In the Supreme Court of Ohio

In the matter of [F.M.], [A.M. et al.],	:	Case No. 2024-0137
	:	
Appellants,	:	On Appeal from the
	:	Franklin County
v.	:	Court of Appeals,
	:	Tenth Appellate District
Ohio Department of Medicaid,	:	
	:	Court of Appeals
Appellee.	:	Case No. 23-000104

APPELLEE OHIO DEPARTMENT OF MEDICAID'S MEMORANDUM IN OPPOSITION TO JURISDICTION

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INTRODUCTION

This case is not worthy of review. As the lower courts correctly held, it is well settled that a court of common pleas only has subject-matter jurisdiction over an administrative appeal that is expressly authorized by statute. F.M. has not, and cannot, point to such a statute here because one does not exist. This is the only issue potentially before this Court. The lower courts' decisions are consistent with well-established precedent from this Court. Additionally, review of this case would not be of great general interest, and no substantial constitutional question has been raised.

This case stems from an administrative hearing held pursuant to R.C. 5160.37. Rather than appeal the hearing examiner's decision to the Director of the Ohio Department of Medicaid ("ODM"), as she could have done pursuant to the governing statute, F.M. attempted an appeal under Chapter 119.12 directly to the common pleas court. The common pleas court dismissed the attempted appeal for lack of subject-matter jurisdiction and the Tenth District affirmed.

F.M. now attempts to circumvent the authorizing statute's requirement by arguing that the merits of her constitutional claims gave the common pleas court authority to hear her appeal. The Court has already rejected an identical argument. It held in *Pivonka v. Corcoran*, that a party that wishes to challenge the constitutionality of Ohio's Medicaid subrogation statute must follow the administrative appeals process that Ohio law provides. 162 Ohio St. 3d 326, 2020-Ohio-3476, 165 N.E.3d 1098, ¶ 24. F.M. did not follow that process.

STATEMENT OF CASE AND FACTS

Federal Medicaid law requires states to recoup the medical costs they spend on a Medicaid recipient's injuries when the recipient receives funds from a liable third party (tortfeasor) who caused the injuries. *See Pivonka* at ¶ 4, citing 42 U.S.C. 1396a. To that end, the Ohio General

Assembly enacted R.C. 5160.37, which grants ODM an explicit right to recover such funds and also grants recipients the right to an administrative hearing to challenge any such recovery.

In this case, ODM paid $338,421.70 in medical bills for F.M. relating to her premature birth. Tenth Dist. Dec. at ¶ 3. F.M. filed litigation against three obstetricians who were involved in her and her mother's care, resulting in a settlement of $1,500,000. *Id.* After the case settled, ODM asserted its right to recover the amount of the medical bills it paid on F.M.'s behalf and provided F.M. with information on requesting a hearing to contest its lien. Hearing Examiner's Dec. at ¶ 18. She requested a hearing, and a hearing was held on April 25, 2022 in accordance with R.C. 5160.37 and Ohio Adm.Code 5160-80-06. Tenth Dist. Dec. at ¶ 5. During the hearing, F.M. was represented by counsel, who made arguments of fact and law and cross-examined ODM's witness. *See id.* at ¶ 6; Hearing Examiner's Dec. at ¶ 17. On August 29, 2022, the hearing examiner issued a written decision overruling F.M.'s objections and holding that ODM was entitled to recover the full $338,421.70 from her settlement. Tenth Dist. Dec. at ¶ 7. That decision explicitly advised F.M. of her right to file an administrative appeal to ODM's Director and provided instructions on how to file such an appeal. Hearing Examiner's Dec. at 16. F.M. instead attempted to appeal the hearing examiner's decision directly to the Franklin County Court of Common Pleas. *See* Notice of Appeal; Tenth Dist. Dec. at ¶ 8.

