

COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

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CLERMONT COUNTY, OHIO

2018 SEP -4 PM 3:18

FILED

**CARESPRING DBA
EASTGATESPRING OF CINCINNATI**

Plaintiff

vs.

AUDREY FEDER

Defendant

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CASE NO. 2017 CVH 00314

Judge McBride

DECISION/ENTRY

Jennifer A. Coy, counsel for the plaintiff and counterclaim-defendant Carespring, 1426 North Third Street, Suite 200, P.O. Box 5400, Harrisburg, PA 17110.

Pro Seniors, Inc., Jeremy L. Koenemann and Miriam H. Sheline, counsel for the defendant and counterclaim-plaintiff Audrey Feder, 7162 Reading Road, Suite 1150, Cincinnati, Ohio, 45237.

This cause is before the court for consideration of (1) the motion to dismiss counterclaims filed by the plaintiff and counterclaim-defendant Carespring on October 5, 2017 and (2) the motion for judgment on the pleadings filed by the defendant and counterclaim-plaintiff Audrey Feder on October 26, 2017.

The court scheduled and held a hearing on the motions on February 2, 2018. At the conclusion of the hearing, the court took the issues raised by the motions under advisement.

Upon consideration of the motions, the record of the proceedings, the written arguments of counsel, and the applicable law, the court now renders this written decision.

FACTS OF THE CASE AND PROCEDURAL BACKGROUND

This case arises from a nursing home resident's alleged failure to pay her nursing home for her care and from the nursing home's alleged infringement on her rights. According to the complaint, the defendant and counterclaim-plaintiff Audrey Feder resides at Eastgatespring, a skilled nursing facility owned and operated by the plaintiff and counterclaim-defendant Carespring.¹

On November 4, 2015, Feder moved into Eastgatespring and entered into a written agreement with Eastgatespring titled Resident Admission Agreement ("the Agreement").²

The Agreement provides that "You [Feder] agree to pay all charges and fees that are billed to You by Eastgatespring of Cincinnati when they become due."³ It also provides that, if Feder is or will be a Medicaid recipient, she agrees to take any steps necessary to have her benefits assigned to Eastgatespring.⁴

In citing to the Agreement, Carespring alleges that, in the Agreement, Feder "agreed to compensate Eastgatespring for all care provided included pursuing Medicaid eligibility, if necessary, and payment of her social security income, less the exempt

¹ Pls. Compl., ¶¶ 3-4.

² Pls. Compl., ¶¶ 4-5.

³ Ex. A. to Compl.

⁴ Ex. A. to Compl.

\$50,000 allowance.”⁵ However the court has not identified this provision in the exhibit that is the Agreement, attached to the complaint as Exhibit A.

A Medicaid benefits application was submitted to the Clermont County Department of Jobs and Family Services (“DJFS”) on Feder’s behalf on August 15, 2016, but it was denied because her countable resources exceeded resource limits.⁶ Through January 11, 2017, Feder’s account with Carespring was delinquent by \$111,000 and continues to accrue.⁷

Eastgatespring attempted to discharge Feder, but could not discharge her until it locates a location to transfer her to.⁸ Carespring is unaware of another facility that will accept Feder because of her unwillingness to cooperate in obtaining Medicaid benefits.⁹

According to Feder’s answer and counterclaims, Carespring engaged in conduct that violated her rights as a nursing home resident. Feder alleges that she was moved from her room on the first floor to one on the second without explanation and that the new room was behind locked doors that restricted her free movement more than necessary.¹⁰ Carespring moved Feder to the Montgomery Care Center without any prior notice or preparation.¹¹ Feder alleges that Carespring’s decision to file this complaint is an attempt to intimidate her into relinquishing her rights.¹²

⁵ Pls. Compl., ¶ 8. The court also notes that the date on Exhibit A is April 20, 2016, not November 5, 2015, as indicated in the complaint.

⁶ Pls. Compl., ¶¶ 9-10.

⁷ Pls. Compl., ¶ 11.

⁸ Pls. Compl., ¶¶ 13-15.

⁹ Pls. Compl., ¶ 16.

¹⁰ Defs. Answer, ¶ 27.

¹¹ Defs. Answer, ¶ 27.

¹² Defs. Answer, ¶ 28.

On March 13, 2017, Carespring filed a complaint against Feder for two causes of action, those being breach of contract and unjust enrichment. In its prayer for relief, it requests an order compelling Feder to (1) cooperate with the DJFS spend-down process, or alternatively for the court to designate Eastgatespring as limited power of attorney or guardian ad litem so it can assist Feder in spending-down her resources, (2) compel Feder to turn over and remit to Eastgatespring any financial resources DJFS identified as rendering Feder over resources and preventing her from receiving Medicaid eligibility, and (3) compelling Feder to designate Eastgatespring as representative payee of her social security income. It also prays for any other equitable relief as the court deems appropriate.

Feder filed counterclaims on September 1st. Her first cause of action alleges that Carespring committed multiple violations of state and federal statutes designed to protect resident's rights. She requests compensatory damages and injunctive relief preventing Carespring from engaging in these practices again pursuant to R.C. 3721.17(I). Her second cause of action alleges that Carespring violated the Ohio Consumer Sales Protection Act. She requests non-economic damages and punitive damages.

On October 5th, Carespring filed a motion for judgment on the pleadings on Feder's counterclaims. On October 26th, Feder filed a memorandum in opposition to Carespring's motion and a motion to dismiss Carespring's complaint based on the premise that the requested relief is unavailable to Carespring. After the court granted Carespring's motion for additional time to respond to Feder's motion, Carespring ultimately did not file a response in opposition. Carespring also did not file a reply in support of its motion.

On February 2, 2018, the court was scheduled to hear oral argument on the motions. Counsel for Carespring did not appear. Counsel for Feder indicated she would stand on her briefs and did not offer additional oral argument. Following the hearing, the court took the motions under advisement.

