COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

LORI LANA	:	
Plaintiff-Appellant	:	**CASE NO. 2014 CVF 01304**
vs.	:	**Judge McBride**
OHIO BUREAU OF MOTOR VEHICLES	:	**DECISION/ENTRY**
Defendant-Appellee	:	

Milton S. Goff, III, counsel for the plaintiff-appellant Lori Lana, 130 Dudley Road, Edgewood, Kentucky 41017.

Attorney General of Ohio, Zachary C. Schaengold, Assistant Attorney General, Executive Agencies Section, counsel for the defendant-appellee Ohio Bureau of Motor Vehicles, 30 East Broad Street, 26th Floor, Columbus, Ohio 43215.

This cause is before the court for consideration of a motion to dismiss and a motion to strike filed by the appellee Ohio Bureau of Motor Vehicles, as well as a motion for summary judgment filed by the appellant Lori Lana.

On November 24, 2014, the court filed a briefing schedule with regard to the appellee's motion to dismiss and the appellant's motion for summary judgment. Neither

party requested oral argument by the deadline set in the briefing order of January 16, 2015. The motions were taken under advisement on January 20, 2015.

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

FACTS OF THE CASE AND PROCEDURAL BACKGROUND

Appellant Lori Lana received a notice of license suspension pursuant to Sections 4509.37 and 4509.101 of the Revised Code from the Ohio Bureau of Motor Vehicles dated September 17, 2014.[1] On September 29, 2014, Lana filed an "Appeal of License Suspension" with this court.

In her "Appeal of License Suspension," Lana states that the license suspension occurred due to a failure to pay a cognovit note, and she argues that she was appealing the license suspension because "the Bureau does not have statutory authority under these facts to suspend her license."[2] She later states in the notice of appeal that "[t]he purpose of Ohio's Financial Responsibility law is not intended to make the BMV a collection agency for breaches of contract disputes or settlement agreements," and she cites to an Ohio appellate case.[3] Attached to the appeal are copies of the complaint and judgment entry from the cognovit note action, as well as a copy of the notice of license suspension received by the appellant.

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[1] Appeal of License Suspension at ¶ 3.
[2] Id. at ¶¶ 4-6.
[3] Id. at ¶ 11.

In her notice of appeal, Lana states that she "sent a separate letter to the Bureau requesting an appeal as well."[4] She states that she "hereby gives notice to the Bureau and the Court of Common Pleas of this appeal."[5] A summons with a copy of the notice of appeal was sent by the Clerk of Courts to the appellee and it was served via certified mail on October 2, 2014.[6]

The Ohio Bureau of Motor Vehicles filed the present motion to dismiss the appeal for lack of subject matter jurisdiction, arguing that the appellant failed to comply with the mandates of R.C. 119.12.

The appellant filed a motion for summary judgment, setting forth various legal arguments regarding the propriety of the license suspension. In response, the appellee filed a motion to strike the motion for summary judgment, arguing that Civ.R. 56(C) is not applicable to this special statutory proceeding.

LEGAL ANALYSIS

(A) MOTION TO DISMISS

The Ohio Bureau of Motor Vehicles moves for dismissal of the present appeal, arguing that this court lacks subject matter jurisdiction to hear the appeal.

The appellee first argues that the appellant failed to file a notice of appeal with the BMV, which divests this court of jurisdiction to hear this appeal.

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[4] Id. at ¶ 9.
[5] Id. at ¶ 8.
[6] Certified Mail return, filed October 7, 2014.

R.C. 119.12 provides in relevant part as follows:

> "Any party adversely affected by an order of an agency issued pursuant to an adjudication * * * revoking or suspending a license * * * may appeal from the order of the agency to the court of common pleas of the county in which the place of business of the licensee is located or the county in which the licensee is a resident. * * *
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> Any party desiring to appeal shall file a notice of appeal with the agency setting forth the order appealed from and stating that the agency's order is not supported by reliable, probative, and substantial evidence and is not in accordance with law. The notice of appeal may, but need not, set forth the specific grounds of the party's appeal beyond the statement that the agency's order is not supported by reliable, probative, and substantial evidence and is not in accordance with law. The notice of appeal shall also be filed by the appellant with the court. In filing a notice of appeal with the agency or court, the notice that is filed may be either the original notice or a copy of the original notice. Unless otherwise provided by law relating to a particular agency, notices of appeal shall be filed within fifteen days after the mailing of the notice of the agency's order as provided in this section.
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> The court may affirm the order of the agency complained of in the appeal if it finds, upon consideration of the entire record and any additional evidence the court has admitted, that the order is supported by reliable, probative, and substantial evidence and is in accordance with law. In the absence of this finding, it may reverse, vacate, or modify the order or make such other ruling as is supported by reliable, probative, and substantial evidence and is in accordance with law. The court shall award compensation for fees in accordance with section 2335.39 of the Revised Code to a prevailing party, other than an agency, in an appeal filed pursuant to this section."