ODM moved to dismiss F.M.'s attempted appeal, arguing that the court lacked subject-matter jurisdiction because there was no statutory authority for the court to hear such an appeal. ODM's Mtn. to Dismiss at 4-8. The court agreed, noting that the hearing examiner's decision was not an "adjudication" as that term is defined by R.C. 119.01(D) and therefore the appeal was not authorized under R.C. 119.12. Franklin Cty. C.P. Dec. at 3-4.

F.M. then filed an appeal with the Tenth District Court of Appeals, arguing in her sole assignment of error that the lower court misapplied the doctrine of exhaustion of administrative remedies by failing to consider the vain act exception. *See* Appellants' Tenth Dist. Br. at 6. In reality, the lower court did not utilize that doctrine in its decision but, rather, dismissed for lack of subject-matter jurisdiction, which the Tenth District Court of Appeals affirmed. Tenth Dist. Dec. at ¶¶ 29-30.

F.M. has appealed to this Court, now arguing that the common pleas court had jurisdiction pursuant to R.C. Chapter 119 because ODM's governing statute, R.C. 5160.37, is unconstitutional and preempted by federal law. F.M. also reasserts her position that the lower courts misapplied the vain act exception to the exhaustion of administrative remedies doctrine, despite the fact that neither court below utilized that doctrine in their decisions.

THIS IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND DOES NOT RAISE A SUBSTANTIAL CONSTITUTIONAL QUESTION

This Court should decline jurisdiction for several reasons. First, the actual issue before this Court is well-settled law in Ohio: A court of common pleas only has jurisdiction to hear an administrative appeal if such appeal is provided by law. Further, the particular statute in question *does* provide an avenue for appeal to court, and F.M. simply chose to ignore that avenue. And this Court has already ruled that the administrative review process under R.C. 5160.37 is the proper procedure for raising a constitutional challenge. *Pivonka*, 162 Ohio St.3d 326, 2020-Ohio-3476, 165 N.E.3d 1098, at ¶ 24. Additionally, there is no general interest in this Court hearing this matter because other similarly-situated Medicaid recipients could simply follow the prescribed appeal route permitted by statute. Second, F.M. failed to exhaust her administrative remedies before ODM, thus her meritorious arguments are all waived. Therefore, even if the question of jurisdiction is overturned, F.M. would still fail on the merits of her claim.

A. The lower courts properly applied well-established precedent leaving, at most, error correction.

Despite F.M.'s focus on the underlying merits, there is only one issue before this Court: Whether the common pleas court lacked subject-matter jurisdiction over F.M.'s attempted administrative appeal of the hearing examiner's decision. It did. It is well settled that a court of common pleas only has subject-matter jurisdiction over an administrative appeal if it is provided by statute, and both the Franklin County Court of Common Pleas and the Tenth District Court of Appeals followed this well-settled law in deciding F.M.'s case. F.M. cannot point to a statute that permits her attempted appeal from the hearing examiner's decision to the Franklin County Court of Common Pleas because none exists. In her Memorandum in Support of Jurisdiction, she attempts to cloud this issue by claiming that her purportedly valid constitutional arguments on the merits somehow exempt her from the need to establish subject-matter jurisdiction. They do not. In fact, this Court has already overruled this argument. *Pivonka* at ¶¶ 24-25. The only issue in this case is the mundane principle that an administrative appeal can only be taken to court if permitted by statute. And this mundane principle of subject-matter jurisdiction is not a matter of general concern. Further, the outcome F.M. is seeking would only impact her attempted appeal and would be, at most, error correction remanding the case back to the common pleas court.

As this Court has noted, "[s]ubject matter jurisdiction refers to the constitutional or statutory power of a court to adjudicate a case." *Pivonka* at ¶ 20. "Without subject-matter jurisdiction, a trial court has no power to act." *Id.* Therefore, the common pleas court had no option but to dismiss. *See Sizemore v. Smith*, 6 Ohio St.3d 330, 336, 453 N.E.2d 632 (1983), *superseded by rule on other grounds*, *Pridemore v. Dula*, 12th Dist. Butler Nos. CA94-02-043 & CA94-06-139, 1995 Ohio App. Lexis 1478, *6, fn. 1 (Apr. 10, 1995).