I. CARESPRING'S MOTION DISMISS UNDER CIV.R. 12(B)(6)

LEGAL STANDARD

Civ.R. 12(B)(6) provides that a party may move to dismiss an action on the basis of failure to state a claim upon which relief can be granted. "A motion to dismiss for failure to state a claim upon which relief can be granted tests the sufficiency of the complaint."¹³ "Thus, the movant may not rely on allegations or evidence outside the complaint; such matters must be excluded * * *."¹⁴ "The factual allegations of the complaint and items properly incorporated therein must be accepted as true. Furthermore, the plaintiff must be afforded all reasonable inferences possibly derived therefrom."¹⁵ "It must appear beyond doubt that the plaintiff can prove no set of facts entitling him to relief."¹⁶

¹³ *Volbers-Klarich v. Middletown Mgt., Inc.*, 125 Ohio St.3d 494, 2010-Ohio-2057, 929 N.E.2d 434, ¶ 11, citing *Assn. for the Defense of the Washington Local School Dist. v. Kiger*, 42 Ohio St.3d 116, 117, 537 N.E.2d 1292 (1989).

¹⁴ *Volbers-Klarich*, 2010-Ohio-2057 at ¶ 11, citing Civ.R. 12(B).

¹⁵ *Volbers-Klarich*, 2010-Ohio-2057 at ¶ 12, quoting *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 192, 532 N.E.2d 753 (1988).

¹⁶ *Volbers-Klarich*, 2010-Ohio-2057 at ¶ 12, citing *Vail v. Plain Dealer Publishing Co.*, 72 Ohio St.3d 279, 280, 649 N.E.2d 182 (1995).

ANALYSIS

A. VIOLATIONS OF RESIDENT RIGHTS UNDER THE U.S. CODE AND OHIO REVISED CODE

1. VIOLATIONS OF THE U.S. CODE

Feder's first cause of action alleges that Carespring violated her rights under the state and federal resident's rights statutes and regulations in multiple ways. These include violations of R.C. 3721.13 and 42 C.F.R. 483.10. Carespring argues that Feder's claims under the federal provisions fail to state a claim for relief because 42 C.F.R. 483.10 does not create a private cause of action for violations of a resident's rights. Feder counters that the federal statute is relevant to establishing the standard of care that Carespring must follow under the Ohio statute and its duties to Feder.

In examining 42 C.F.R. 483.10, it does provide for numerous rights to residents, as does the Ohio version, R.C. 3721.13(A). However, 42 C.F.R. 483.10 does not have a federal corollary provision to R.C. 3721.17, which grants a private cause of action to residents whose rights are violated. In fact, the court has not been able to identify, nor have the parties identified, cases in which Ohio courts have allowed for a private cause of action based upon violations of 42 C.F.R. 483.10. To the contrary, the court has found case law expressly stating that "there is no private, federal cause of action against a nursing home under the Medicaid Act and the regulations promulgated thereunder, *i.e.*,

42 C.F.R. 483 *et seq.*"¹⁷ Other federal courts have held likewise, concluding that there is no private right of action under the Medicaid Act.¹⁸

The cases that the court has found that discuss the federal regulations for purposes of establishing a standard of care deal with the regulations in relation to negligence actions, not private causes of action under R.C. Chapter 3721.¹⁹

Moreover, when determining a violation of R.C. 3721.13(A), the Second District Court of Appeals has instructed that courts must apply the statute as written.²⁰ For example, in *Dayspring of Miami Valley v. Shepherd*, 2d Dist. Clark No. 06-CA-113, 2007-Ohio-2589, ¶¶ 28-30, the appellate court found it was error for the trial court to consider factors that were not listed in the Ohio statute in finding a violation of R.C. 3721.13(A).²¹ Indeed, the Fifth District Court of Appeals has concluded that " * * the manifest intent of R.C. 3721.13 *et seq.* was to establish therein the simple standard of care which was 'adequate and appropriate' under all the facts of the case."²² Accordingly, the court finds

¹⁷ *Prie v. Broadview Multi-Care Center*, N.D. Ohio No. 1:08 CV 1427, 2008 WL 2745977, *2 (July 11, 2008).

¹⁸ See *Harmon v. St. Augustine Manor*, N.D. Ohio No. 1:06CV2845, 2007 WL 1072164 (April 5, 2007), citing *Fuzie v. Manor Care, Inc.* 461 F.Supp. 689 (N.D. Ohio 1977) ("No private remedy is implied on behalf of a recipient under the Medicaid Act and the regulations promulgated under it."); *Nichols v. St. Luke Center of Hyde Park*, 800 F.Supp. 1564, 1567 (S.D. Ohio 1992) (noting that, generally, federal statutes do not give rise to a private cause of action unless the statute or its legislative history indicate such intent, and specifically stating that "[n]othing in 42 U.S.C. § 1396r indicates that Congress intended the legislation to grant individuals a private right of action enforceable against their private nursing homes.").

¹⁹ See *Prie*, 2008 WL 2745977 at *2 (finding 42 C.F.R. 483 *et seq.* may be important to the plaintiff's case as it pertains to the standard of care). See generally *Eisenhuth v. Moneyhon*, 161 Ohio St. 367, 119 N.E.2d 440 (1954), citing *Sluder v. St. Louis Transit Co.*, 189 Mo. 107, 88 S.W. 648 (1905) (discussing the import of legislative enactments in the context of negligence, stating: "The violation of any specific legislative enactment enacted for the protection of private persons is of itself such a breach as to constitute negligence.").

²⁰ *Dayspring of Miami Valley v. Shepherd*, 2d Dist. Clark No. 06-CA-113, 2007-Ohio-2589, ¶¶ 28-30.

²¹ *Id.*

²² *Slagle v. Parkview Manor, Inc.*, 5th Dist. Stark No. CA-6155 and CA-6159, 1983 WL 7079, *4 (Oct. 7, 1983).

that the federal regulations governing resident's rights are irrelevant to Feder's cause of action for violations of her resident's rights and do not create a private cause of action. Therefore the court grants Carespring's motion to dismiss the portions of Feder's first counterclaim that are based upon violations of 42 C.F.R. 483.10.

