COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

AUDREY FEDER	:	
Appellant	:	**CASE NO. 2017 CVF 00923**
vs.	:	**Judge McBride**
OHIO DEPARTMENT OF JOB & FAMILY SERVICES	:	**DECISION/ENTRY**
Appellee	:	

Pro-Seniors, Inc., Jeremy Koenemann, counsel for the appellant Audrey Feder, 7162 Reading Road, Suite 1150, Cincinnati, Ohio 45202.

Attorney General of Ohio, Julie E. Brigner and Jedidiah I. Bressman, Assistant Attorneys General, Health and Human Services Section, counsel for the appellee Ohio Department of Job and Family Services, 30 East Broad Street, 26th Floor, Columbus, Ohio 43215.

This cause is before the court for consideration of the merits of the Audrey Feder's appeal, the notice of which she filed on July 25, 2017. The court heard oral argument on the appeal on June 8, 2018. At the conclusion of the oral arguments of counsel, the court took the appeal under advisement.

Upon consideration of the appellate briefs, the record of the proceedings, the oral arguments of counsel, and the applicable law, the court renders this written decision.

FACTS OF THE CASE AND PROCEDURAL BACKGROUND

The appellant Audrey Feder resides at a nursing home facility.[1] She is considered an "Institutionalized Spouse," and the appellant's husband is considered the "Community Spouse."[2] On August 16, 2016 and September 1, 2016, the appellant's Authorized Representative ("AR"), Eastgatespring of Cincinnati, applied for Long Term Care Facility Medicaid benefits on her behalf.[3]

On October 3, 2016, the Clermont County Department of Job and Family Services ("CCDJFS") issued a verification checklist that requested documentation pertinent to the appellant and her husband, including documentation related to their income, two checking accounts, the appellant's annuity, car titles, an Ameriprise brokerage account, withdrawal of money from one of their bank accounts in March 2016, and the amount the appellant draws monthly from her annuity.[4] On November 3rd and 21st, CCDJFS reissued the verification checklist, which requested the same documents, as well as documents related to money that the appellant and her husband gave to their daughter and documents related to money withdrawn from their bank accounts.[5]

On December 6, 2016, the appellant intimated to the AR that her husband had an Ameriprise account that he did not want CCDJFS to know about.[6] On that day, CCDJFS also gave the appellant an additional ten days to get the verifications that had had been

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[1] Certified R., (Admin. Appeal), pg. 35.
[2] Certified R., (Admin. Appeal), pgs. 3, 35.
[3] Certified R., (Admin. Appeal), pgs. 3, 12-13, 35.
[4] Certified R., (State Hearing), pg. 574.
[5] Certified R., (State Hearing), pg. 574.
[6] Certified R., (State Hearing), pg. 572.

reissued.[7] The AR requested assistance from CCDJFS in obtaining documentation from Pacific Life and Union Savings Bank.[8] CCDJFS subpoenaed these records, but was unable to subpoena records for other bank accounts on the appellant's intake form because the names of the banks were not provided.[9]

On December 21, 2016, CCDJFS conducted a resource assessment and determined that the appellant and her husband owned assets totaling $ 131,442.69.[10] The amount attributed to the appellant was $65,721.35, or half of the couple's total combined assets as of the resource assessment date.[11] CCDJFS indicated that it had, "completed a resource assessment based on the information that agency was able to obtain through all options that were available to them. This resource assessment is based on this information and agency feels that it is not complete due to non-cooperation of family and missing resources."[12]

On December 22, 2016, CCDJFS denied the appellant's September 1, 2016 Medicaid application for long term care because the appellant had countable resources in excess of the resource limit and did not meet the non-financial criteria for any Medicaid program.[13] The resource limit for an individual was $2,000 and $3,000 for a couple.[14]

On January 24, 2017, the appellant's AR filed another application for Medicaid for the appellant.[15] On March 28, 2017, CCDJFS determined that the countable resources

