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BARBARA A. WIEDENBEIN
CLERK OF COMMON PLEAS COURT
CLERMONT COUNTY, OHIO

COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

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

Milton S. Goff, counsel for the appellant Lori Lana, 130 Dudley Road, Suite 195, Edgewood, Kentucky 41017.

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

This cause is before the court for consideration of 1) a motion filed by the appellee Ohio Bureau of Motor Vehicles to strike exhibits which were submitted outside the case record and 2) a motion filed by the appellant Lori Lana to consider additional evidence.

The court held a hearing on the motions on June 19, 2015. 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 proceeding, the written and oral arguments of counsel, and the applicable law, the court now renders this written decision.

FACTS OF THE CASE AND PROCEDURAL BACKGROUND

On July 1, 2012, the appellant Lori Lana agreed in a cognovit note to pay Personal Service Insurance Company the sum of $2,900.75 plus interest in monthly installments.[1] In July 2014, Personal Service Insurance Company filed a complaint for money damages in the Clermont County Municipal Court alleging that the appellant defaulted on her cognovit note.[2] The Municipal Court entered a judgment for the creditor in the amount of $1,800.75, plus interest and court costs, on July 16, 2014.[3]

Personal Service Insurance Company sent the judgment to the appellee Ohio Bureau of Motor Vehicles on August 25, 2014, stating in its letter that the judgment stemmed from a "vehicular accident."[4] The appellee then sent the appellant a Notice of License Suspension pursuant to Sections 4509.37 and 4509.101 of the Revised Code on September 17.[5]

On September 23, the appellant sent a letter to the appellee asking to appeal the license suspension.[6] Following that, the appellant filed an appeal of the license suspension with this court on September 29.

[1] Appellant's Ex. C.
[2] Certified R. 7 and Appellant's Ex. B.
[3] Certified R. 4.
[4] Certified R. 3.
[5] Certified R. 6.
[6] Appellant's Ex. G.

The appellant appeals on the basis that the appellee lacks statutory authority to suspend her license.[7] On October 24, the Ohio Department of Public Safety filed a certified copy of the record of the proceedings considered by the appellee with the Clerk of this Court.

The parties have filed a number of motions and briefs regarding the merits of the case.[8] Amidst the briefing on the merits, on May 14, 2015 the appellee filed a pretrial motion to exclude four of the appellant's seven exhibits: B, C, G, and F. The appellee contends that these exhibits are outside of the certified record of the proceedings, and because the appellant did not have them admitted as "additional evidence," the court may not consider them.

The appellant opposes the motion to strike and filed a motion to consider these exhibits as additional evidence. In its reply to the motion, the appellee counters that Exhibits B, C, G, and F fail to satisfy the standard set forth in R.C. 119.12 to be admitted as additional evidence.

The court held a hearing on the motions on June 19, 2015.

Exhibit B is the complaint filed by Personal Service Insurance Company in the Municipal Court, which is also contained within the certified record of the proceedings. The remaining exhibits in dispute are not in the certified record. Exhibit C is the cognovit note in which the appellant agreed to pay Personal Service Insurance

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[7] Certified R. 7 and Appellant Ex. B at ¶¶ 4-6.

[8] The appellant filed a motion for summary judgment. The appellee filed a motion to strike the appellant's motion for summary judgment and a motion to dismiss the appeal for lack of subject matter jurisdiction. On March 27, 2015 this court denied the appellee's motion to dismiss but granted its motion to strike the appellant's motion for summary judgment. In accordance with this court's briefing and hearing schedule, the appellant filed a brief in support of her appeal on April 29. The appellee filed its brief on May 28, and the appellant's reply thereto was filed June 15.

Company. Exhibit F is a copy of the appellant's car insurance policy in effect from March 14, 2015 to September 14, 2015. Exhibit G is the appellant's September 23, 2014 letter to the appellee requesting an appeal.

LEGAL ANALYSIS

Ohio's Administrative Procedure Act governs appeals of administrative agency orders and provides in R.C. 119.12 that "[a]ny party adversely affected by any order of an agency issued pursuant to an adjudication denying * * * revoking or suspending a license * * * may appeal from the order of the agency to the court of common pleas * * * "[9] Within 30 days of the agency's receipt of the appeal notice, the agency must prepare and certify a "complete record of the proceedings in the case."[10]

For the agency decision to survive appeal, the court of common pleas must be able to conclude that the "agency's order is supported by reliable, probative, and substantial evidence and is in accordance with law."[11] The scope of review for the common pleas court "may be limited to a review of the record, or, at the judge's discretion, the hearing may involve the acceptance of briefs, oral argument and/or newly discovered evidence."[12]

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[9] R. C. 119.12.
[10] Id.
[11] Id.
[12] *Ohio Motor Vehicle Dealers Bd. V. Central Cadillac Co.*, 14 Ohio St.3d 64, 67, 471 N.E.2d 488, 14 O.B.R. 456 (1984). *See Williams v. Dollison*, 62 Ohio St.2d 297, 405 N.E.2d 714, 16 O.O. 3d 350 (1980) ("Unless otherwise provided by law, in the hearing of such an appeal, that court is confined to the record as certified by the bureau."); *University of Cincinnati v. Conrad*, 63 Ohio St.2d 108, 110, 407 N.E.2d 1265, 17 O.O.3d 65 (1980) (holding same).