2. VIOLATIONS OF THE OHIO RESIDENT'S RIGHTS STATUTES

R.C. Chapter 3721 deals with " * * * provisions for protecting rights of patients and residents at nursing homes, a quickly growing segment of Ohio's population."²³ R.C. 3721.13 lists a "non-exhaustive list of rights for the safety, treatment, privacy, and civil rights of nursing home patients."²⁴ The list includes rights such as the right to certain living conditions and the right to adequate medical treatment, among many others.²⁵ The resident's rights statutes " * * * were conceived not to give residents special rights, but to restore basic human rights that had been eroded."²⁶

In the resident's rights statutes, R.C. 3721.17 explicitly provides for a private cause of action for violations under the Ohio resident's rights statutes.²⁷ It states:

"(I)(A)(1) Any resident whose rights under sections 3721.10 to 3721.17 of the Revised Code are violated has a cause of action against any person or home committing the violation. *
* *

²³ *Washington Cty. Home v. Ohio Dept. of Health*, 178 Ohio App.3d 78, 2008-Ohio-4342, 896 N.E.2d 1011, ¶ 30 (4th Dist.), quoting *Belinky v. Drake Ctr., Inc.*, 117 Ohio App.3d 497, 503, 690 N.E.2d 1302 (1st Dist. 1996).

²⁴ *Brooks v. Montgomery Care Ctr.*, 1st Dist. Hamilton No. C-130838, 2014-Ohio-4644, ¶ 6, citing *Cramer v. Auglaize Acres*, 113 Ohio St.3d 266, 2007-Ohio-1946, 865 N.E.2d 9, ¶ 9.

²⁵ *Washington Cty. Home*, 2008-Ohio-4342 at ¶ 30, quoting *Belinky*, 117 Ohio App.3d at 503.

²⁶ *Elder v. Fischer*, 129 Ohio App.3d 209, 220, 717 N.E.2d 730 (1998 1st Dist.), citing Note, H.B. 600: Ohio's Bill of Rights for Nursing Home Patients (1980), 5 U. Dayton L.Rev. 507, 510-511.

²⁷ *Brooks*, 2014-Ohio-4644 at ¶ 7.

(I)(2)(A) The plaintiff in an action filed under division (I)(1) of this section may obtain injunctive relief against the violation of the resident's rights. The plaintiff also may recover compensatory damages based upon a showing, by a preponderance of the evidence, that the violation of the resident's rights resulted from a negligent act or omission of the person or home and that the violation was the proximate cause of the resident's injury, death, or loss to person or property."²⁸

Carespring offers three arguments as to why the remainder of Feder's first counterclaim must be dismissed for failure to state a claim upon which relief can be granted: (1) Feder failed to allege a negligent act as required under R.C. 3721.17(I)(2)(a), (2) Feder failed to allege facts which constitute a violation of the resident's right statute, R.C. 3721.13(A), and (3) Feder failed to allege injury or death, as required by R.C. 3721.17(I)(2)(a). Because the first argument is dispositive of the motion, the court will only address that issue.

As quoted above, to succeed on a claim for compensatory damages under R.C. 3721.17(I)(2)(a), Feder must show "that the violation of [her] rights resulted from a negligent act or omission of the person or home."²⁹ The Eighth District Court of Appeals has recently confirmed that this is an express statutory requirement, reflecting that "the statute itself requires negligent conduct—human judgment or decision-making—in order to recover compensatory damages * * *."³⁰

Feder argues that under notice pleading, it is sufficient that her complaint identifies multiple violations of R.C. 3721.13. It is true that, in Ohio, a plaintiff is not required to

²⁸ R.C. 3721.17(I).

²⁹ R.C. 3721.17(A)(2)(a).

³⁰ *Altercare of Mayfield Village, Inc. v. Berner*, 2017-Ohio-958, 86 N.E.3d 649, ¶ 17 (8th Dist.).

plead operative facts with particularity.³¹ However, Civ.R. 8(A) requires more than Feder suggests to state a claim that can survive a Civ.R. 12(B)(6) motion. The Twelfth District Court of Appeals has thoroughly explained what adequate pleading requires:

"Though code pleading was abandoned, a 'notice' pleading was not adopted. Pure 'notice' pleading would permit a claimant to merely inform his or her opponent of the fact that a lawsuit had been filed against him or her, thus giving notice of the claim. Rule pleading, to the contrary, is better viewed as 'simplified' pleading, in that a 'short and plain statement' of a party's claim is required."³²

In order to satisfy Civ.R. 8(A)'s requirement for a short and plain statement of the circumstances entitling the plaintiff to relief, the "complaint must contain either direct allegations on every material point necessary to sustain a recovery on any legal theory, 'or contain allegations from which an inference fairly may be drawn that evidence on these material points will be introduced at trial.'"³³ Indeed, if "a pleading ties a party's actions to the elements of a claim, but fails to state in detail the facts underlying the claim, that pleading has not failed to 'state a claim upon which relief can be granted,' pursuant to Civ.R. 12(B)(6)."³⁴

In the case at bar, the elements for a claim under R.C. 3721.17(I) were not tied to Carespring's acts because there are no allegations that state or suggest negligence by Carespring. Carespring's negligence is a material point necessary to succeed on a claim for recovery of compensatory damages under R.C. 3721.17(I). It is insufficient for Feder

³¹ *Klan v. Med. Radiologists, Inc.*, 12th Dist. Warren No. CA2014-01-007, 2014-Ohio-2344, ¶ 13, citing *Golden v. Milford Exempted Village School Bd. of Edn.*, 12th Dist. Clermont No. CA2008-10-097, 2009-Ohio-3418, ¶ 23.

³² *Clermont Environmental Reclamation Co. v. Hancock*, 16 Ohio St.3d 9, 12, 474 N.E.2d 357 (12th Dist. 1984), citing Staff Note to Civ.R. 8.

³³ *Klan*, 2014-Ohio-2344 at ¶ 13, quoting *Sexton v. Mason*, 12th Dist. Warren No. CA2006-02-026, 2007-Ohio-38, ¶ 25.

