Motion No. 4900989

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Court of Common Pleas

MOTION TO...
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By: DANIEL J. MYERS 0087909

Confirmation Nbr. 2132039

AMANDA VAN BRAKLE

vs.

CLEVELAND CLINIC FOUNDATION

CV 20 936348

Judge: JOHN P. O'DONNELL

Pages Filed: 7

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

AMANDA VAN BRAKLE, on behalf of herself and all others similarly situated, Plaintiff, v. CLEVELAND CLINIC FOUNDATION, Defendant.	)	CASE NO.: CV-20-936348 JUDGE: JOHN P. O'DONNELL **PLAINTIFF'S MOTION TO STRIKE DEFENDANT'S REPLY BRIEF**

Defendant offers two brand-new arguments in its Reply Brief in support of its Motion to Dismiss that should be stricken from the Court's consideration. First, Defendant argues that this Court should "take judicial notice" that "there is no ascertainable 'cash selling price'" for the services that it renders. (Def.'s Reply, p. 3). Second, Defendant contends that "a healthcare provider cannot estimate costs without insurer cooperation; and… medical emergencies cannot wait for estimates." (*Id.*, p. 5).

Both arguments must be stricken and disregarded because (1) they are patent misrepresentations of the facts and law properly before this Court, and (2) neither argument was raised in Defendant's motion. For the reasons outlined herein, Amanda van Brakle requests that these two arguments in Defendant's Reply Brief be stricken or, alternatively, requests leave for the arguments set forth below to be considered as a sur-reply.

I. LAW AND ARGUMENT.

A. Cleveland Clinic's New Arguments were not Raised in its Motion to Dismiss and Must Therefore be Stricken.

The Cleveland Clinic is not permitted to raise arguments in its Reply Brief that not previously argued in its Motion to Dismiss. A reply brief is "limited to matters in rebuttal, and a

party may not raise new issues for the first time." *Holmes v. Sullinger*, 6th Dist. Lucas County No. L-18-1106, 2019-Ohio-2653, ¶ 20 (quoting *Smith v. Ray Esser & Sons, Inc.*, 9th Dist. Lorain No. 10CA009798, 2011-Ohio-1529, ¶ 15). When a new argument is raised in a reply brief "the proper procedure is to strike the reply." *Id.* Failure to grant a motion to strike the reply or allow for a surreply is an abuse of discretion and reversible error. *Id.*, at ¶¶ 21, 27.

The Cleveland Clinic never argued in its Motion to Dismiss that there is no ascertainable price of the services at issue in this case. That new, unsworn, and unsubstantiated assertion by its counsel is, at a minimum, vehemently contested by Plaintiff (as well as by the Cleveland Clinic itself, as outlined herein), and most likely demonstrably false with even the most cursory discovery into the Clinic's billing protocols. Yet in its Reply, the Clinic suggests that the Court should take judicial notice of its conjured "fact."

The Clinic also never argued that "a healthcare provider cannot estimate costs" prior to performing services. Again, while this argument penned by the Clinic's counsel nicely fits into the defense narrative, that argument demonstrably false and directly contradicted by the Clinic's own public statements and admissions, including statements about this very litigation. Moreover, in advancing that new argument, Defendant plainly misstates the requirements of OAC 109:4-3-05.

Had Defendant properly presented those arguments, they would have been strenuously rebutted in Plaintiff's opposition, as they are below. But, by first presenting the arguments in a reply brief—and devoting nearly six pages to them—Defendant in engaged prohibited litigation "by ambush". *Holmes v. Sullinger*, 6th Dist. Lucas County No. L-18-1106, 2019-Ohio-2653, ¶ 20 (quoting *Int'l Fid. Ins. Co. v. T C Architects, Inc.*, 9th Dist. Summit No. 23112, 2006-Ohio-4869, ¶ 11). Thus, the Cleveland Clinic's Reply Brief, or at least the first six pages, should be stricken.

B. The Cleveland Clinic's Argument that its Services have "no Ascertainable Price" is Simply Wrong and not in the Record Properly Before the Court.

Defendant's argument that it does not know the price of its services appears nowhere in its Motion to Dismiss. The closest it comes is an argument that "the amount due from a patient and the date services will be completed depend on the nature of the services the patient needs and then consents to receive." (Def.'s M. to Dism., p. 1). Certainly, a newly admitted patient's hospital course or insurance coverage for not-yet-contemplated services cannot be predicted with 100% accuracy at the time of admission. However, those unknowns have zero bearing on the known and established prices that the Cleveland Clinic charges for those services. As stated by the Cleveland Clinic, regardless of insurance coverage, or any other patient-specific details, "[t]he hospital's charges are the same for all patients." Cleveland Clinic Main Campus Price List, available at https://my.clevelandclinic.org/-/scassets/files/org/locations/price-lists/main-campus-hospital-patient-price-list.ashx, p. 1, last accessed Dec. 7, 2020 (emphasis added).

The Cleveland Clinic publishes a price list for many services, including imaging services, on its website and even invites the public on that website to "[l]earn more about the total costs incurred for medical procedures at Cleveland Clinic." "Patient Price Lists," available at https://my.clevelandclinic.org/patients/billing-finance/patient-price-lists, last accessed Dec. 7, 2020 (emphasis added). It is required to do so by law. ORC 3727.42.

The Cleveland Clinic has an online "Cost Estimator" where patients and the public can "understand[] the cost of your upcoming surgery or exam. *Id.* (emphasis added). The Cleveland Clinic sends patients who are "[l]ooking for more information for understanding healthcare pricing," to follow a link and read "Understanding Healthcare Prices: A Consumer Guide" from the Healthcare Financial Management Association (HFMA). *Id.* That Guide specifically tells patients to request an estimate, and that the estimate from the medical provider "should include

the following specific information. . . . The total price of your care and the portion of that price that you are expected to pay." UNDERSTANDING HEALTHCARE PRICES: A CONSUMER GUIDE, at pgs. 7, 15-16, available at https://www.aha.org/system/files/2018-04/14transparency-consumerguide.pdf, last accessed Dec. 7, 2020 (stating in no fewer than three separate locations that patients should be told upfront the total price of their care).