The appellee states in its motion that the appellant never filed a notice of appeal with the BMV and cites to the certified record of this case. The appeal filed with the

court indicates that a separate letter was sent to the BMV but it is not part of the certified record. However, that certified record does show that the BMV received the certified mail service of the appeal filed with the court.

"When the right to appeal is conferred by statute, an appeal can be perfected only in the manner prescribed by statute."[7] " '[A] party adversely affected by an agency decision must * * * strictly comply with R.C. 119.12 in order to perfect an appeal.' "[8] The failure to file a notice appeal within the filing deadline set forth in R.C. 119.12 will result in dismissal of the appeal, "as it precludes jurisdiction in the trial court."[9]

The question then becomes whether receipt of the notice of appeal filed with the court sent by the clerk of courts via certified mail service meets the requirement of R.C. 119.12.

The statute requires that any party desiring to appeal must file a notice of appeal with the agency. In the case at bar, the appellant did not personally file her appeal with the agency. However, she did cause a copy of her notice of appeal to be filed with the BMV via the clerk's certified mail service. R.C. 119.12 provides that "[i]n filing a notice of appeal with the agency or court, the notice that is filed may be either the original notice or a copy of the original notice." As a result, it is of no consequence that the appeal received by the BMV was a copy of the appeal filed with the court of common pleas.

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[7] *Courtyard Lounge v. Bur. of Environmental Health*, 190 Ohio App.3d 25, 940 N.E.2d 626, 2010-Ohio-4442, ¶ 6, citing *Ramsdell v. Ohio Civ. Rights Comm.*, 56 Ohio St.3d 24, 27, 563 N.E.2d 285 (1990).
[8] *Swartz v. Ohio Dept. of Job & Family Servs.*, 12th Dist. Butler No. CA2014-01-004, 2014-Ohio-3552, ¶ 8, quoting *Hughes v. Ohio Dept. of Commerce*, 114 Ohio St.3d 47, 868 N.E.2d 246, 2007-Ohio-2877, ¶ 17.
[9] Id., citing *Austin v. Ohio FAIR Plain Underwriting Assn.*, 10th Dist. Franklin No. 10AP-895, 2011-Ohio-2050, ¶ 6, citing *Thompson & Ward Leasing Co. v. Ohio State Bur. of Motor Vehicles*, 10th Dist. Franklin No. 08AP-41, 2008-Ohio-3101, ¶ 10.

There is nothing in the statute setting forth what exactly is required to "file a notice of appeal with the agency." Since a copy of the document filed with the court is sufficient to satisfy this requirement, the court cannot say that causing service of the summons and notice of appeal to be sent via the clerk of courts does not meet the technical requirements of filing a copy of the notice of appeal with the agency.

It is obviously a risky manner in which to attempt to file a notice of appeal with the agency, given that the appellant has only fifteen days from the date the order is mailed to do so. However, in the case at bar, the BMV happened to be served on the fifteenth day after the date the notice of license suspension was sent to the appellant. Therefore, the appellant in this case did meet the requirement of filing a notice of appeal with the BMV within the fifteen-day time period.

The appellee's other argument in support of its motion to dismiss is that the appellant's notice of appeal fails to state that the agency's order "is not supported by reliable, probative, and substantial evidence and is not in accordance with law." The appellee argues that this omission divests the court of jurisdiction to hear the present appeal.

As set forth above, R.C. 119.12 states as follows: "Any party desiring to appeal shall file a notice of appeal with the agency setting forth the order appealed from and stating that the agency's order is not supported by reliable, probative, and substantial evidence and is not in accordance with law. The notice of appeal may, but need not, set forth the specific grounds of the party's appeal beyond the statement that the agency's order is not supported by reliable, probative, and substantial evidence and is not in accordance with law."

In the case at bar, it is clear that the appeal filed by the appellant does not contain language stating that "the agency's order is not supported by reliable, probative, and substantial evidence and is not in accordance with law." The notice of appeal does, however, state that the appellant is appealing the license suspension at issue "as the Bureau does not have statutory authority under these facts to suspend her license."[10] This sentence clearly sets forth an argument that the agency's order is not in accordance with the law.

Therefore, the issue is whether the appellant's failure to use the precise language set forth in R.C. 119.12 that "the agency's order is not supported by reliable, probative, and substantial evidence and is not in accordance with law" constitutes noncompliance with the dictates of the statute and is fatal to her appeal.