³⁴ *Clermont Environmental Reclamation Co.*, 16 Ohio St.3d at 12.

to list Carespring's alleged violations of the resident's rights statute but fail to include any facts that would allow the inference that Carespring made a negligent act or omission. As such, the court finds that Feder's first cause of action for violations of the resident's rights statutes must be dismissed under Civ.R. 12(B)(6) for a failure to state a claim upon which relief can be granted as to Feder's claim for compensatory damages under R.C. 3721.17(I).

Importantly, Carespring does not address Feder's claim for injunctive relief under R.C. 3721.17(I). While the statute states that a plaintiff seeking compensatory damages must prove the violation of the resident's rights resulted from a negligent act or omission, it does not say the same for injunctive relief. Therefore, Feder may still pursue her claim for injunctive relief.

B. VIOLATIONS OF THE OHIO CONSUMER SALES PROTECTION ACT

Feder's second cause of action is based upon Carespring's alleged violations of the Ohio Consumer Sales Protection Act ("CSPA"). Feder alleges that, in filing this lawsuit, Carespring is trying to intimidate her. She also posits that Carespring's requested remedies are not ones it is entitled to. As such, she argues these acts are unfair, deceptive, and unconscionable. Carespring argues that the claim should be dismissed because filing this lawsuit is not a consumer transaction under the CSPA.

The CSPA, set forth in R.C. Chapter 1345, was designed to protect consumers from suppliers who engage in deceptive and unconscionable sales practices.³⁵ The CSPA generally prohibits suppliers from engaging in unfair, deceptive, or unconscionable acts in consumer transactions.³⁶ More specifically, the CSPA prohibits a "supplier" from committing "an unfair or deceptive act or practice in connection with a consumer transaction. Such an unfair or deceptive act or practice by a supplier violates this section whether it occurs before, during or after the transaction."³⁷

The CSPA is "remedial in nature" and is purposed to "* * * compensate for incomplete consumer remedies available at common law."³⁸ As such, courts liberally construe the CSPA in favor of consumers.³⁹ The plaintiff bears the burden of maintaining and proving the truth of his CSPA violation allegations.⁴⁰

A "supplier" is statutorily defined as "a seller, lessor, assignor, franchisor, or other person engaged in the business of effecting or soliciting consumer transactions, whether or not that person deals directly with the consumer."⁴¹ A "consumer" is "a person who engages in a consumer transaction with a supplier."⁴² In turn, per R.C. 1345.01(A), a

³⁵ *Sterling Constr., Inc. v. Alkire*, 12th Dist. Madison Nos. CA2013-08-028, CA2013-08-030, 2014-Ohio-2897, ¶ 11, quoting *Burdge v. Kerasotes Showplace Theaters, L.L.C.*, 12th Dist. Butler No. CA2006-02-023, 2006-Ohio-4560, ¶ 39.

³⁸ *Wasserman v. The Home Corp.*, 8th Dist. Cuyahoga No. 90915, 2008-Ohio-5477, ¶ 12, citing *Einhorn v. Ford Motor Co.*, 48 Ohio St.3d 27, 29, 548 N.E.2d 933 (1990).

³⁷ R.C. 1345.02(A).

³⁸ *Anderson v. Barclay's Capital Real Estate, Inc.*, 136 Ohio St.3d 31, 2013-Ohio-1933, 989 N.E.2d 997, ¶ 9, citing *Einhorn*, 48 Ohio St.3d 27 at 29. See *Stultz v. Artistic Pools, Inc.*, 9th Dist. Summit No. C.A.20189, 2001 WL 1219473, *3 (Oct. 10, 2001) ("The CSPA was enacted to '[p]rotect consumers from suppliers who * * * commit deceptive acts or practices, or commit unconscionable acts or practices[,] and to '[e]ncourage the development of fair consumer sales practices.'").

³⁹ *Anderson*, 2013-Ohio-1933 at ¶ 9.

⁴⁰ See *Wasserman*, 2008-Ohio-5477 at ¶ 15.

⁴¹ R.C. 1345.01(C).

⁴² R.C. 1345.01(D).

consumer transaction is defined as “* * * a service * * * to an individual for purposes that are primarily personal, family, or household, or solicitation to supply any of these things. * * *”⁴³ Services by residential care facilities to nursing home residents fall within the purview of the CSPA as consumer transactions.⁴⁴ The CSPA covers conduct that the resident’s rights statutes do not because “[n]either R.C. 3721.13 nor other sections of R.C. Chapter 3721 regulate the use of unfair, deceptive, or unconscionable contractual provisions by residential-care facilities.”⁴⁵

Generally an act is deceptive or unfair when it misleads consumers about “the nature of the product or [service] they are receiving.”⁴⁶ It has also been defined as an act that “has the likelihood of inducing a state of mind in the consumer that is not in accord with the facts.”⁴⁷ Moreover, a deceptive act is one that “has the tendency and capacity to mislead consumers concerning a fact or circumstance material to a decision to purchase the product or service offered for sale.”⁴⁸ “An act or practice is unfair if it is marked by injustice, partiality, or deception, or results in inequitable business dealings.”⁴⁹

⁴³ R.C. 1345.01(A).

⁴⁴ *Elder*, 129 Ohio App.3d at 215.

⁴⁵ *Id.* at 220.

⁴⁶ *Davis v. Byers Volvo*, 4th Dist. Pike No. 11CA817, 2012-Ohio-882, ¶ 28, quoting *Johnson v. Microsoft Corp.*, 106 Ohio St.3d 278, 2005-Ohio-4985, 834 N.E.2d 791, ¶ 24.

⁴⁷ *Davis*, 2012-Ohio-882 at ¶ 28, quoting *Chesnut v. Progressive Cas. Ins. Co.*, 166 Ohio App.3d 299, 2006-Ohio-2080, 850 N.E.2d 751, ¶ 23 (8th Dist.). See *Wasserman*, 2008-Ohio-5477 at ¶ 12, citing *Lump v. Best Door & Window*, 3d Dist. Logan Nos. 8-01-09, 8-01-10, 2002-Ohio-1389 (“Instead, the generally recognized touchstone in making the determination is whether the act ‘has the likelihood of inducing in the mind of the consumer a belief which is not in accord with the facts.’”).