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[7] Certified R., (State Hearing), pg. 572.
[8] Certified R., (State Hearing), pg. 574.
[9] Certified R., (State Hearing), pg. 574.
[10] Certified R., (Admin. Appeal), pgs. 3, 35, Certified R., (State Hearing), pg. 576.
[11] Certified R., (Admin. Appeal), pgs. 3, 35.
[12] Certified R., (State Hearing), pg. 580.
[13] Certified R., (Admin. Appeal), pgs. 3, 35, 44.
[14] Certified R., (Admin. Appeal), pg. 3, citing Ohio Adm.Code 5160:1-3-05.1.
[15] Certified R., (Admin. Appeal), pgs. 3, 35.

were $121,007, and that the appellant's share of those countable resources was $60,503.[16] Since the last assessment, the appellant had removed $34,905 from her Thrift Savings account.[17] She also withdrew $19,729 from Pacific Life, which was paid to Eastgatespring.[18] CCDJFS indicated that the resource assessment was updated.[19] Further, CCDJFS noted that "this assessment is based on information that was submitted to the agency but feel [*sic*] it is not completed due to non cooperation [*sic*] of Audrey and her family and missing resources."[20] On March 30, 2017, CCDJFS issued a notice denying the January 24, 2017 Medicaid application.[21]

The appellant, through her AR, administratively appealed CCDJFS's determination of her first Medicaid application denial on March 21, 2017 and challenged whether CCDJFS processed the appellant's August 16, 2016 Medicaid application correctly.[22]

A state hearing was held on April 10, 2017 before a hearing officer.[23] At the hearing, the appellant's attorney argued that CCDJFS failed to process the appellant's Medicaid application within the 45-day processing timeframe and never told the appellant the amount of resources that needed to be spent down in order to be eligible for Medicaid until the application was denied.[24] This in turn caused the appellant to incur a $120,000 private pay bill from the nursing facility.[25] The attorney also argued that, had CCDJFS acted in a timely manner, the community spouse could have preserved more of his

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[16] Certified R., (Admin. Appeal), pgs. 3, 35; Certified R., (State Hearing), pg. 592.
[17] Certified R., (State Hearing), pg. 592.
[18] Certified R., (State Hearing), pg. 592.
[19] Certified R., (State Hearing), pg. 592.
[20] Certified R., (State Hearing), pg. 592.
[21] Certified R., (Admin. Appeal), pgs. 3, 35.
[22] Certified R., (Admin. Appeal), pgs. 33, 35.
[23] Certified R., (Admin. Appeal), pg. 33.
[24] Certified R., (Admin. Appeal), pg. 36.
[25] Certified R., (Admin. Appeal), pg. 36.

assets.[26] The attorney reasoned the denial should be rescinded and the August 16, 2016 application be maintained for retroactive relief and to give the appellant an opportunity to spend down to a level under the Medicaid resource limit.[27]

Following the hearing, a state hearing decision was mailed on April 19, 2017, which found that the appellant was not eligible for Medicaid coverage.[28] It specifically concluded that, although CCDJFS failed to process the application within the allowable timeframes, there was no further relief that could be offered.[29]

The appellant filed an administrative appeal of the state hearing decision on May 4, 2017, and argued in her appellate brief that CCDJFS failed to inform her and her husband that they were over the countable resource limit and by how much.[30] Further, she posited that had CCDJFS "simply assisted the Feders with the process as required, they would have paid the nursing facility the resources that put them over. Because [CCDJFS] failed to assist the Feders, Mr. Feder, the Community Spouse, will be left with nearly no resources for his own care and maintenance."[31] Moreover, the appellant argued that CCDJFS failed to adhere to the processing time requirements in Ohio Adm.Code 5160:1-2-01(K)(2) and 42 CFR § 435.912(c)(3)(ii), and had the agency followed the deadlines, the appellant and her husband would have been able to transfer their resources and protect the husband's resource allowance.[32] The appellant requested that the denial be rescinded, the August 16, 2016 application be reopened, the Community

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[26] Certified R., (Admin. Appeal), pg. 36.
[27] Certified R., (Admin. Appeal), pg. 36.
[28] Certified R., (Admin. Appeal), pgs. 33, 64.
[29] Certified R., (Admin. Appeal), pgs. 35-37.
[30] Certified R., (Admin. Appeal), pgs. 25, 56-57.
[31] Certified R., (Admin. Appeal), pg. 26.
[32] Certified R., (Admin. Appeal), pg. 26.