In *Zidian v. Dept. of Commerce*, 7th Dist. Mahoning No. 11MA39, 2012-Ohio-1499, the notice of appeal failed to contain the statutory language that "the agency's order is not supported by reliable, probative, and substantial evidence and is not in accordance with law."[11] However, the appellate court held that said "deficiency does not deprive the common pleas court of jurisdiction."[12] The court held that the "requirement to put the standard of review in the notice of appeal is redundant and the failure to do so does not render the common pleas court without jurisdiction to hear the appeal."[13]

Citing to a previous holding, the court noted that it had found that " 'the Ohio Supreme Court has indicated that 'when a party files an appeal from an order of an administrative agency, it is already making an affirmative statement that it believes that

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[10] Complaint at ¶ 6.
[11] *Zidian*, supra, at ¶ 43.
[12] Id.
[13] Id., citing *State of Ohio Pharmacy Bd. v. Evankovich*, 194 Ohio App.3d 686, 957 N.E.2d 823, 2011-Ohio-3172, ¶ 32 (7th Dist.).

the underlying order 'is not supported by reliable, probative, and substantial evidence, and/or is not in accordance with law' because it must meet that standard to succeed on appeal under the plain language of R.C. 119.12."[14] Furthermore, the appellate court noted that "the Ohio Supreme Court has consistently indicated that the purpose of the notice of appeal is to inform the opposing party of the taking of an appeal."[15]

In *Siegler v. Ohio State Univ.*, 10th Dist. Franklin No. 10AP-421, 2011-Ohio-2485, the notice of appeal consisted of only one sentence which simply stated that the appellant was appealing a particular judgment entry from the pharmacy board to the common pleas court.[16] The appellate court found that the notice of appeal failed to comply with the statutory requirements.[17] The court stated that "* * * notably absent from the appellant's notice is any indication or allegation that the agency's order is not supported by reliable, probative, and substantial evidence and is not in accordance with law."[18] As a result, the court held that the "appellant failed to invoke the jurisdiction of the common pleas court."[19]

This was the extent of the *Siegler* court's discussion of this issue. However, this court considers the *Siegler* court's use of the phrase "any indication or allegation" to be noteworthy. The court could have simply said that the notice did not contain the statutory language. Instead, the court found that the notice contained no indication or allegation that the order at issue was not supported by the evidence and did not comply with the law.

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[14] Id. at ¶ 44, citing *Evankovich* at ¶ 31, quoting *Medcorp, Inc. v. Ohio Dept. of Job and Family Servs.*, 121 Ohio St.3d 622, 906 N.E.2d 1125, 2009-Ohio-2058, ¶ 14.
[15] Id., citing *Evankovich* at ¶ 32.
[16] *Siegler*, supra, at ¶ 6.
[17] Id.
[18] Id.
[19] Id.

In the case at bar, the appellant stated that the license suspension she received was the result of her failure to pay a cognovit note and she then states that the BMV did not have the statutory authority to suspend her license under those facts. She later states in the notice of appeal that "[t]he purpose of Ohio's Financial Responsibility law is not intended to make the BMV a collection agency for breaches of contract disputes or settlement agreements," and she cites to an Ohio appellate case.

These statements in the notice of appeal put the BMV on notice that the appellant is intending to argue that the order suspending her license is not supported by reliable, probative, and substantial evidence and is not in accordance with law. Rather than use the generic statutory language, she actually set forth the reasons she believes the agency's order was improper.

The court finds that the appellant's failure to use the precise statutory language that "the agency's order is not supported by reliable, probative, and substantial evidence and is not in accordance with law" does not divest this court of jurisdiction to hear the appeal. The statements set forth in the notice of appeal indicate and allege why the appellant believes the agency's order is not supported by reliable, probative, and substantial evidence and is not in accordance with law and, therefore, are sufficient to put the agency on notice.

Based on the above analysis, the motion to dismiss filed by the appellee shall be denied.

(B) MOTION FOR SUMMARY JUDGMENT

On December 1, 2014, the appellant filed a motion for summary judgment pursuant to Civ.R. 56(C). In response, the appellee filed a motion to strike the motion for summary judgment.

The appellee argues that Civ.R. 56 does not apply to administrative appeals taken via R.C. 119.12.