⁴⁸ *Davis*, 2012-Ohio-882 at ¶ 29, quoting *Cranford v. Joseph Airport Toyota, Inc.*, 2d Dist. No. 15408 (May 17, 1996).

⁴⁹ *Walker v. Dominion Homes, Inc.*, 164 Ohio App.3d 385, 2005-Ohio-6055, 842 N.E.2d 570, ¶ 25, citing *Saraf v. Mardona Homes, Inc.*, 10th Dist. Franklin No. 02AP-461, 2002-Ohio-6741, ¶ 58.

The CSPA not only prevents suppliers from engaging in deceptive acts and practices, but from unconscionable acts and practices acts as well.⁵⁰ R.C. 1345.03 provides, in relevant part:

"(A) No supplier shall commit an unconscionable act or practice in connection with a consumer transaction. Such an unconscionable act or practice by a supplier violates this section whether it occurs before, during, or after the transaction.

(B) In determining whether an act or practice is unconscionable, the following circumstances shall be taken into consideration:

* * *

(6) Whether the supplier knowingly made a misleading statement of opinion on which the consumer was likely to rely to the consumer's detriment * * *."⁵¹

Although the CSPA is concerned with unfair and deceptive acts, it does not require the plaintiff "to demonstrate that a supplier intended to be unfair or deceptive."⁵² Hence, the deceptive or unfair act does not need to amount to fraud, negligence, or breach of contract.⁵³ Moreover, it is no defense for the supplier to demonstrate that the act was done unintentionally.⁵⁴

⁵⁰ R.C. 1345.03.

⁵¹ (Emphasis added.) R.C. 1345.03.

⁵² *Hacker v. Natl. College of Business & Technology*, 186 Ohio App.3d 203, 2010-Ohio-380, 927 N.E.2d 38, ¶ 21 (2d Dist.). See *Wasserman*, 2008-Ohio-5477 at ¶ 12 ("An intent to deceive the consumer is not required to establish an OCSPA violation."); *Mannix v. DCB Serv., Inc.*, 2d Dist. Montgomery No. 19910, 2004-Ohio-6672, ¶ 18 ("The basic tenet is one of fairness; the act need not rise to the level of fraud, negligence, or breach of contract.").

⁵³ *Hacker*, 2010-Ohio-380 at ¶ 21.

⁵⁴ *Gallagher*, 2007-Ohio-6615 at ¶ 29, citing *Fletcher v. Don Foss of Cleveland Inc.*, 90 Ohio App.3d 82, 86, 628 N.E.2d 60 (1993).

In the instant case, Ohio case law indicates that Carespring's services to Feder in a nursing home falls within the scope of the CSPA as a consumer transaction.⁵⁵ Moreover, the Agreement with Feder indicates that "Eastgatespring of Cincinnati will provide room, board, housekeeping, social, activities [sic] and general nursing services * * *."⁵⁶ These qualify as consumer transactions under R.C. 1345.01(A), which is defined as services to an individual for purposes that are primarily personal, family, or household * * *."⁵⁷ As such, Carespring, a supplier, cannot commit any unfair, deceptive, or unconscionable acts in connection with its consumer transactions with Feder when providing her nursing home services.⁵⁸

Significantly, the express language of R.C. 1345.03 states that an unconscionable act or practice violates the CSPA "whether it occurs before, during or after the transaction."⁵⁹ Thus, Feder's claims do not fail merely because the alleged illegal acts occurred during or subsequent to the nursing home services that are within the purview of the CSPA.

Importantly to this claim:

"[I]t is a deceptive and unconscionable act or practice as defined [in the CSPA] for a supplier engaged in the collection of claims of debt arising from consumer transactions knowingly to make a misstatement of fact that is designed to exaggerate the remedies or power of the creditor or collector over the consumer, or the consequences to the consumer of non-payment of the claim or knowingly misstate the law or the consumer's obligations to the creditor."⁶⁰

⁵⁵ *Elder*, 129 Ohio App.3d at 215.

⁵⁶ Ex. A. to Compl.

⁵⁷ R.C. 1345.01(A).

⁵⁸ R.C. 1345.09.

⁵⁹ R.C. 1345.03(A).

⁶⁰ *Kline v. Mortgage Electronic Sec. Systems*, S.D. Ohio No. 3:08cv408, 2010 WL 6298721, *8 (Dec. 30, 2010), quoting *Bennett v. Tri-State Collection Serv.*, Cuyahoga C.P. No. 940002, 1976 WL 38806 (Aug. 24, 1976). See *Edwards v. McCormick*, 136 F.Supp.2d 785, 806 (S.D. Ohio

Therefore, if Carespring knowingly exaggerated its legal remedies or the consequences for Feder's failure to pay in its complaint, then it may have violated the CSPA. For these reasons, the court finds that Feder's second counterclaim for violations of the CSPA should not be dismissed.

II. FEDER'S MOTION FOR JUDGMENT ON THE PLEADINGS UNDER CIV.R. 12(C)

LEGAL STANDARD

Civ.R. 12(C) allows any party to move for judgment on the pleadings: "After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings."⁶¹ The Ohio Supreme Court has characterized a Civ.R. 12(C) motion as a " * * * belated Civ.R. 12(B)(6) motion for failure to state a claim upon which relief can be granted."⁶² Unlike a Civ.R. 12(B)(6) motion, however, parties use a motion under Civ.R. 12(C) specifically to resolve legal questions.⁶³

Upon a motion for judgment on the pleadings, the trial court must " * * * construe as true all the material allegations in the complaint, with all reasonable inferences to be drawn in favor of the nonmoving party."⁶⁴ As such, in determining a motion for judgment

2001) (finding it deceptive for a supplier to exaggerate its remedies available and the consequences to the debtor for nonpayment).