Spouse Resource Allowance be re-conducted, and that she receive assistance from CCDJFS in the form of communications telling her how much her countable resources were over the limit.[33]

At the administrative appeal hearing, counsel for the appellant argued as follows:

> "[T]he Agency [CCDJFS] failed to process the case correctly and, as a result, there was a delay which caused Appellant to be unaware of the amount of resources that needed to be spent down to be eligible for Medicaid. Appellant, according to counsel, incurred $120,000 in private pay costs due to the NF. Appellant's attorney also argued that the husband would have been able to preserve more of his assets. In addition, Appellant's counsel cited 42 CFR 435.903(b) which requires state agencies to take corrective action to ensure adherence to the state plan provisions and 42 CFR 431.246 which provides that the agency must make corrective payments retroactive to the date of the incorrect action."[34]

On June 22, 2017, an administrative appeal decision was issued by a panel of three administrative appeal examiners which found that the appellant was ineligible for Medicaid coverage on all three applications because the eligibility factors were not met, despite the fact that CCDJFS delayed in processing the first two applications.[35] Thus, the administrative appeal decision affirmed the state hearing decision.[36]

The appellant then appealed the administrative appeal decision to the Clermont County Court of Common Pleas by filing a notice of appeal on July 25, 2017. The appellant filed her appellate brief on March 15, 2018, and the appellee Ohio Department of Job and Family Services (hereinafter referred to as "ODJFS") filed its appellate brief on April 16th. The appellant filed a reply brief on April 30th, and ODJFS filed a motion to

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[33] Certified R., (Admin. Appeal), pgs. 26-27, 57-58.
[34] Certified R., (Admin. Appeal), pg. 5.
[35] Certified R., (Admin. Appeal), pg. 5.
[36] Certified R., (Admin. Appeal), pg. 6.

strike portions of the reply on May 7, 2018. The court heard oral argument on June 8th, after which time it took the appeal under advisement.

LEGAL STANDARD

Under R.C. 5101.35(E), an appellant who disagrees with the decision of ODJFS's director or his or her designee may appeal the decision to the court of common pleas pursuant to R.C. 119.12.[37] The right to appeal from an administrative agency decision is statutory and falls within the ambit of Ohio's Administrative Procedure Act, codified in R.C. Chapter 119.[38] R.C. 119.12 provides, in relevant part, 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. * * *"

Under R.C. 119.12, an administrative agency is required to file complete, certified administrative records within 30 days of the notice of appeal.[39] "A 'complete record of proceedings' in a case is a precise history of the proceedings from their commencement

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[37] *Rose v. Ohio Dept. of Job & Family Serv.*, 160 Ohio App.3d 581, 2005-Ohio-1804, 828 N.E.2d 166, ¶ 11 (12th Dist.); R.C. 5101.35(E). R.C. 5101.35(E) provides that R.C. 119.12 applies, with limited exceptions. One such exception is that: "The department shall be required to file a transcript of the testimony of the state hearing with the court only if the court orders the department to file the transcript. The court shall make such an order only if it finds that the department and the appellant are unable to stipulate to the facts of the case and that the transcript is essential to a determination of the appeal. The department shall file the transcript not later than thirty days after the day such an order is issued." R.C. 5101.35(E)(4). Of note, the parties in the instant case have not requested that the court order a transcript or argued that it is essential to the determination of this appeal.

[38] *Ohio Historical Soc. v. State Emp. Relations Bd.*, 66 Ohio St.3d, 466, 470, N.E.2d 591 (1993).

[39] R.C. 119.12.

to their termination."[40] 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 the law."[41] This two-pronged inquiry is a hybrid of fact and law.[42]

The first prong analyzes whether there is the "absence or presence of the requisite quantum of evidence."[43] It "is in essence a legal question, but inevitably involves a consideration of the evidence."[44] The Ohio Supreme Court has construed the meaning of reliable, probative, and substantial evidence as follows:

> "(1) 'Reliable' evidence is dependable; that is, it can be confidently trusted. In order to be reliable, there must be a reasonable probability that the evidence is true. (2) 'Probative' evidence is evidence that tends to prove the issue in question; it must be relevant in determining the issue. (3) 'Substantial' evidence is evidence with some weight; it must have importance and value."[45]