The right to an appeal is neither inherent nor inalienable and, therefore, must be conferred by constitutional or statutory authority. *Roper v. Richfield Twp. Bd. of Zoning Appeals*, 173 Ohio St. 168,173, 180 N.E.2d 406 (1978); *see also Willoughby Hills v. C.C. Bar's Sahara, Inc.*, 64 Ohio St.3d 24, 26, 591 N.E.2d 1203 (1992).; *Cincinnati Gas & Elec. Co. v. Pope*, 54 Ohio St.2d 12, 18, 374 N.E.2d 406 (1978), citing *Middletown v. City Comm. of Middletown*, 138 Ohio St. 596, 37 N.E.2d 609 (1941); *In re Mahoning Valley Sanitary Dist.*, 161 Ohio St. 250, 254, 85 N.E.2d 376 (1949).

Article IV, Section 4(B) of the Ohio Constitution provides the constitutional basis for jurisdiction and review by common pleas courts of decisions rendered by administrative agencies:

> The courts of common pleas and divisions thereof shall have such original jurisdiction over all justiciable matters and such powers of review of proceedings of administrative officers and agencies *as may be provided by law*.

(Emphasis added.) As this Court has noted, "[a]s may be provided by law" refers only to statutory enactments, and "the general subject matter jurisdiction of the Ohio courts of common pleas is defined *entirely by statute*." (Emphasis sic.) *Ohio High School Athletic Assn. v. Ruehlman*, 157 Ohio St.3d 296, 2019-Ohio-2845, 136 N.E.3d 436, ¶ 7, quoting *State v. Wilson*, 73 Ohio St.3d 40, 42, 652 N.E.2d 196 (1995). Thus, subject-matter jurisdiction over an administrative appeal must be conferred by the General Assembly. *See Elec. Classroom of Tomorrow v. Ohio State Bd. of Educ.*, 166 Ohio St.3d 96, 2021-Ohio-3445, 182 N.E.3d 1170, ¶ 10. *Accord In re Seltzer*, 67 Ohio St.3d 220, 222, 6161 N.E.2d 1108 (1993); *Yanega v. Cuyahoga Cty. Bd. of Revision*, 156 Ohio St.3d 203, 2018-Ohio-5208, 123 N.E.3d 806, ¶ 10; *Midwest Fireworks Mfg. Co. v. Deerfield Twp. Bd. of Zoning Appeals*, 91 Ohio St.3d 174, 177, 743 N.E.2d 894 (2001), citing *Roper* at 173; *Saber Health Care v. Ohio Dept. of Job & Family Servs.*, 4th Dist. Adams No. 20CA1107, 2020-Ohio-4044, ¶ 16; *Jrb Holdings v. Stark Cty. Bd. of Revision*, 5th Dist. Stark No. 2021CA00144, 2022-Ohio-1646, ¶ 11; *Women of the Old West. End, Inc. v. Toledo City Counsel*, 6th Dist. Lucas No.

L-20-1181, 2021-Ohio-3267, ¶ 19; *Meziane v. Munson Twp. Bd. of Trustees*, 11th Dist. Geauga No. 2020-G-0251, 2020-Ohio-5142, 162 N.E.3d 103, ¶ 7; *Alesi v. Bd. of Cty. Commrs.*, 12th Dist. Warren Nos. CA2013-12-123, CA2013-12-124, CA2013-12-127, CA2013-12-128, CA2013-12-131, CA2013-12-132, 2014-Ohio-5192, ¶ 16. And a statutory conferral of jurisdiction must be express. *See State ex rel. Wellington v. Kobly*, 112 Ohio St.3d 195, 2006-Ohio-6571, 858 N.E.2d 798, ¶ 28, citing *Cent. Ohio Transit Auth. v. Transport Workers Union of Am. Local 208*, 37 Ohio St.3d 56, 60, 524 N.E.2d 151 (1988).