⁶¹ Civ.R. 12(C).

⁶² *Whaley v. Franklin Cty. Bd. of Commrs.*, 92 Ohio St.3d 574, 581, 752 N.E.2d 267 (2001), citing *Nelson v. Pleasant*, 73 Ohio App.3d 479, 482, 597 N.E.2d 1137 (4th Dist. 1991).

⁶³ *Whaley*, 92 Ohio St.3d at 581, citing *State ex rel. Midwest Pride IV, Inc. v. Pontious*, 75 Ohio St.3d 565, 569-570, 664 N.E.2d 931 (1996).

⁶⁴ *Whaley*, 92 Ohio St.3d at 581, citing *Peterson v. Toedosiso*, 34 Ohio St.2d 161, 165-166, N.E.2d 113 (1973).

on the pleadings, the court is “* * * restricted solely to the allegations in the pleadings.”⁶⁵ To grant dismissal under Civ.R. 12(C), “* * * it must appear beyond doubt that [the plaintiff] can prove no set of facts warranting the requested relief, after construing all material factual allegations in the complaint and all reasonable inferences therefrom in the [nonmovant's] favor.”⁶⁶

ANALYSIS

Feder argues that the court must dismiss all of Carespring's claims because all of the relief that it has requested is beyond the court's power to give, either because the power does not lie with the court or because the result would be illegal. In Carespring's complaint, all of the relief it requested was in equity. It asks the court to (1) compel Feder to cooperate with the DJFS spend-down process, or alternatively for the court to designate Eastgatespring as limited power of attorney or guardian ad litem for Feder so it can assist her in spending down her resources, (2) compel Feder to turn over and remit to Eastgatespring any financial resources DJFS identified as rendering Feder over resources and preventing her from receiving Medicaid eligibility, and (3) compelling Feder to designate Eastgatespring as representative payee of her social security income. Carespring did not file a memorandum in opposition to any of these arguments.

A. REQUEST TO APPOINT EASTGATESPRING AS LIMITED POWER OF ATTORNEY OR GUARDIAN AD LITEM FOR FEDER

⁶⁵ *Whaley*, 92 Ohio St.3d at 582, quoting *Peterson*, 34 Ohio St.2d at 166.

⁶⁶ *State ex rel. Toledo v. Lucas Cty. Bd. of Elections*, 95 Ohio St.3d 73, 74, 765 N.E.2d 854 (2002).

Feder first argues the court does not have the power to appoint Eastgatespring as her limited power of attorney. To designate a power of attorney under R.C. 13337.25, "[a] power of attorney must be signed by the principal or in the principal's conscious presence by another individual directed by the principal to sign the principal's name on the power of attorney. * * *"⁶⁷

In turn, a "principal" is defined as "an individual who grants authority to an agent in a power of attorney."⁶⁸ It is clear from these statutes that only the principal can designate a power of attorney, and the principal is an individual. As such the court is not the principal, since it is not an individual, and it cannot appoint Eastgatespring to be Feder's power of attorney. Therefore, the court agrees it cannot grant the relief requested by Carespring, namely by designating it power of attorney so that it can spend-down Feder's resources so as to qualify for Medicaid.

In the same request for relief, if not designated as power of attorney, Carespring asks to be appointed guardian ad litem for Feder, again so it can spend-down her resources. Trial courts have the power to appoint a guardian ad litem.⁶⁹ A guardian ad litem is " * * * literally a guardian of the case, who has no duties prior to the institution of the suit or after its termination but whose sole duty is to defend in a particular cause."⁷⁰ Under Civ.R. 17(B), the court can appoint a guardian ad litem for those minors and incompetent persons who do not have a representative to defend on their behalf.

⁶⁷ R.C. 1337.25.

⁶⁸ (Emphasis added.) R.C. 1337.22(l).

⁶⁹ *State ex rel. Robinson v. Cuyahoga Cty. Court of Common Pleas*, 75 Ohio St.3d 431, 662 N.E.2d 798 (1996).

⁷⁰ *State ex rel. Robinson*, 75 Ohio St.3d at 431.

A guardian ad litem is distinguished from other types of guardians, like a general guardian or the guardian of an estate.⁷¹ The probate court has exclusive jurisdiction to appoint and remove guardians.⁷²

In turning to the present case, the court finds that it cannot appoint Carespring to be Feder's guardian ad litem for the purposes of assisting her in the spend-down process. Although the court can appoint a guardian ad litem, the complaint does not allege that Feder is incompetent, and she is not a minor since it states she is 82 years old. Moreover, a guardian ad litem only defends a case; it does not have the power to spend Feder's resources for Medicaid purposes. The power to grant a guardian of the estate lies exclusively with the probate court and is a power this court does not have. Accordingly, the court finds it cannot order that Eastgatespring be designated as Feder's power of attorney or appointed as her guardian ad litem to spend-down her resources.

Notably, Feder's argument does not touch upon the first part of Carespring's first prayer for relief. Carespring requests that Feder be compelled to "cooperate with CDJFS in the Medicaid Application/Spend-down Process or in the alternative designating Eastgatespring as Limited Power-of-Attorney or Guardian Ad Litem to assist Ms. Feder in the Medicaid Application/Spend-down Process."⁷³ Although Feder addresses the latter half of this request, she does not deal with the first portion regarding Feder being compelled to cooperate with DJFS. Since that request for relief has not been addressed, the court will not further address it, and it shall remain part of the suit.

B. REQUEST TO COMPEL FEDER TO SURRENDER HER ASSETS

⁷¹ *In re Etter*, 134 Ohio App.3d 484, 498, 731 N.E.2d 694 (1998).

⁷² R.C. 2101.24.

⁷³ Compl., pg. 4.

In its second request for relief, Carespring prays the court will issue an order for "specific performance" to compel Feder to "turn over and remit to Eastgatespring any financial resources identified by CDJFS as rendering Ms. Feder over resources and preventing Medicaid liability."⁷⁴ The court finds that it cannot grant this relief because (1) the Agreement does not require Feder to turn over and remit her financial resources to Eastgatespring should they prevent her from receiving Medicaid, and (2) specific performance is only available when money damages would not make a party whole.