The court must review "the entire record" for reliable, probative, and substantial evidence, which is "a hybrid" form of review that is "neither strictly of either law nor of law and fact."[13] Rather, the court "must appraise all the evidence as to the credibility of the witness, the probative character of the evidence, and the weight thereof.' "[14] When evidence conflicts, the common pleas court gives "due deference" to the administrative agency's resolution of the conflict.[15]

As noted, the general rule that the court is constrained to the certified record has an exception. "[T]he court may grant a request for the admission of additional evidence when satisfied that the additional evidence is newly discovered and could not with reasonable diligence have been ascertained prior to the hearing."[16] If the two requirements set forth in R.C. 119.12 are satisfied, the decision to admit such additional evidence is discretionary.[17]

"Newly discovered" evidence has been construed to mean evidence that existed at the time of the administrative hearing, but that could not have been ascertained with the exercise of due diligence before the hearing.[18] Evidence that is newly created evidence is not deemed "newly discovered" evidence.[19] Moreover, a party that does not

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[13] *Andrews v. Board of Liquor Control*, 164 Ohio St. 275, 280, 131 N.E.2d 390, 58 O.O. 51 (1955). *See Lies v. Ohio Veterinary Medical Bd.*, 2 Ohio App.3d 204, 207, 441 N.E.2d 584, 2 O.B.R. 223 (1st Dist. 1981) (holding same).
[14] *Andrews* at 280.
[15] *Conrad* at 111.
[16] R.C. 119.12.
[17] *Northfield Park Assoc. v. Ohio State Racing Comm.*, 10th Dist. Franklin No. 05AP-749, 2006-Ohio-3446, ¶ 57.
[18] *In re Henneke*, 12th Dist. Clermont No. CA2011-05-039, 2012-Ohio-996, ¶ 62.
[19] Id. at ¶ 65. *See Northfield Park Assoc.*, 2006-Ohio-3446 at ¶ 57.

attempt to seek out additional evidence until after the administrative hearing has not exercised reasonable diligence.[20]

The "newly discovered" evidence exception still applies in cases where an appellant is offered an administrative hearing, but the appellant voluntarily declines to take advantage of it.[21] For example, in *Beach v. Ohio Board of Nursing*, 10th Dist. Franklin No. 10AP-940, 2011-Ohio-3451, ¶ 1, the appellant appealed a decision by the Ohio Board of Nursing that permanently revoked her nursing license. At the administrative level, the appellant withdrew her requests for a hearing and the Ohio Board of Nursing revoked her license following a regular agency meeting.[22] When the appellant appealed the decision to the court of common pleas, the court denied her request to admit additional evidence.[23]

On appeal to the Tenth District Court of Appeals, the appellant argued that the common pleas court applied an "overly strict construction of R.C. 119.12 and failed to account for the fact that no hearing took place."[24] The Tenth District Court of Appeals rejected this argument and affirmed the trial court's decision, explaining that "the board complied with procedural due process by affording the appellant notice and an opportunity to be heard. Appellant's failure to take advantage of her opportunity for a

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[20] *In re Henneke* at ¶ 62. *See Chong v. Hadaway, Inc. v. Ohio Liquor Control Com'n*, 10th Dist. Franklin No. 03AP-302, 2003-Ohio-5584, ¶ 17 (excluding additional evidence because "nothing in the record indicates the appellant could not have procured [it] prior to the hearing before the commission.").
[21] *Beach v. Ohio Board of Nursing*, 10th Dist. Franklin No. 10AP-940, 2011-Ohio-3451, ¶¶ 1, 19, 24.
[22] Id. at ¶ 9.
[23] Id. at ¶ 12.
[24] Id.

hearing did not require the common pleas court to grant her motion to admit additional evidence."[25]

In a similar case, the Tenth District Court of Appeals observed that "[i]f appellant had wanted to ensure certain evidence would be included in the record both before the board and the trial court, she should have taken the proper steps to procure a hearing."[26] Notably, the cases discussed above all involve appellants who were either invited to or participated in administrative hearings.