Finally, this Court has already applied these well-established principles to the very statute F.M. is challenging. The *Pivonka* Court recognized that constitutional challenges do not exempt a litigant from the requirement of establishing subject-matter jurisdiction.

> But even though administrative agencies cannot adjudicate constitutional questions, a party cannot circumvent the administrative-review process by first raising a constitutional challenge in the common pleas court. Rather, the proper procedure for raising a constitutional challenge is to first exhaust all administrative remedies. A party can then raise the constitutional challenge in the court that hears the administrative appeal.

Pivonka at ¶ 24, (internal citation omitted). Because this matter is so well settled, it is not one of public concern or great general interest and does not raise a substantial constitutional question.

1. R.C. 5160.37 does not authorize F.M.'s attempted appeal.

R.C. 5160.37 does not provide jurisdiction for an appeal of a hearing examiner's decision directly to a court of common pleas. Rather, it only authorizes an appeal to a common pleas court after there has been an administrative appeal to ODM's Director and a decision by the same. *See Masters v. Ohio Dept. of Medicaid*, 2d Dist. No. 2022-CA-9, 2022-Ohio-3075, at ¶¶ 82, 95; R.C. 5160.37(M) & (N). Revised Code 5160.37(M)(1) provides that "[a] Medicaid recipient who disagrees with a hearing examiner's decision . . . may file an administrative appeal with the Medicaid director." The statute further provides that "[a] party to an administrative appeal

described in division (M) of this section may file an appeal with a court of common pleas in accordance with section 119.12 of the Revised Code." R.C. 5160.37(N). This Court has recognized this process in *Pivoka v. Corcoran*, noting that R.C. 5160.37 "identifies the steps required to request a hearing," "provides a process for appealing the hearing examiner's decision to ODM's director," and "provides a process for appealing the director's decision to the common pleas court." *Pivonka*, 162 Ohio St.3d 326, 2020-Ohio-3476, 165 N.E.3d 1098, at ¶ 23. Thus, the only appeal to court authorized under R.C. 5160.37 is an appeal of the Director's decision, and no portion of R.C. 5160.37 authorizes an appeal to court of a hearing examiner's decision. Without express authority to hear an administrative appeal, a court of common pleas lacks jurisdiction. *See Pryor v. Dir., Ohio Dept. of Job & Family Servs.*, 148 Ohio St.3d 1, 2016-Ohio-2907, 68 N.E.3d 729, ¶ 12, citing *Zier v. Bur. of Unemp. Comp.*, 151 Ohio St. 123, 84 N.E.2d 746 (1949) ("When a statute confers a right to appeal, the appeal can be perfected only in the mode the statute prescribes.").

F.M. availed herself of the hearing process in R.C. 5160.37, receiving an in-person hearing before a third-party hearing examiner. When the hearing examiner issued his decision, he advised F.M. of her right to appeal his decision to ODM's director, citing Ohio Adm.Code 5160-80-09, which provides the method for filing such an appeal under R.C. 5160.37(M)(1). Instead of filing an appeal to the Director, F.M. filed a R.C. 119.12 administrative appeal with the Franklin County Court of Common Pleas. Nothing within R.C. 5160.37—nor any other statute—authorized such an appeal, and the court correctly dismissed the case for lack of subject-matter jurisdiction, which the Tenth District affirmed.

2. R.C. Chapter 119 does not authorize F.M.'s attempted appeal, nor does any other statute.

Neither R.C. Chapter 119 nor any other statute provides jurisdiction for an appeal of a hearing examiner's decision issued pursuant to R.C. 5160.37 to a court of common pleas. R.C.