R.C. 119.12 does "not contemplate a trial de novo."[46] Rather, the court's scope of review is "limited to a review of the record, or, at the judge's discretion * * * the acceptance of briefs, oral argument and/or newly discovered evidence."[47] The court reviews "the

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[40] *Citizens for Akron v. Ohio Elections Comm.*, 10th Dist. Franklin Nos. 11AP-152, 11AP-153, 2011-Ohio-6387, quoting *Checker Reality Co. v. Ohio Real Estate comm.*, 41 Ohio App.2d 37, 322 N.E. 139 (1974), paragraph two of the syllabus.
[41] *Bateson v. Ohio Dept. of Job & Family Services*, 12th Dist. Warren No. CA2003-09-093, 2004-Ohio-6247, ¶ 7, quoting R.C. 119.12.
[42] *Ohio Historical Soc.*, 66 Ohio St.3d at 470.
[43] *University of Cincinnati v. Conrad*, 63 Ohio St.2d 108, 111, 407 N.E.2d 1265 (1980).
[44] Id.
[45] *Our Place, Inc. v. Ohio Liquor Control Comm.*, 63 Ohio St.3d 570, 571, 589 N.E.2d 1303, 73 Ed. Law Rep. 765 (1992).
[46] *University of Cincinnati*, 63 Ohio St.2d at 110.
[47] *Ohio Motor Vehicle Dealers Bd. v. Central Cadillac Co.*, 14 Ohio St.3d 64, 67, 471 N.E.2d 488 (1984). *See Williams v. Dollison*, 62 Ohio St.2d 297, 405 N.E.2d 714 (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*, 63 Ohio St.2d at 110 (holding same).

entire record" for "reliable, probative, and substantial evidence."[48] In doing so, the court "must appraise all the evidence as to the credibility of the witness, the probative character of the evidence, and the weight thereof.'"[49]

When evidence conflicts, the trial court gives "due deference" to the administrative agency's resolution of the conflict.[50] However, the agency's findings "are by no means conclusive."[51] As such, the agency's findings of fact are presumed correct unless the "court determines that the agency's findings are internally inconsistent, impeached by evidence of a prior inconsistent statement, rest upon improper interferences, or are otherwise unsupportable."[52] The court may reverse, vacate, or modify the agency order when there are "legally sufficient reasons for discrediting certain evidence" the agency relied on.[53]

The second prong of R.C. 119.12 obligates the court to "determine whether the agency's decision is 'in accordance with law.'"[54] Phrased differently, the court decides whether the agency action is "in accordance with the statutes and law applicable."[55] While

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[48] *Andrews v. Board of Liquor Control*, 164 Ohio St. 275, 280, 131 N.E.2d 390 (1955). *See Lies v. Ohio Veterinary Medical Bd.*, 2 Ohio App.3d 204, 207, 441 N.E.2d 584 (1st Dist. 1981) (holding same).
[49] *Andrews*, 164 Ohio St. at 280.
[50] *University of Cincinnati*, 63 Ohio St.2d at 111.
[51] *Bartchy v. State Bd. of Edn.*, 120 Ohio St.3d 205, 2008-Ohio-4826, 897 N.E.2d 1096, 239 Ed. Law Rep. 272, ¶ 37, quoting *Ohio Historical Soc. v. State Emp. Relations Bd.*, 66 Ohio St.3d 466, 470-71, 613 N.E.2d 591 (1993).
[52] *Bartchy*, 2008-Ohio-4826 at ¶ 37, quoting *Ohio Historical Soc.*, 66 Ohio St.3d at 471. *See University of Cincinnati*, 63 Ohio St.2d at 111-112 (observing that "where it appears that the administrative determination rests upon inferences improperly drawn from the evidence adduced, the court may reverse the administrative order.").
[53] *Bartchy*, 2008-Ohio-4826 at ¶ 37, quoting *Ohio Historical Soc.*, 66 Ohio St.3d at 470.
[54] *Ohio Historical Soc.*, 66 Ohio St.3d at 471.
[55] Id., citing *Andrews*, 164 Ohio St. at 280.

the court shows deference to the agency's factual findings, the trial court "must construe the law on its own."[56]

LEGAL ANALYSIS

I. MOTION TO STRIKE

ODJFS filed a motion to strike portions of the appellant's reply brief on April 30, 2018. ODJFS argues that portions of the reply raise wholly new arguments that were not raised in the appellant's appellate brief.