The case at bar is unique from the above cases because, unlike those appellants, here the appellant had no opportunity to be heard at the administrative level before she appealed to this court. She never had a hearing because the "registrar of motor vehicles is not required to hold any hearing in connection with an order canceling or suspending a motor vehicle driver's [license]."[27] The Ohio Supreme Court has held that an agency does not run afoul of due process when it revokes an individual's driver license without a hearing.[28] In reaching this conclusion, the Court explained that due process is served because, among other reasons, the individual "has the right to appeal the registrar's suspension order, pursuant to R.C. 119.12."[29]

In the case at hand, the appellant has moved to admit exhibits that are outside of the certified record of the proceedings.[30] The appellant's driver license was revoked without any opportunity for her to present evidence opposing her license suspension to

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[25] Id. at ¶ 19. *See Jain v. Ohio State Med. Bd.*, 10th Dist. Franklin No. 00AP-01180, 2010-Ohio-2855, ¶ 20 (affirming the trial court's decision to exclude additional evidence where the appellant had been "given a proper opportunity consistent with due process to request and participate in an administrative hearing, but failed to do so."
[26] *Jain* at ¶ 20.
[27] R.C. 119.062(A).
[28] *Dollison*, 62 Ohio St.2d 297, 405 N.E.2d 714, 16 O.O. 3d 350.
[29] Id.
[30] Exhibit B is in fact part of Cert. R. 7, which is analyzed below.

the appellee. Although the lack of hearing for her license suspension is constitutional, the appellant argues that she should be able to admit new evidence because she never had the occasion to submit evidence until now. She posits that her procedural due process will be vitiated if she cannot present evidence at any point during her case.

The appellee's position is that the appellant's evidence should be excluded because, under R.C. 119.12, she cannot show how the proposed exhibits are "newly discovered." Moreover, the appellee argues that the appellant failed to exercise "due diligence" because multiple proffered exhibits existed months or years before the appellant's suspension took place.

The issue before the court then is whether the court may consider the appellant's "additional evidence" when the appellant has not been offered an earlier opportunity to submit evidence which would then be part of the certified record of the proceeding for purposes of appeal. The Fifth District Court of Appeals dealt with a similar issue in *Ashland County Heartland Home v. Croskey*, 160 Ohio App.3d 170, 2005-Ohio-1476, 826 N.E.2d 365. There, the administrative law judge prepared a report and recommendation without holding a hearing.[31] In turn, the State Personnel Review Board adopted the report and recommendation.[32] The appellants then appealed to the court of common pleas and moved to admit additional evidence.[33] The court of common pleas excluded the appellant's evidence.[34] On appeal, the Fifth District Court of Appeals reversed the lower court decision. The court reasoned: "Because the record of the administrative process demonstrates that appellants were never afforded the

[31] *Ashland County Heartland Home v. Croskey*, 160 Ohio App.3d 170, 2005-Ohio-1476, 826 N.E.2d 365, ¶ 7.
[32] Id. at ¶ 8.
[33] Id. at ¶ 9.
[34] Id.

opportunity to set forth evidence, the trial court should have granted their request to present additional evidence in this matter pursuant to R.C. 119.12."[35]

The case of *Hudson v. Brown*, 75 Ohio Misc.2d 4, 662 N.E.2d 99 (C.P. 1995), reached a similar result and is directly on point to the instant case. Similar to this case, the Ohio Bureau of Motor Vehicles suspended the appellant's driver license under the Ohio Financial Responsibility Act for his failure to pay a civil judgment.[36] The appellant appealed the administrative decision to the court of common pleas pursuant to R.C. 119.12.[37] As here, the Ohio Bureau of Motor Vehicles was not required to, nor did it, hold a hearing for the suspension.[38]

Upon appeal to the court of common pleas, the appellant moved to admit additional evidence for the court's consideration.[39] The Ohio Bureau of Motor Vehicles opposed the admission of additional evidence in reliance on "the limitations found in R.C. 119.12," arguing that the evidence was not "newly discovered."[40] The court rejected the Bureau of Motor Vehicles' position, instead finding:

> "R.C. 119.12 presupposes that a hearing was available before the administrative agency in the first instance. Here, the statutes indicate, and the record before the court confirms, no hearing was held by the bureau before it suspended appellant's license. Appellant, then, has been given no opportunity to present evidence opposing his license suspension.
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> By its own terms the limitation of additional evidence applies where a hearing was available before the administrative agency. That is not the case here, however. The court concludes that the limitation on additional evidence found in R.C. 119.12 has no applicability where, as here, no hearing is available to an appellant. Where a

[35] Id. at ¶ 11.
[36] *Hudson v. Brown*, 75 Ohio Misc.2d 4, 662 N.E.2d 99 (C.P. 1995).
[37] Id. at 5.
[38] Id.
[39] Id.
[40] Id.