Moreover, despite the vociferous protestations of its counsel, the Cleveland Clinic, in response to a news story about this case, represented that "[e]stimates for care are available to patients when scheduling surgical and diagnostic services and upon request for all other services." "New Lawsuit Claims Cleveland Clinic Uses 'Deceptive' Billing Practices; Clinic Responds," Jonathan Walsh, available at https://www.news5cleveland.com/news/local-news/investigations/diagnosis-debt/new-lawsuit-claims-cleveland-clinic-uses-deceptive-billing-practices-clinic-responds (emphasis added).

Finally, the Cleveland Clinic knows exactly what it is allowed to charge Amanda van Brakle for those services under its agreement with Amanda's insurer. *See* R.C. 3923.81; *see also* Frequently Asked Questions, at Nos. 2 and 6, available at https://my.clevelandclinic.org/patients/billing-finance/comprehensive-hospital-charges/faq, last accessed Dec. 7, 2020.

So, whereas Defendant, or defense counsel, contends that a lack of known prices for hospital services are "a matter of established fact and general public knowledge" such that this Court should take judicial notice of that fact, every available and relevant publication of the Cleveland Clinic consists of a representation and admission that it can, does, will, and should provide the total costs to patients up front, and that it knows what those costs are whether the

patient has insurance or not. The Cleveland Clinic clearly knows more about its billing and price estimation capabilities than its counsel does.

Since this argument was not in Defendant's Motion and since it is an unequivocal falsehood, this Court should strike it from consideration. *See also* Civ.R. 11 (permitting the Court to strike sham or false statements and documents that are not supported by good grounds).

C. Defendant's Argument about the Practicality of Adherence to OAC 109:4-3-05 is Also New and Unsupported by Fact or Law.

Defendant also failed to argue in its Motion that this Court should not apply the Attorney General's Services Rule on "public policy" or "practicality" grounds, but that argument appears in its Reply. For the first time here, Defendant contends that "a healthcare provider cannot estimate costs without insurer cooperation; and… medical emergencies cannot wait for estimates." (Def.'s Reply, p. 5).

Had Defendant made that argument, Plaintiff would have pointed out that the argument was a blatant misrepresentation of what exactly is required under OAC 109:4-3-05. OAC 109:4-3-05 does not actually obligate suppliers to provide a written or oral estimate to every customer for every single service. Rather, it merely requires that suppliers provide a written notice to all patients that informs the patient of the right to receive a written, oral, or no estimate. OAC 109:4-3-05(A)(1). It requires signs be posted informing patients of their right to receive and request an estimate. OAC 109:4-3-05(A)(2). Only if an estimate is requested does a supplier have to issue one.

How does the potentially acute medical condition of patients prevent the Cleveland Clinic from posting a sign near the information desk informing patients of their right to an estimate? The Cleveland Clinic forces patients, even those suffering from medical emergencies, to sign and fill out intake and triage paperwork. Is it impossible for Defendant to also include along with those

forms a notice that the patient has the right to request an estimate? Nothing stops the Cleveland Clinic from posting the sign or providing the written disclosure required by OAC 109:4-3-05(A).

Once informed of their right to an estimate, it is the patient's choice whether to exercise that right. The situation is no different than the patient's choice, once informed of the risks or benefits of a certain treatment or procedure, to decline or authorize that care.

Moreover, as outlined previously, counsel's statement contradicts the Cleveland Clinic's own public admission about this case, that "[e]stimates for care are available to patients when scheduling surgical and diagnostic services and upon request for all other services." *See* Discussion in Section I.B, *supra*. And again, the Cleveland Clinic's online Price List / Estimator / Cost website has a link to the HFMA's guide advising patients to request an estimate of "[t]he total price of your care and the portion of that price that you are expected to pay" before services are rendered.

And though Defendant's Reply conflates the requirements of the Service Rule, OAC 109:4-3-05, and the Receipt Rule, OAC 109:4-3-07(B), nothing prevents the Cleveland Clinic from providing a receipt for a co-payment, either. Even in situations where the cash selling price of a service were to change after initial payment, the Receipt Rule provides the Clinic with an easy and fair mechanism for changing the price. OAC 109:4-3-07(C) (providing for a new initial receipt if the consumer agrees to the new price). As discovery will no doubt reveal, in order for a co-payment to be charged to or accepted from a patient, the Cleveland Clinic must know what service it will be rendering and what co-payment is permitted under the patient's health insurance plan.

Finally, even if the fact of practicability of following these regulations was not in dispute, that fact is irrelevant, because claimed "impossibility" of compliance is simply not a defense to a claim under the CSPA. *Brown v. Deacon's Chrysler Plymouth, Inc.*, 8th Dist. Cuyahoga County

Case No. 39399, 1979 Ohio App. LEXIS 11171, 9 (Nov. 15, 1979). If, as Plaintiff posits, the CSPA applies to hospitals, then Defendant must comply with the Attorney General's regulations enforcing it. Defendant has already admitted it can, but does not, comply with those regulations.

II. CONCLUSION.

Based on the foregoing, this Court should either strike Defendant's Reply Brief or grant leave instanter to Plaintiff to file a surreply, and consider this filing to be that surreply brief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was served via the Court's electronic filing system, as well as email, on this December 8, 2020, on counsel for Defendant.

/s/ Daniel J. Myers, Esq.
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