The court finds that portions of ODJFS's motion is well-taken. Namely, the appellant's arguments regarding the evidentiary value and credibility of the certified record are new and could have been raised in the appellant's appellate brief but were not. The court shall not consider these new arguments regarding the evidence and factual findings.

However, the appellant's arguments with respect to Ohio Adm.Code 5160:1-3-06.4 are in response to the arguments ODJFS raised in its appellate brief. As such, the court shall consider the latter arguments.[57]

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[56] *Bartchy*, 2008-Ohio-4826 at ¶ 37, quoting *Ohio Historical Soc.*, 66 Ohio St.3d, at 471.
[57] *See Chen v. Ohio Dept. of Job & Family Servs.*, 12th Dist. Clermont No. CA2011-04-026, 2012-Ohio-994, ¶ 33, citing App.R. 16(C) and *Sheppard v. Mack*, 68 Ohio App.2d 95, 97, 427 N.E.2d 522 (8th Dist. 1980), fn. 1 ("It is well-established that a reply brief is merely an opportunity to reply to the brief of the appellee.").

II. MERITS OF APPEAL

The Medicaid program was created to assist the poor, and later was amended to include assistance to the elderly in long-term institutionalized care.[58] Today, "Medicaid is a cooperative federal-state program through which the federal government offers financial assistance to participating states that provide medical care to needy individuals."[59] Participating states must develop reasonable standards for determining eligibility consistent with the act.[60] Ohio participates in the Medicaid program and codified the eligibility requirements at R.C. 5111.01 *et seq.*[61] "In Ohio, ODJFS supervises the administration of Ohio's Medicaid program, * * * and has promulgated rules for doing so under the Ohio Administrative Code, which closely mirrors federal Medicaid law."[62]

The issue the appellant has raised on appeal is: "Whether Defendant's determination that Plaintiff's resources in excess of the Medicaid resource limit should be counted, thereby making her ineligible for Medicaid, when they are held by a reluctant spouse."[63] This involves an analysis of the Ohio Adm.Code 5160:1-3-04.6 (2014), referred to as the reluctant spouse rule.[64] Ohio Adm.Code 5160:1-3-04.6 (2014) provides:

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[58] *Estate of Atkinson v. Ohio Dept. of Job & Family Servs.*, 144 Ohio St.3d 70, 2015-Ohio-3397, 40 N.E.3d 1121, ¶ 4, citing *Schweiker v. Gray Panthers*, 453 U.S. 34, 38, 101 S.Ct. 2633, 69 L.Ed.2d 460 (1981).
[59] *Bateson*, 2004-Ohio-6247 at ¶ 8, quoting *Wood v. Tompkins*, 33 F.3d 600, 602 (6th Cir.1994).
[60] *Bateson*, 2004-Ohio-6247 at ¶ 8, citing 42 U.S.C. 1982, § 1396a(a)(17).
[61] *Bateson*, 2004-Ohio-6247 at ¶ 8.
[62] *Estate of Montgomery v. Ohio Dept. of Job & Family Servs.*, 5th Dist. Delaware No. 11 CAH 06 0054, 2012-Ohio-574, ¶ 20, quoting *Pfautz v. Ohio Dept. of Job and Family Servs.*, 3d Dist. Marion No. 9–06–62, 2007–Ohio–6424, ¶ 18.
[63] Appellant's Brief, pg. 1.
[64] The appellant's appellate brief actually refers to Ohio Adm.Code 5160:1-6-4, which became effective after the Administrative Appeal Decision was issued. The appellant acknowledges this in her reply brief, wherein she begins to reference Ohio Adm.Code 5160:1-3-04.6 (2014) instead.