The Twelfth District Court of Appeals has described the nature of specific performance as " * * * an equitable remedy, and an action for specific performance is an equitable action. The remedy of specific performance of contracts is a well-recognized and important branch of jurisprudence but one that generally is available only to protect contract rights."⁷⁵ The remedy of specific performance compels the defendant to perform the contract:

"The remedy of specific performance requires a part[y] to provide performance specifically as agreed. The purpose of the remedy is to give the one who seeks it the benefit of the contract in specie by compelling the other party to the contract to do that which was agreed—to perform the contract on the precise terms agreed upon by the parties. Hence, a decree for specific performance is nothing more or less than a means of compelling a party to do precisely that which ought to have been done without the court's coercion."⁷⁶

⁷⁴ Compl., pgs. 4-5.

⁷⁵ *Sorrell v. Micomonaco*, 2017-Ohio-1498, 89 N.E.3d 21, ¶ 26 (12th Dist.), quoting 84 Ohio Jurisprudence 3d, Specific Performance, Section 1 (2016).

⁷⁶ (Emphasis added.) *Sorrell*, 2017-Ohio-1498 at ¶ 26, quoting 84 Ohio Jurisprudence 3d, Specific Performance, Section 1 (2016).

Furthermore, specific performance is not an available remedy for all contracts.⁷⁷ It is only available when damages for a breach of contract will not provide an adequate remedy to the injured party.⁷⁸ "Typically, one who seeks specific performance bears the burden of establishing that legal remedies, such as money damages, are inadequate."⁷⁹ One such common exception to the general rule restricting plaintiffs to damages is contracts involving real property.⁸⁰

Notably, a claim for money damages and a claim for specific performance are distinct causes of action, even when arising from the same factual context.⁸¹ A "finding that a party is not entitled to the equitable relief of specific performance is merely a denial of one special form of damages."⁸² Accordingly, the denial of specific performance does not preclude, by way of *res judicata*, an action for money damages.⁸³

In turning to the present case, the Agreement provides that "You [Feder] agree to pay all charges and fees that are billed to You by Eastgatespring of Cincinnati when they become due."⁸⁴ It also provides that if Feder is or will be a Medicaid recipient then she agrees to take any steps necessary to have her benefits assigned to Eastgatespring.⁸⁵ There is no provision requiring Feder to remit resources identified as preventing her from receiving Medicaid to Eastgatespring. The equitable remedy of specific performance

⁷⁷ *Sorrell*, 2017-Ohio-1498 at ¶ 26, quoting 84 Ohio Jurisprudence 3d, Specific Performance, Section 1 (2016).

⁷⁸ *Sorrell*, 2017-Ohio-1498 at ¶ 27, quoting *Gehret v. Rismiller*, 2d Dist. Darke No. 06CA1705, 2007-Ohio-1893, ¶ 14.

⁷⁹ *Sorrell*, 2017-Ohio-1498 at ¶ 28.

⁸⁰ See generally *Sorrell*, 2017-Ohio-1498.

⁸¹ *Center Ridge Ganley, Inc. v. Stinn*, 31 Ohio St.3d 310, 315, 511 N.E.2d 106 (1987).

⁸² *Id.*

⁸³ *Id.*

⁸⁴ Ex. A. to Compl.

⁸⁵ Ex. A. to Compl.

allows the court to compel the breaching party to perform the contract precisely as agreed. Although Feder agreed to pay for all charges and fees, there is no term requiring her to turn over and remit to Eastgatespring any financial resources identified by DJFS as rendering her over resources and preventing Medicaid liability. As such, the specific performance Carespring requests is unavailable to it.

Additionally, money damages would be an adequate remedy in this case. Carespring's chief complaint is that it is owed over \$111,000 from Feder, which continues to accrue. There is no reason to believe that an award of money damages would not make Carespring whole again.

For these reasons, the court finds that requiring Feder to turn over and remit to Eastgatespring any financial resources identified by DJFS as rendering Ms. Feder over resources and preventing Medicaid liability is not an equitable remedy the court can grant in this case. Carespring has not alternatively prayed for money damages. However, the court notes that the dismissal of claims for specific performance do not necessarily preclude, by res judicata, claims for money damages arising from the same conduct.

C. REQUEST TO COMPEL FEDER TO DESIGNATE EASTGATESPRING AS REPRESENTATIVE PAYEE FOR HER SOCIAL SECURITY INCOME IN SATISFACTION OF HER PATIENT LIABILITY

Carespring's last request for relief is that the court order Feder to make it into her representative payee for her social security income so it can be used in satisfaction of her patient liability. Feder argues that such action would be illegal, and therefore is not a remedy available to Carespring.

Whether the court can name Carespring as payee turns first upon whether Feder could name Carespring as her social security payee. Typically the Social Security Administration pays social security benefits directly to beneficiaries.⁸⁶ However, the administration may distribute the benefits “‘for [a beneficiary’s] use and benefit’ to another individual or entity as the beneficiary’s ‘representative payee’.”⁸⁷ The Social Security Administration selects the representative payee.⁸⁸ The Social Security Administration gives preference to legal guardians and relatives, and custodial institutions “‘come last in order of preference.’”⁸⁹ “Whoever the appointee may be, the Commissioner of Social Security must be satisfied that the particular appointment is ‘in the interest of the beneficiary.’”⁹⁰ Moreover, “[a]lthough a representative payee ‘may not be required to use benefit payments to satisfy a debt of the beneficiary’ that arose before the period the benefit payments are certified to cover, a payee may discharge such a debt ‘if the current and reasonably foreseeable needs of the beneficiary are met’ and it is in the beneficiary’s interest to do so.”⁹¹ Thus, it appears the court does not have the power to order Feder to designate Carespring as her representative payee because that power lies solely with the Social Security Administration.

