IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
CIVIL DIVISION

Benjamin B. Annor,	:	
Appellant,	:	CASE NO. 16CV-7375
-vs-	:	**JUDGE SERROTT**
Ohio Department of Public Safety, Bureau of Motor Vehicles,	:	
Appellee.	:	

DECISION AND ENTRY AFFIRMING THE ORDER OF APPELLEE
AND
ENTRY DENYING APPELLANT'S MOTION TO SUPPLEMENT THE RECORD
AND
ENTRY DENYING APPELLANT'S MOTION TO STRIKE
AND
NOTICE OF FINAL APPEALABLE ORDER

Rendered this 8th day of December, 2016

SERROTT, J.

I. INTRODUCTION

This matter is before the Court on a R.C. 119.12 appeal from the Order of Appellee the Ohio Motor Bureau of Motor Vehicle (the "BMV") imposing a non-compliance suspension and security suspension of Appellant Benjamin B. Annor's driver's license. Appellant was determined to be the driver of in a "hit skip" accident that caused damage to two parked motor vehicles. Appellant argued in the underlying proceedings and continues to argue here that he was not the driver of the vehicle, which is owned by his sister.

Because the BMV's Order relies heavily upon his sister's purported statement to the investigating police officer, Appellant moves the Court to supplement the record

with his sister's Affidavit where she avers that the officer did not properly record her statement. Additionally, the BMV moves to either strike Appellant's Reply for relying on evidence outside of the record and for raising arguments that have been waived or for leave to file a surreply. The issues have been fully briefed and are ready for consideration.

II. PROCEDURAL HISTORY AND RELEVANT FACTS

On November 8, 2015 at approximately 7 p.m., the operator of a Jaguar lost control of the vehicle causing damage to two parked cars. The individual then left the scene of the accident leaving the Jaguar behind. The responding Columbus Police Officer described the circumstances of the accident in the Traffic Crash Report as follows:

> Unit #1 [the Jaguar] was traveling southbound on Karl Rd. and lost control of the vehicle somewhere in front of 6355 Karl Rd. Unit #1 crossed over the northbound lane, jumped over a curb, and then struck Unit #2 which was parked in the driveway in front of 6380 Karl Rd. causing disabling damage to back rear driver's side. Debris from Unit #2 then flew off and struck Unit #3 which was parked in the driveway in front of 6370 Karl Rd. Unit #1 then drove over a concrete divider located between 6380 and 6370 Karl Rd. causing damage to it before coming to a stop in the front yard of 6380 Karl Rd.

The Traffic Crash Report also includes the following account from a witness who purportedly saw the collision unfold and attempted to communicate with the driver of the vehicle:

> Witness #1 stated he was in his vehicle traveling northbound on Karl Rd. and saw Unit #1 traveling at a high rate of speed heading southbound on Karl Rd. Witness #1 stated he saw the driver of Unit #1 lose

> control, jump over the curb and strike Unit #2. Witness #2 stated he was walking northbound on Karl Rd. and witnessed the accident. Witness #2 stated after Unit #1 struck Unit #2 he witnessed the driver of Unit #1 exit the vehicle and walk southbound on Karl Rd. Witness #2 stated he asked if the driver of Unit #1 needed any help, but the driver didn't respond to his question and continued southbound. The driver of Unit #1 was described as a dark skinned male black who was short and chubby. The driver of Unit #1 was further described as having a goatee.

The Responding Officer then reached out to Appellant's sister, Adwoa Nyarko, the registered owner of the Jaguar. The Officer reported:

> Responding officer made contact with the owner of the vehicle who stated her brother (the listed driver) had taken the vehicle around 5:30 p.m. The owner of the vehicle stated she had no idea her brother had gotten into an accident and had no idea where he was.

Thus, based upon Appellant's sister's purported statement, the Responding Officer identified Appellant as the driver of the Jaguar in the Traffic Crash Report.

The incident was subsequently brought to the BMV's attention through legal correspondence sent on behalf of Erie Insurance, the insurer of vehicle Unit #3, owned by Marie Allen. Erie Insurance provided information indicating that Ms. Nyarko was the named insured on an automobile policy issued by Grange Insurance, but that Grange Insurance had denied Ms. Allen's claim for coverage after investigating the incident. Thus, Erie Insurance, paid the sum of $2,232.28 toward Ms. Allen's insurance claim. Erie Insurance requested that the BMV "take whatever steps necessary to suspend [Appellant's] license and/or registration."

Thereafter, the BMV mailed a Notice of Suspension to Appellant on May 11, 2016, notifying him that his driver's license was subject to a mandatory and indefinite suspension that would commence on June 10, 2016. Appellant was informed:

> Under Ohio Revised Code 4509 you are being suspended for the following reasons:
>
> 1. Noncompliance Suspension – failure to prove you were insured at the time of the accident.
>
> 2. Security Suspension – a claim made by another motorist against you for monetary damages caused in an accident.

The Notice further indicated: "By law you have the right to make a written request for an administrative hearing for suspensions 1 (Noncompliance) and 2 (Security Suspension)." The Notice set forth the following hearing instructions with regard to the noncompliance suspension:

HEARING INSTRUCTIONS FOR FAILING TO SHOW PROOF OF FINANCIAL RESPONSIBILITY FOR A MOTOR VEHICLE ACCIDENT UNDER OHIO REVISED CODE, SECTIONS 4509.101 AND 4509.13.