> "When an institutionalized spouse is determined to have resources in excess of the individual resource limit, the institutionalized individual is ineligible for medical assistance due to excess resources; however, the institutionalized spouse must be found eligible for medical assistance if all of the following conditions exist:
>
> (1) The institutionalized spouse's own resources are at or below the individual resource limit; and
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> (2) The community spouse will not cooperate in making resources available to the institutionalized spouse after a resource assessment has been completed; and
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> (3) The institutionalized spouse * * * has assigned his or her rights to support from the community spouse to the state. If the institutionalized spouse lacks the ability to execute an assignment due to a physical or mental impairment, the state will bring a support proceeding against the community spouse as provided for in sections 5160.37 and 5160.38 of the Revised code; and
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> (4) All other eligibility requirements have been met."[65]

Moreover, Ohio Adm.Code 5160:1-3-04.6(E) (2014) contains requirements that the agency, here CCDJFS, must satisfy before issuing a final decision to approve or deny medical assistance. These requirements include mandates such as giving notice to the community spouse and completing various forms.[66]

The appellant posits that, although she had less than $2,000 in resources solely in her name, her husband was uncooperative in assisting with her Medicaid application, and therefore she should have been approved for Medicaid under the reluctant spouse rule.[67] The appellant maintains that CCDJFS failed to comply with the mandates in Ohio

[65] Ohio Adm.Code 5160:1-3-04.6(D) (2014).
[66] Ohio Adm.Code 5160:1-3-04.6(E) (2014).
[67] Appellant's Brief, pgs. 5-6.

Adm.Code 5160:1-3-04.6 (2014) before denying her application, and as such it improperly denied her application.[68]

ODJFS argues that the appellant waived this sole assignment of error by failing to raise it at the administrative level.[69] It highlights portions of the certified record that summarize the appellant's arguments at the underlying proceedings, none of which argue that the CCDJFS failed to apply the reluctant spouse rule. Instead, the arguments from the State Hearing and Administrative Appeal Hearing dealt with the timeliness of the agency's processing of the appellant's Medicaid applications. The appellant consistently argued that, had the agency assisted her and her husband with the process, her husband could have spent down his resources more.

In terms of waiver, "a party's failure to raise an issue at the administrative level precludes the party from raising it before a reviewing court."[70] This derives from the general rule that "reviewing courts do not consider questions not presented to the court

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[68] Appellant's Reply, pg. 5.
[69] Appellee's Brief, pg. 1.
[70] *State ex rel. Schlegel v. Stykemain Pontiac Buick GMC, Ltd.*, 120 Ohio St.3d 43, 2008-Ohio-5303, 896 N.E.2d 143, ¶ 17. *See Valentine Contrs. v. Ohio Dept. of Job & Family Servs.*, 10th Dist. Franklin No. 15AP-86, 2015-Ohio-5576, ¶ 21, quoting *Gilsey Invests., Inc. v. Liquor Control Comm.*, 10th Dist. No. 07AP–1069, 2008–Ohio–2795, ¶ 10 ("Errors which are not brought to the attention of the administrative agency by objection or otherwise are waived and may not be raised on appeal."); *New Carlisle v. Pratt*, 2d Dist. Clark No. 2014-CA-112, 2015-Ohio-1398, ¶ 45, quoting *State ex rel. Quarto Mining Co. v. Foreman*, 79 Ohio St.3d 78, 81, 679 N.E.2d 706 (1997) ("The rule compelling a party to present all legitimate issues before the administrative tribunal is required in order to preserve the integrity of the proceedings before that body and to endow them with a dignity beyond that of a mere shadow-play."); *Mulhausen v. Ohio Counselor, Social Worker & Marriage & Family Therapy Bd.*, 8th Dist. Cuyahoga No. 88776, 2007-Ohio-3917, ¶ 14, citing *Gutierrez v. Trumbull Cty. Bd. of Elections*, 65 Ohio St.3d 175, 177 (1992) and *State ex rel. Quarto Mining Co.*, 79 Ohio St.3d at 82 (finding that "is well-settled that arguments not raised below cannot be raised for the first time on appeal" and "'[b]elow' includes issues not raised at the administrative level."); *Trish's Cafe & Catering, Inc. v. Ohio Dept. of Health*, 10th Dist. No. 10AP-539, 195 Ohio App.3d 612, 2011-Ohio-3304, 961 N.E.2d 236, ¶ 19 (finding that the appellants' failure to raise an issue at an administrative hearing resulted in their waiver of that issue at the administrative appeal).