Additionally, 42 U.S. Code 407(a) prohibits the assignment of social security benefits:

⁸⁶ *Washington State Dept. of Social and Health Services v. Guardianship Estate Keffeler*, 537 U.S. 371, 376, 123 S.Ct. 1017 (2003).

⁸⁷ *Id.*, quoting 42 U.S.C. 405(j)(1)(A), 1683(a)(2)(A)(ii)(I). See *Hall v. Commissioner of Social Security*, S.D. Ohio No. 2:15-cv-1206, 2017 WL 564886, *3 (Jan. 24, 2017), citing *Washington State Dept. of Social and Health Services*, 536 U.S. at 376 (holding same).

⁸⁸ *Hall*, 2017 WL 564886 at *3, citing 20 C.F.R. 404.2001.

⁸⁹ *Washington State Dept. of Social and Health Services*, 536 U.S. at 376.

⁹⁰ *Id.*, quoting 42 U.S.C. 405(j)(2)(A)(ii), 1383(a)(2)(B)(i)(II).

⁹¹ *Washington State Dept. of Social and Health Services*, 536 U.S. at 376, quoting 42 U.S.C. 404.2040(d), 416.640(d).

"The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law."⁹²

The ban on assigning social security benefits was created because social security benefits " * * * are to meet the most basic needs of the poor, and the benefits must be protected from seizure in legal processes against the beneficiary."⁹³

The terms execution, levy, attachment, and garnishment are "legal terms of art [that] refer to procedures by which one person gain a degree of control over property otherwise subject to the control of another."⁹⁴ The term "other legal process," as used in 42 U.S.C. 407(a), " * * * should be understood to be process much like the process of execution, levy, attachment, and garnishment, and at minimum would seem to require utilization of some judicial or quasi-judicial mechanism, though not necessarily an elaborate one, by which control over property passes from one person to another in order to discharge or secure discharge of an allegedly existing or anticipated liability."⁹⁵ Indeed, " * * * the Supreme Court has stated unequivocally that section 407 'imposes a broad bar against the use of any legal process to reach all social security benefits.'⁹⁶

Thus, the issue becomes whether Carespring's effort to become representative payee amounts to employing an execution, levy, attachment, garnishment, or other legal process within the meaning of 42 U.S.C. 407(a). Specifically, the court must determine

⁹² 42 U.S. Code 407(a).

⁹³ *In re Buren*, 725 F.2d 1080, 1084 (6th Cir. 1984), quoting H.R. Rep. No. 92-231, 92d Cong., 1st Sess. 156 (1971).

⁹⁴ *Washington State Dept. of Social and Health Services*, 536 U.S. at 383.

⁹⁵ *Id.* at 385.

⁹⁶ *In re Buren*, 725 F.2d at 1084, citing *Philpott v. Essex County Welfare Board*, 409 U.S. 413, 316, 93 S.Ct. 590 (1973).

whether the manner in which Carespring has attempted to gain control over the federal funds involves "other legal process." The court concludes it does. Carespring's prayer for relief is an attempt to use a judicial mechanism to reach Feder's social security income for the payment of an anticipated liability. As such, the court cannot grant Carespring's prayer for relief asking the court to compel Feder to designate Eastgatespring as payee for her social security income.

CONCLUSION

For the foregoing reasons, the court finds as follows:

Carespring's motion to dismiss is granted in part and denied in part. It is granted as to Audrey Feder's first cause of action for compensatory damages for violations of the resident's right statutes and is denied as to her second cause of action for violations of the Consumer Sales Protection Act. Feder's cause of action for injunctive relief under her first cause of action under the resident's rights statutes remains.

Feder's motion for judgment on the pleadings is granted in part and denied in part. It is granted as to all forms of relief except the relief that Feder did not address in her motion, that being Carespring's request to compel Feder to cooperate with DJFS.

IT IS SO ORDERED.

DATED: _____

Judge Jerry R. McBride

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing order were sent on this _____ day of December 2017 by e-mail to Jennifer A. Coy, attorney for the plaintiff, at jcoy@s-b-b.com, and to Miriam H. Sheline, at msheline@proseniors.org, and Jeremy L. Koenemann@proseniors.org, attorneys for the defendant.

Judicial Assistant to Judge McBride

whether the manner in which Carespring has attempted to gain control over the federal funds involves "other legal process." The court concludes it does. Carespring's prayer for relief is an attempt to use a judicial mechanism to reach Feder's social security income for the payment of an anticipated liability. As such, the court cannot grant Carespring's prayer for relief asking the court to compel Feder to designate Eastgatespring as payee for her social security income.

CONCLUSION

For the foregoing reasons, the court finds as follows:

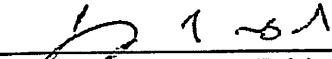
Carespring's motion to dismiss is granted in part and denied in part. It is granted as to Audrey Feder's first cause of action for compensatory damages for violations of the resident's right statutes and is denied as to her second cause of action for violations of the Consumer Sales Protection Act. Feder's cause of action for injunctive relief under her first cause of action under the resident's rights statutes remains.

Feder's motion for judgment on the pleadings is granted in part and denied in part. It is granted as to all forms of relief except the relief that Feder did not address in her motion, that being Carespring's request to compel Feder to cooperate with DJFS.

Counsel shall conference and call Rosemary in the Assignment Office at 513-732-7104 within five business days of the date of filing of this Decision/Entry in order to schedule a case management/trial setting conference which shall be held within three weeks thereafter.

IT IS SO ORDERED.

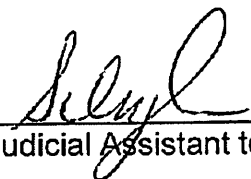
DATED: 9-4-18



Judge Jerry R. McBride

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing order were sent on this 4th day of September 2018 by e-mail to Jennifer A. Coy, attorney for the plaintiff, at jcoy@s-b-b.com, and to Miriam H. Sheline, at msheline@proseniors.org, and Jeremy L. Koenemann@proseniors.org, attorneys for the defendant.



Judicial Assistant to Judge McBride