Chapter 119.12, a subsection of the Administrative Procedures Act, "allows those adversely affected by many types of agency adjudications to appeal to the court of common pleas." *TWISM Ents., L.L.C. v. State Bd. of Registration for Professional Engineers & Surveyors*, 172 Ohio St.3d 225, 2022-Ohio-4677, 223 N.E.3d 371, ¶ 38. That statute only allows an appeal to court from an "order of an agency issued pursuant to an adjudication." *See* R.C. 119.12(A) & (B). The term "adjudication" as used in that section is defined by statute as, "the determination by the *highest or ultimate authority of an agency* of the rights, duties, privileges, benefits, or legal relationships of a specified person, but does not include the issuance of a license in response to an application with respect to which no question is raised, nor other acts of a ministerial nature." (Emphasis added.) R.C. 119.01(D). Therefore, an agency determination is only subject to common pleas court review under R.C. 119.12 if that determination is "(1) that of the highest or ultimate authority of an agency which (2) determines the rights, privileges, benefits, or other legal relationships of a person. Both elements are required." *Russell v. Harrison Twp. Montgomery Cty.*, 75 Ohio App.3d 643, 648, 600 N.E.2d 374 (2d Dist.1991), cited with approval by *Fuller v. Ohio DOT*, 10th Dist. No. 16AP-122, 2016-Ohio-5116, ¶ 12. Thus, "[a] common pleas court only has subject-matter jurisdiction to hear an appeal under R.C. 119.12 from a final order of an administrative agency." *Id.*, citing *Gwinn v. Ohio Elections Comm.*, 187 Ohio App.3d 742, 2010-Ohio-1587, 933 N.E.2d 1112, ¶ 19 (10th Dist.).

Here, the hearing examiner who issued the decision F.M. attempted to appeal is not ODM's "highest or ultimate authority." ODM's highest authority is its Director, Maureen Corcoran. *See* R.C. 5160.03 (noting that ODM's Director is the "executive head" of ODM). Because the hearing examiner's decision was not issued by ODM's highest authority, it is not an adjudication as that term is defined in R.C. 119.01(D). Therefore, R.C. 119.12 does not grant authority for the court of

common pleas to hear such an appeal, and the lower courts correctly held that R.C. 119 does not provide authorization for F.M.'s attempted appeal. *See also Springfield Fireworks, Inc. v. Ohio Dept. of Comm.*, 10th Dist. Franklin No. 03AP-330, 2003-Ohio-6940, ¶ 25.

Because it is well-settled that there must be a statute authorizing a court to hear an administrative appeal, this case does not raise a matter of public or great general interest. Further, other than reciting that this case poses a question of constitutional significance, Appellants have failed to identify any such question. And indeed, no such question exists in this case. Therefore, this Court should decline jurisdiction.

B. Even if the common pleas court had subject-matter jurisdiction, F.M. failed to exhaust her administrative remedies so her other arguments are waived.

This case would be a flawed vehicle to rewrite Ohio's jurisprudence on subject-matter jurisdiction of administrative appeals because, under the doctrine of failure to exhaust administrative remedies, F.M. also waived her merit arguments. Though neither of the lower courts cited failure to exhaust as a ground for dismissal, F.M. argues in her Memorandum in Support of Jurisdiction as if they had, alleging that the common pleas court misapplied one of that doctrine's exceptions—the vain act exception. Memo in Support at 6. Even if the common pleas court had subject-matter jurisdiction, which it did not, F.M.'s argument is inconsistent with settled law on exhaustion of administrative remedies, and the lower court would have been correct to dismiss her appeal on those grounds.

"The purpose of the doctrine of exhaustion of administrative remedies is to prevent premature interference with the administrative process." *Basic Distrib. Corp. v. Ohio Dept. of Taxation*, 94 Ohio St.3d 287, 290, 762 N.E.2d 979 (2002), citing *Nemazee v. Mt. Sinai Med. Ctr.*, 56 Ohio St.3d 109, 111, 564 N.E.2d 477 (1990). The U.S. Supreme Court has described the doctrine as, "the long settled rule of judicial administration that no one is entitled to judicial relief