whose judgment is sought to be reversed."[71] The Ohio Supreme Court has explained the purpose of these rules in *State ex rel. Quarto Mining Co. v. Foreman*, 79 Ohio St.3d 78, 679 N.E.2d 706 (1997):

> "These rules are deeply embedded in a just regard to the fair administration of justice. They are designed to afford the opposing party a meaningful opportunity to respond to issues or errors that may affect or vitiate his or her cause. Thus, they do not permit a party to sit idly by until he or she loses on one ground only to avail himself or herself of another on appeal. In addition, they protect the role of the courts and the dignity of the proceedings before them by imposing upon counsel the duty to exercise diligence in his or her own cause and to aid the court rather than silently mislead it into the commission of error."[72]

The Court went on to cite to persuasive reasoning from a California case that applied the waiver rule to administrative hearings, continuing:

> "It was never contemplated that a party to an administrative hearing should withhold any defense then available to him or make only a perfunctory or 'skeleton' showing in the hearing and thereafter obtain an unlimited trial de novo, on expanded issues, in the reviewing court. * * * The rule compelling a party to present all legitimate issues before the administrative tribunal is required in order to preserve the integrity of the proceedings before that body and to endow them with a dignity beyond that of a mere shadow-play."[73]

Furthermore, the Court explained that allowing a party to be excepted from the waiver rule would overburden the administrative commission, forcing an "already overworked commission to comb through the files of every * * * case in search of issues that could potentially be raised by both sides at the hearing table. In addition it would

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[71] *State ex rel. Quarto Mining Co.*, 79 Ohio St.3d at 81, citing *Goldberg v. Indus. Comm.*, 131 Ohio St. 399, 404, 3 N.E.2d 364 (1936).
[72] *State ex rel. Quarto Mining Co.*, 79 Ohio St.3d at 81, citing *State v. Williams*, 51 Ohio St.2d 112, 117, 364 N.E.2d 1364 (1977).
[73] *State ex rel. Quarto Mining Co.*, 79 Ohio St.3d at 82, quoting *Bohn v. Watson*, 130 Cal.App.2d 24, 37, 278 P.2d 454, 462 (1954).

waste judicial and administrative resources by permitting a party to secure another bite at the * * * apple based upon the commission's failure to consider an issue or correct an error upon which the party remained silent."[74]

In the instant case, the appellant has argued that the waiver rule would apply to the agency, but not to her. Indeed, a workers compensation claimant raised the same argument in *State ex rel. Schlegel v. Stykemain Pontiac Buick GMC, Ltd.*, 120 Ohio St.3d 43, 2008-Ohio-5303, 896 N.E.2d 143. The claimant, who had not presented an argument to the district hearing officer or state hearing officer, was not allowed to present that argument during his appeal at the trial court.[75] He argued that waiver should only apply to employers who fail to raise issues at the administrative levels, not claimants, due to the liberal-construction of the workers compensation statutes.[76] However, the Ohio Supreme Court rejected this argument, and found that waiver applied to both parties.[77]

The appellant in the present case also argues that waiver should not apply to bar her new argument because the agency carries the burden of proof. Although correct that the agency does carry the burden of proof,[78] she has not cited any case law to support the proposition that waiver only bars new arguments made by the party bearing the burden of proof.

Moreover, a dissent in the recent case of *Tiggs v. Ohio Department of Job & Family Services*, 2018-Ohio-3164, 118 N.E.3d 985 (8th Dist.) suggests that the waiver rule does apply to individuals involved in Medicaid appeals. In *Tiggs*, ODJFS appealed from a trial

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[74] Id. at 82-83.
[75] *State ex rel. Schlegel*, 2008-Ohio-5303 at ¶ 17.
[76] Id.
[77] Id. at ¶ 21.
[78] See Ohio Adm.Code 5101:6-7-01(C)(1)(c).

court's ruling that found in favor of a Medicaid recipient residing in a nursing home.[79] The trial court modified the administrative appellate decision, and ODJFS appealed.[80] The appellate court majority found that ODJFS did not have statutory authority to appeal on its second and third assignments of error, which dealt with whether ODJFS had a duty to assist the Medicaid recipient in determining whether an insurance policy was accessible to him.[81] This was so because R.C. 119.12(N) only allows agency to appeal questions of law pertaining to statutes and regulations, and courts have construed that narrowly to mean that the questions of law must involve a statute or regulation's constitutionality, construction, or interpretation.[82] As such, the appellate court found it did not have jurisdiction to consider the errors.