> hearing is not available, the appellant may request a common pleas court to admit any additional evidence that would be relevant to the administrative agency's determination in taking the action appealed."[41]

Hence, when an appellant has not received a prior opportunity for an administrative hearing, the limitations found in R.C. 119.12 are inapplicable. In *Hudson*, although the appellant had the right to admit evidence for the court's consideration, the court ultimately did not admit the evidence because it was "not relevant to the issues at hand."[42]

The case before the court is nearly identical to *Hudson* and is highly analogous to *Croskey*. As discussed, both courts reached the same conclusion, holding that the common pleas court may admit the appellant's additional evidence when the appellant did not receive an opportunity for an administrative hearing. Their results are also supported by the language in R.C. 119.12, which uses a "prior hearing" as a reference point to determine if an appellant exercised reasonable diligence.[43]

Furthermore, although R.C. 119.12 does not define "newly discovered," courts have consistently construed it to mean the evidence was "in existence at the time of the administrative hearing but that could not have been discovered with the exercise of due diligence prior to the hearing."[44] The definition of "newly discovered" and the language in R.C. 119.12 presuppose that an administrative hearing occurred. Accordingly, the court cannot analyze the facts in the instant case under the "additional evidence"

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[41] Id. at 5-6.
[42] Id. at 6.
[43] In pertinent part, R.C. 119.12 states: "Unless otherwise provided by law, the court may grant a request for the admission of additional evidence when satisfied that the additional evidence is newly discovered and could not with reasonable diligence have been ascertained prior to the hearing before the agency." (Emphasis added.)
[44] *In re Henneke*, 2012-Ohio-996 at ¶ 62.

framework because that analysis is predicated upon an earlier administrative hearing.[45] Because there was no administrative hearing, the appellant may present additional evidence outside the certified record of the proceedings.

Although the court will allow the appellant to submit additional evidence, such evidence must still be relevant and probative to the facts and issues in this case.[46] The first exhibit at issue, Exhibit B, is the complaint that Personal Service Insurance Company filed in the Municipal Court. While relevant, the complaint is already contained within Certified Record 7. Because Exhibit B is cumulative and its exclusion will not prejudice the appellant, the court grants the appellee's motion to strike Exhibit B from the record and denies the appellant's motion to admit Exhibit B into the record.[47]

Exhibit C is the cognovit note in which the appellant agreed to pay Personal Service Insurance Company $2,900.75, plus interest. In oral argument the appellant maintained that the cognovit note is highly probative of whether the appellee had sufficient evidence to suspend the appellant's license. The appellant's argument is well-taken. The court denies the appellee's motion to strike Exhibit C and grants the appellant's motion to admit Exhibit C.

Exhibit F is a copy of the appellant's car insurance policy, effective from March 14, 2015 to September 14, 2015. Exhibit G is the appellant's September 23, 2015 letter

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[45] Of note, the appellee did acknowledge in oral argument that the "prior hearing" language does "cause pause" and "poses a little bit of a problem." However, the appellee ultimately argued that the problem was not fatal to the additional evidence analysis.
[46] *See Hudson* at 43 (excluding irrelevant additional evidence). R.C. 119.12 ("The hearing in the court of common pleas shall proceed as in the trial of a civil action, and the court shall determine the rights of the parties in accordance with the laws applicable to a civil action."). *See* Evid.R. 401-402.
[47] *See Beach*, 2011-Ohio-3451 at ¶ 18 (excluding an appellant's proffered documents because they were identical to documents already part of the certified record); *Jain*, 2010-Ohio-2855 at ¶ 19 (concluding that minutes from a board meeting that the appellant should be excluded because were already part of the record).

to the appellee requesting an appeal. In her briefing the appellant has failed to explain the relevance of Exhibits F and G. In oral argument the appellant conceded that these two documents are "really not that necessary" and "really [have] no bearing on this particular case." Because the court can find no relevant purpose for these two exhibits to the remaining issues, the Court grants the appellee's motion to strike Exhibits F and G and denies the appellant's motion to admit the same.

CONCLUSION

For the foregoing reasons, the appellee's motion to strike Exhibits B, C, F, and G is granted as to Exhibits B, F, and G and denied as to Exhibit C. The appellant's motion to admit Exhibits B, C, F, and G is granted as to Exhibit C only.

Within seven days of the date of this Decision/Entry, counsel shall confer and call the Assignment Commissioner at (513) 732-7108 in order to schedule a Telephone Status Conference in order to determine if the briefing in the case is complete and to schedule oral argument on the appeal. The Telephone Status Conference shall be scheduled and held within 20 days of the date of this Decision/Entry.

IT IS SO ORDERED.

DATED: 10-3-15

Judge Jerry R. McBride