

**COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO**

FRANKLIN MILLER, et al., :

Plaintiffs : **CASE NO. 2012 CVA 01052**

vs. : **Judge McBride**

H&G NURSING HOMES, INC., et al., : **DECISION/ENTRY**

Defendants :

Slater & Zurz, LLP, Martin S. Delahunty, counsel for the plaintiffs Franklin Miller and Marilyn Miller, One Cascade Plaza, Suite 2210, Akron, Ohio 44308-1135.

Freund, Freeze & Arnold, Susan Blasik-Miller and Shannon K. Bockelman, counsel for defendants H&G Nursing Homes, Inc. and Adams County Manor Nursing Home, Fifth Third Center, 1 South Main Street, Suite 1800, Dayton, Ohio 45402-2017.

This cause is before the court for consideration of a motion to join necessary parties filed by defendants H&G Nursing Homes, Inc. and Adams County Manor Nursing Home.

The court scheduled and held a hearing on the motion via telephone on January 14, 2013. At the conclusion of that hearing, the court took the issues raised by the motion under advisement.

Upon consideration of the motion, the record of the proceeding, the oral and written arguments of counsel, and the applicable law, the court now renders this written decision.

FACTS OF THE CASE

On May 29, 2012, the plaintiffs Franklin Miller and Marilyn Miller filed the present medical malpractice action against the defendants H&G Nursing Homes, Inc. and Adams County Manor Nursing Home. The parties agree that Franklin Miller's medical bills, for which the plaintiff is seeking compensatory damages, were paid by Medicare and, as such, Medicare would have a subrogation interest in any award for the amount of the medical bills in the present action.

The defendants filed the present motion asking that the Department of Health & Human Services (Medicare) be joined as a party in the present action pursuant to Civ.R. 19(A). The plaintiffs argue that the Department of Health & Human Services is not subject to service of process and, consequently, cannot be joined as a party to this action.

LEGAL ANALYSIS

Pursuant to Civil Rule 19(A):

“A person who is subject to service of process shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action

and is so situated that the disposition of the action in his absence may (a) as a practical matter impair or impede his ability to protect that interest or (b) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest, or (3) he has an interest relating to the subject of the action as an assignor, assignee, subrogor, or subrogee. If he has not been so joined, the court shall order that he be made a party upon timely assertion of the defense of failure to join a party as provided in Rule 12(B)(7). If the defense is not timely asserted, waiver is applicable as provided in Rule 12(G) and (H). If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. In the event that such joinder causes the relief sought to exceed the jurisdiction of the court, the court shall certify the proceedings in the action to the court of common pleas.”

Medicare has a subrogation interest in the present action by virtue of the medical bills paid on behalf of Franklin Miller. Therefore, joinder of Medicare falls under Civ.R. 19(A)(3) as set forth above.

The plaintiff argues that Medicare should not be joined in this case because, due to its sovereign immunity, the United States Department of Health & Human Services is not subject to service of process, which is required to join a party under Civ.R. 19(A).

The Department of Health & Human Services is one of the fourteen Executive Branch departments and any agency which is part of that department is entitled to sovereign immunity.¹ As such, under the doctrine of sovereign immunity, Medicare cannot be compelled to join this action.² The United States and its agencies must expressly and unequivocally waive sovereign immunity and consent to being sued.³

¹ *CareToLive v. von Eschenbach*, 525 F.Supp.2d 938, 951 (S.D. Ohio, 2007).

² *Gobrecht v. McGee*, 249 F.R.D. 262, 263 (N.D. Ohio, 2007).

³ See, e.g., *Normandy Pointe Associates v. Federal Emergency Management Agency*, 105 F.Supp.2d 822, 826 (S.D. Ohio, 2000).

However, Medicare has chosen in some prior cases to waive its sovereign immunity and assent to being made a party to an action to protect its subrogation interest. This choice lies solely with the agency. While the plaintiff stated at the telephone hearing on this matter that Medicare is aware of the present action and is choosing not to participate, the plaintiff has not provided proof of such to defense counsel or the court.

The court finds that Medicare may be named as a party to this action and served with a complaint and summons. Thereafter, if Medicare takes the position in the litigation that it is not waiving its sovereign immunity and is not consenting to being sued in the present action, dismissal of the agency can be achieved in short order.

In at least one other action before this court, Medicare has asserted sovereign immunity as an affirmative defense but has not asked the court to dismiss it as a party but has instead participated in the resolution of the case. This has been helpful because it is sometimes difficult for counsel to get a timely response from Medicare to settlement proposals absent the involvement of Medicare in the actual litigation. The issue in this case will be whether Medicare asks the court for a ruling on its claim of sovereign immunity either through a motion to dismiss or a motion for summary judgment. In the event that it does so, it is anticipated that the motion will be granted.

CONCLUSION

The defendants' motion to join the Department of Health and Human Services as a party to this action is well-taken and shall be granted. As noted above, should

Medicare request to be dismissed from the action on the basis of sovereign immunity, the court will promptly rule on that matter and almost certainly dismiss Medicare as a party.

IT IS SO ORDERED.

DATED: _____
Judge Jerry R. McBride

CERTIFICATE OF SERVICE

The undersigned certifies that copies of the within Decision/Entry were sent via Facsimile/E-Mail/Regular U.S. Mail this 8th day of February 2013 to all counsel of record and unrepresented parties.

Administrative Assistant to Judge McBride