Civil Rule 1(A) provides that the Civil Rules "prescribe the procedure to be followed in all courts of this state in the exercise of civil jurisdiction at law or in equity, with the exceptions stated in subdivision (C) of this rule." Civ.R. 1(C) provides in relevant part that "[t]hese rules, to the extent that they would by their nature be clearly inapplicable, shall not apply to procedure (1) upon appeal to review any judgment, order or ruling, * * * (7) in all other special statutory proceedings; provided, that where any statute provides for procedure by a general or specific reference to all the statutes governing procedure in civil actions such procedure shall be in accordance with these rules."

"The civil rules should be held inapplicable when their use will alter the basic statutory purpose for which the specific procedure was originally provided in the special statutory action."[20]

The First District Court of Appeals has classified the appeal of a license suspension as a special statutory proceeding but also held that the Civil Rules governing discovery were not "clearly inapplicable" to such a proceeding.[21]

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[20] *State v. Slatton*, 12th Dist. Butler No. CA2002-01-009, 2002-Ohio-5608, ¶ 13, citing *Tower City Properties v. Cuyahoga Cty. Bd. of Revision*, 49 Ohio St.3d 67, 69, 551 N.E.2d 122, citing *State ex rel. Millington v. Weir*, 60 Ohio App.2d 348, 349, 397 N.E.2d 770 (10th Dist.,1978).

In *Dvorak v. Municipal Civil Service Commission of City of Athens*, 46 Ohio St.2d 99, 346 N.E.2d 157 (1976), the appellant argued that a motion for summary judgment did not properly lie in an appeal taken pursuant to Chapter 2506.[22] The court found that a motion for summary judgment could not be filed in that case but it appears that it found as such because the appeal invoked a statute entitling the appellant to notice and a hearing.[23]

However, thereafter, an appellate court held that Civ.R. 56(C) was not applicable to appeals taken pursuant to R.C. 2506.04.[24] That statute provides that "[t]he court may find that the * * * decision [of the agency] is unconstitutional, illegal, arbitrary, capricious, unreasonable, or supported by the preponderance of substantial, reliable, and probative evidence on the whole record."[25] The court held that "[t]his determination is beyond the scope of the analysis required by Civ.R. 56(C)."[26]

The determination to be made under R.C. 2506.04 is similar to the consideration by the court under R.C. 119.12, which provides that "[t]he court may affirm the order of the agency complained of in the appeal if it finds, upon consideration of the entire record and any additional evidence the court has admitted, that the order is supported by reliable, probative, and substantial evidence and is in accordance with law." Furthermore, "[i]n the absence of this finding, it may reverse, vacate, or modify the order or make such other ruling as is supported by reliable, probative, and substantial evidence and is in accordance with law."

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[21] *Lysaght v. Dollison*, 61 Ohio App.2d 59, 61-62, 399 N.E.2d 121 (1st Dist.,1978).
[22] *Dvorak*, supra, 46 Ohio St.3d at 102.
[23] Id. at 103-104.
[24] *Kuntz v. Civil Service Com'n.*, 1st Dist. Hamilton No. C-860334, 1987 WL 8418, * 1.
[25] Id., quoting R.C. 2506.04.
[26] Id.

The court finds that an examination of this appeal under Civ.R. 56(C) would operate to alter the basic statutory purpose of this appeal. On an appeal taken pursuant to R.C. 119.12, the court is to consider the appeal and the entire administrative record and render a ruling as to whether the order is supported by reliable, probative, and substantial evidence and is in accordance with law. This does not involve a consideration of genuine issues of material fact and R.C. 119.12 does not involve the burden-shifting present under a Civ.R. 56(C) analysis. Additionally, Civ.R. 56 does not provide that a court can modify the order being analyzed, and R.C. 119.12 explicitly gives the court that option.

As such, the court finds that Civ.R. 56 is not applicable to this appeal and, therefore, the motion to strike the appellant's motion for summary judgment shall be granted.

CONCLUSION

The appellee's motion to dismiss is not well-taken and is hereby denied.

The appellee's motion to strike the appellant's motion for summary judgment is well-taken and is hereby granted. As a result, the appellant's motion for summary judgment will not be considered by the court.

A telephone case management conference will be held on Friday, April 3, 2015 at 2:00 p.m. at which time the court will discuss with counsel whether either side will seek to introduct any additional evidence and will establish a briefing and oral argument

schedule. Counsel should conference and call the court at the time scheduled for the conference.

IT IS SO ORDERED.

DATED:_____

Judge Jerry R. McBride

NOTICE TO CLERK:

The Clerk is hereby directed to serve upon all parties not in default for failure to appear notice of this judgment and the date of its entry upon the journal. Within three days of entering this judgment upon the journal, the Clerk shall serve the parties in a manner prescribed by Civ.R.5(B) and note the service in the appearance docket.

Common Pleas Judge