for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51, 58 S.Ct. 459, 82 L.Ed. 638 (1938). Requiring the administrative process to run its course first allows "an agency to bring its expertise to bear on a problem as well as to correct its own mistakes." *Olivas v. Cincinnati Pub. Schools*, 171 Ohio App.2d 669, 2007-Ohio-1857, 872 N.E.2d 962, ¶ 15 (1st Dist.). A failure to exhaust results in a waiver or forfeiture of any issue unless the appeal to court would have provided the litigant with her first opportunity to raise it. *See Edmonds v. State Med. Bd. of Ohio*, 10th Dist. Franklin No. 14AP-778, 2015-Ohio-2658, ¶¶ 16-20.

F.M. failed to exhaust the administrative remedy available to her pursuant to R.C. 5160.37 and thus waived any meritorious arguments she might have otherwise made. If F.M. wished to contest the hearing examiner's decision, her next step was to file an administrative appeal with ODM's Director under R.C. 5160.37(M)(1). She failed to do so and instead appealed directly to court. Due to her disregard of the administrative process, ODM's Director never had a chance to consider the hearing examiner's decision. Indeed, the stated language of R.C. 5160.37(M)(1) allows ODM's Director to "affirm, modify, remand, or reverse the hearing decision," thus granting ODM an opportunity to apply its expertise to the matter. But ODM was not given the opportunity to apply its expertise. *See T & M Machines, LLC v. Yost*, 10th Dist. Franklin No. 19AP-124, 2020-Ohio-551, ¶ 23. Without such an opportunity, any judicial review would be premature.

In an attempt to remedy her abandonment of the mandatory administrative process, F.M. argues that appealing the hearing examiner's decision to ODM's Director under R.C. 5160.37 would have been a "vain act," thereby exempting her from the requirement of exhausting her administrative remedies before seeking redress in court. Memo. In Support at 3-6. However, she misunderstands this exception. The "vain act" exception holds that a litigant need not exhaust

administrative remedies prior to filing in court if no administrative remedy exists that could provide the relief sought or if the remedy available would be wholly futile. *T & M Machines* at ¶ 24, quoting *Karches v. City of Cincinnati*, 38 Ohio St.3d 12, 17, 526 N.E.2d 1350 (1988).[1] This exception is not met merely by alleging that the litigant is unlikely to succeed in the administrative process. *State ex rel. Teamsters Local Union No. 436*, 132 Ohio St.3d 47, 2012-Ohio-1861, 969 N.E.2d 224, ¶ 24. Rather, the exception only applies if the administrative agency "lacks the authority to grant the relief sought." *Nemazee* at 115. Thus, the focus is on the *power* of the administrative body to grant the relief requested, not on the *likelihood* of the relief actually being granted. *Id.*

The relief sought by F.M. when she requested a hearing was to have ODM reduce or eliminate the amount of money she owed ODM, and ODM's Director has clear and explicit authority in R.C. 5160.37(M)(1) and Ohio Admin.Code 5160-80-09 to grant that relief. F.M. argues that the Director only had authority to affirm the hearing officer's decision and therefore could not have granted the relief she sought. Memo in Support, at 5. This is incorrect. ODM's Director has authority under R.C. 5160.37(M)(1) to "affirm, modify, remand, or reverse" the hearing examiner's decision regarding the dollar amount of ODM's right of recovery. Further, ODM's Director has explicit authority in her administrative appeal decision to "reverse, decrease, or increase any monetary finding." Ohio Admin.Code 5160-80-09(F)(1). Therefore, had F.M. filed the mandatory appeal to ODM's Director, the Director could have reviewed the administrative record and reversed the hearing examiner's decision, thereby reducing or eliminating ODM's lien

[1] There is another exception that a litigant need not exhaust administrative remedies prior to filing in court if the available remedy is onerous or unusually expensive, *see Karches* at 17, but that exception has not been raised here.

in its entirety. Because the Director's decision could have granted F.M. the remedy she sought, the vain act exception does not apply.