In a concurring and dissenting decision, Judge Stewart highlighted that the majority failed to address the fact that the Medicaid recipient did not raise the issue of ODJFS's duty to help him with his insurance policy at the administrative level.[83] Instead, that issue was raised for the first time at the trial court.[84] Judge Stewart observed that "[i]t is well established that the failure to raise an issue at the state hearing level waives the issue on appeal to the court of common pleas."[85] Judge Stewart found that the majority's application of R.C. 119.12(N) prevented ODJFS from seeking review as to whether the

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[79] *Tiggs v. Ohio Department of Job & Family Services*, 2018-Ohio-3164, 118 N.E.3d 985 (8th Dist.).
[80] Id. at ¶¶ 9-10.
[81] Id. at ¶ 33.
[82] Id. at ¶ 31.
[83] Id. at ¶ 38.
[84] Id.
[85] Id., citing *State ex rel. Schlegel*, 2008-Ohio-5303 at ¶¶ 17-18.

trial court erred by failing to apply the waiver rule, which would also have been a question of law.[86]

The court has not found any other case beyond *Tiggs* that discusses the waiver rule's application to administrative appeals from ODJFS's Medicaid decisions. However, *Tiggs*, along with the robust body of case law that consistently applies the waiver rule to administrative proceedings generally, strongly suggests that it applies in this case. Moreover, the reasoning that underpins the waiver rule's application to administrative proceedings seems likewise applicable here. To make an exception for Medicaid appeals, the administrative appeal examiners would have to comb through extensive files in each case to determine if there were issues that either side could raise, and it would deprive the administrative appeal examiners of the opportunity to consider an issue or correct an error.

Indeed, in this case the appellant argued below that CCDJFS did not timely process her Medicaid application, and that delay caused the appellant to be unaware of the amount of resources that needed to be spent down to become eligible for Medicaid.[87] The appellant also argued that her husband could have preserved more of his assets had they been timely aware of the amount they needed to spend down.[88] This argument would seem to imply to the administrative appeal examiners that the appellant's husband was being cooperative and would have been cooperative had he known the amount he needed to spend down. In other words, it was not patently obvious that the appellant's

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[86] *Tiggs*, 2018-Ohio-3164 at ¶ 38.
[87] Certified R., (Admin. Appeal), pg. 5. Of note, neither party has requested that the court order ODJFS to submit the transcript of the administrative appeal hearing. The appellant has not argued in her brief or reply that she made any arguments at that hearing that were not reflected in the oral hearing summaries and briefs in the certified record.
[88] Certified R., (Admin. Appeal), pg. 5.

husband's cooperation was at issue. Had the appellant raised this issue at her administrative appeal, the examiners could have dealt with the issue at that time. However, the appellant did not. The court finds that the appellant's sole assignment of error is waived.

The court recognizes and appreciates that its ruling in the case at bar leads to a harsh result for the appellant. However, it is not the role of this court to craft new exceptions to well established legal doctrine. If Medicaid applicants are differently situated from other administrative appellants, as the appellant has argued, then perhaps the Twelfth District Court of Appeals or the Ohio Supreme Court can create an exception to the wavier rule in Medicaid cases. But this court cannot do that in this case. Accordingly, the court affirms ODJFS's decision to deny Medicaid coverage to the appellant because it finds that she waived her assignment of error.

CONCLUSION

For the foregoing reasons, the court overrules the appellant Audrey Feder's assignment of error and affirms the decision of the Ohio Department of Job and Family Services.

IT IS SO ORDERED.

DATED: 4-19-19

Judge Jerry R. McBride

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Decision/Entry were sent on this 19th day of April 2019 by e-mail to Jeremy Koenemann, Attorney for the Appellant Audrey Feder, at jkoenemann@proseniors.org, and to Julie E. Brigner, at julie.brigner@ohioattorneygeneral.gov, and Jedidiah Bressman, at jedidiah.bressman@ohioattorneygeneral.gov, Assistant Attorneys General for the Appellee Ohio Department of Job and Family Services.

Judicial Assistant to Judge McBride