be moot.

{¶36} The judgment of the Court of Common Pleas of Muskingum County, Ohio is hereby affirmed.

By Farmer, J.

Gwin, P.J. and

Wise, J. concur.

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