F.M.'s argument that the vain act exception applies here to grant the common pleas court subject-matter jurisdiction is not supported by well-settled case law and is not worthy of further review by this Court.

ARGUMENT IN OPPOSITION TO APPELLANTS' PROPOSITIONS OF LAW

Even if this Court were to grant review, F.M.'s propositions of law would fail, as she ignores well-settled case law and attempts to raise arguments that are without merit.

Appellee's Proposition of Law No. 1 (responding to F.M.'s Propositions 1 & 2):

> *A common pleas court lacks subject-matter jurisdiction over an administrative appeal when no statute authorizes the appeal.*

Even if this Court were to grant review, F.M.'s attempt to establish jurisdiction within the common pleas court to hear her appeal would fail. F.M.'s first and second Propositions of Law both essentially assert that a Medicaid beneficiary can establish a common pleas court's jurisdiction to hear a R.C. 119.12 administrative appeal merely by alleging that ODM's statute is unconstitutional. This Court has held the opposite. It held in *Pivonka* that a party that alleges that ODM's subrogation statute is unconstitutional must *follow* the administrative appeal statute—not ignore it as F.M. does. *Pivonka*, 162 Ohio St. 3d 326 at ¶24.

This case is not a declaratory judgment action. It is not a writ or other attempted collateral attack. It is an attempted administrative appeal pursuant to R.C. 119.12 of a hearing examiner decision that was issued in accordance with R.C. 5160.37. F.M. was, therefore, required to evoke the common pleas court's jurisdiction by strictly complying with the procedures necessary to establish jurisdiction for a R.C. 119.12 administrative appeal. *See Pryor*, 148 Ohio St.3d 1, 2016-Ohio-2907, 68 N.E.3d 729, ¶ 12. And as discussed at length above, a court of common pleas has

no jurisdiction to hear an administrative appeal under R.C. 119.12 unless a statute expressly grants jurisdiction. *See supra* 4-9. No such statute exists here. Acknowledging this deficiency, F.M.'s propositions of law urge this Court to create a new exception for establishing R.C. 119.12 jurisdiction in a court of common pleas: namely, if an appellant alleges that an agency's authorizing statute is unconstitutional, then the appellant is exempt from establishing subject-matter jurisdiction. F.M. cites to no authority that supports such a radical exception, and it is so out of step with R.C. 119.12 jurisprudence that it is not worth this Court's time to consider. Furthermore, this Court has already rejected such an argument in *Pivonka*.

F.M.'s propositions of law seek to circumvent a foundational principle of Ohio law by allowing her appeal to commence without any statutory authority establishing jurisdiction. She weaves her merit arguments throughout her discourse on jurisdiction, but such arguments are misplaced and irrelevant. The only issue here is jurisdiction. And no statutory authority exists to establish jurisdiction for this appeal.

Appellee's Proposition of Law No. 2 (responding to F.M.'s Proposition 3):

R.C. 5160.37 is constitutional and does not violate the Federal Anti-Lien Provision.

F.M.'s third proposition of law fails to address the real issue here of subject-matter jurisdiction and instead contemplates the underlying merits, which neither court below addressed. F.M. argues that R.C. 5160.37 is unconstitutional and is preempted by the Anti-Lien Provision of federal Medicaid law. Memo. in Support at 6-11. Though these issues would not be properly before this Court, Appellee will address them here briefly. In short, they would fail.

As this Court has noted, "[f]acial challenges to the constitutionality of a statute are the most difficult to mount successfully, since the challenger must establish that not set of circumstances exist under which the act would be valid." *Wymsylo v. Bartec, Inc.*, 132 Ohio St.3d 167, 2012-Ohio-2187, 970 N.E.2d 898, ¶ 21. A party bringing a facial challenge must prove, beyond a

reasonable doubt, that there is no set of circumstances under which the statute would be valid. F.M. has not met this high burden. She has not argued that there is no set of facts under which R.C. 5160.37 would be valid. Nor can she, since every Medicaid recipient can—by way of the administrative process and appeals to court, if necessary—successfully contest ODM's determination of the amount owed by demonstrating at a hearing (or on appeal) that ODM's application of R.C. 5160.37 is incorrect. F.M.'s lack of success at hearing is not conclusive that no recipient could successfully rebut ODM's right of recovery.

Further, R.C. 5160.37 is not preempted by federal law. F.M. argues that R.C. 5160.37 violates the federal Medicaid Anti-Lien statute (42 U.S.C. 1396p). Memo. in Support at 10. She cites U.S. Supreme Court decisions *Arkansas Dept. of Health & Human Servs. vs. Ahlborn*, 547 U.S. 268, 126 S.Ct. 1752, 164 L.Ed.2d 459 (2006), and *Wos v. E.M.A.*, 568 U.S. 627, 133 S.Ct. 1391, 185 L.Ed.2d 471 (2013), for support. *Ahlborn* and *Wos* serve as the definitive cases for understanding a state's duties and limitations when recouping the costs of medical care after a Medicaid recipient is injured by a third party. In *Wos*, as well as in its predecessor *Ahlborn*, the Court held, in part, that a state cannot take any portion of a Medicaid recipient's settlement that is not designated as payment for medical care because that would be a violation of the federal anti-lien statute. *Wos* at 630; *Ahlborn* at 284. But the U.S. Supreme Court also recognized that not all settlements specifically allocate funds. With this in mind, the *Wos* Court found that when a settlement is unallocated and the parties do not stipulate to a particular allocation, a judicial or administrative hearing may be necessary. *Wos* at 638-639. While the Court acknowledged that a formal process may be needed, it did not go so far as to require a specific type of hearing or prescribe that a particular formula must be followed. *See id.* at 641.

In response to the *Wos* decision, the Ohio General Assembly amended its Medicaid subrogation statute in 2015 to grant recipients a new hearing right to challenge ODM's right of recovery. *See Pivonka*, 162 Ohio St.3d 326, 2020-Ohio-3476, 165 N.E.3d 1098, ¶ 9. The present version of R.C. 5160.37 is in line with the requirements of *Ahlborn* and *Wos* because it provides Ohio Medicaid recipients with the opportunity to rebut ODM's determination of what it is owed. The statutory process allows a recipient to demonstrate at an administrative hearing why a different amount is warranted. That process allows the recipient to present evidence demonstrating to a hearing examiner, and subsequently to ODM and to a court on appeal why ODM's recovery determination is incorrect. And this determination goes beyond just whether the formula in R.C. 5160.37(G)(2) is followed, as evidenced by the ability of a recipient to submit witness testimony and physical evidence that a *different allocation is warranted*. *See* R.C. 5160.37(L)(2). The fact that F.M. was unsuccessful at the administrative hearing does not negate this. The current statutory framework in R.C. 5160.37 is precisely the type of mechanism the *Wos* Court suggested would pass constitutional muster, and the U.S. Supreme Court recently held that a nearly identical statute did not violate the federal anti-lien statute. *See Gallardo v. Marstiller*, 596 U.S. 420, 142 S.Ct. 1751, 213 L.Ed.2d 1 (2022).

Ultimately, F.M.'s propositions of law attempt to obscure the real issue: She failed to timely appeal to ODM's Director and instead attempted a R.C. 119.12 administrative appeal of the hearing examiner's decision directly to the court of common pleas without statutory authority to do so. Her arguments concerning exhaustion, constitutionality of the governing statute, and preemption of federal law are all secondary. Acceptance of this appeal would be governed by well-settled law and serve to be, at most, error correction of the common pleas court's determination of its own jurisdiction, as any merit arguments are waived or would fail.

CONCLUSION

For the above reasons, ODM urges the Court to deny jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Appellee Ohio Department of Medicaid's Memorandum in Opposition to Jurisdiction was served via electronic mail this 26th day of February 2024, upon the following counsel:

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