Things you should know about a hearing:

1. There will be no need for you to request a hearing if the driver and the vehicle involved were covered by liability insurance at the time of the accident, and your insurance company is either paying the damages, or investigating the accident to determine which insurance company will pay damages. Please submit a copy of your insurance card, and a letter from your agent or similar documentation regarding the disposition of the claim. Information will be verified
2. The hearing is limited strictly to whether Proof of Financial Responsibility was in effect for the driver of the vehicle at the time of the incident.
3. Your request must be made in writing and received by the Ohio Bureau of Motor Vehicles within 10 days of the mailing date of this letter. Please include a daytime phone number with your hearing request.
4. Send a personal check, money order or certified check for $30 00 with your written request for a hearing. This will cover the hearing costs. Make check payable to Ohio Treasurer of State. Your driving and registration privileges will not be restored unless the cost of the hearing is paid.
5. A request for a hearing does not stop the suspension of your registration, license plates and driver license.
6. This hearing is separate from any hearing you may have requested for bodily injury or property damages.
7. The Hearing Examiner does not have the authority to grant driving privileges during the suspension.

Such requests and fees must be sent to the address below.

The following hearing instructions for a security suspension were also included:

HEARING INSTRUCTIONS FOR BEING INVOLVED IN A MOTOR VEHICLE ACCIDENT INVOLVING BODILY INJURY OR PROPERTY DAMAGE.

Things you should know about a hearing:

1. There will be no need for you to request a hearing if the driver and the vehicle involved were covered by liability insurance at the time of the accident, and your insurance company is either paying the damages, or investigating the accident to determine which insurance company will pay damages. Please submit a copy of your insurance card, and a letter from your agent or similar documentation regarding the disposition of the claim. Information will be verified.
2. You can request of the Ohio Bureau of Motor Vehicles a pre-suspension administrative hearing for the purpose of demonstrating to the State of Ohio that, notwithstanding the fact that you were uninsured, there is no "reasonable possibility of judgment being rendered against you in a court of law."
3. The hearing request must be made in writing and filed with the Ohio Bureau of Motor Vehicles within 30 days from the date of this notice. Please include a daytime phone number and supporting documents with your hearing request. You may be represented by an attorney, appear alone or with your attorney; submit evidence and examine witnesses appearing for or against you.
4. The hearing is separate from any hearing you may have requested for failing to show Proof of Financial Responsibility at the time of the incident. Hearing request must specify for which suspension(s).

On May 21, 2016, Appellant submitted a request for a hearing on the grounds that he was not driving the Jaguar at the time of the accident:

> My name is Benjamin Broni Annor and I am requesting for the security suspension hearing because I was not the person who was driving the car which was involved the accident on 11/08/15. I drove the car earlier on the day but I came home and my friends came over and we were having a cook out. I was not paying attention so I did not know who took the keys. I went to my friend nearby my apartment looking for my cell phone so when the police officer came to the house, my sister who owns the car was in the house. She told the officer that she lived with me and I have stepped out so she does not know if I was the one driving the car. I have my own car which Jeep 2011 Compass but my sister used that during the morning that is why I used her car. In addition, the car which was involved with the accident has insurance, its been attached to this letter. The insurance company was informed after the accident. The claim #1960134.

With the hearing request, Appellant attached a Grange Insurance Card showing that his sister was the named insured on a policy covering the Jaguar for the policy period of August 10, 2015 through February 10, 2016.

On May 25, 2016, the BMV notified Appellant that his driver's license suspension would be held in abeyance due to his filing for an administrative hearing. On May 26, 2016, the BVM issued a Notice of Hearing indicating that an administrative hearing was scheduled for June 8, 2016 and advising him that:

> you may appear at such hearing in person, represented by an attorney, or by such other representative who is permitted to practice before the agency. If you personally appear, you may present evidence or examine witnesses appearing for or against you.

On the hearing date, Appellant appeared on his own behalf. The Hearing Examiner explained to him that the hearing would be "informal," that she would begin with opening statements, and then both sides would be given an opportunity to present witnesses. She informed Appellant: "Once it's your turn, obviously you can't ask yourself questions, so you will just have an opportunity to plead your case, give us any—give me any information that you think is important." (Hearing Transcript, p. 5).

The Assistant Attorney General representing the BMV then gave the following opening statement:

> We're here today for a noncompliance and security suspension hearing.
>
> The evidence will show that on November 8th, 2015 a 2002 Jaguar owned by Adwoa Nyarko but being operated by her brother, Benjamin B. Annor, was involved in a traffic accident that resulted in damage

> to a vehicle owned by Marie Allen. An incident report was filed.
>
> The evidence will also show that there seems to be an insurance policy covering the 2002 Jaguar at the time of the accident through Grange Insurance and under the name of Adwoa Nyarko; however, the claim regarding this accident has been denied.
>
> The evidence will also show that since the day of the accident, Mr. Annor has not deposited the security, required by Section 4509.12 of the Ohio Revised Code, to satisfy any judgment for damages resulting from the incident as may be recovered against each driver or owner involved in the accident.
>
> At the end of this hearing, the BMV will ask for a recommendation that a noncompliance and security suspension be imposed against Mr. Annor.

(Id. at pp. 6-7).

Appellant was then afforded an opportunity to present his opening statement:

> My name is Benjamin Annor. I'm the one being alleged of operating the vehicle, Jaguar, 2002 Jaguar, and an incident happened November on the 8th, 2015.
>
> Actually, I wasn't the one driving the car, but I do drove the car in the morning around 8:00 to 12:00. Because at that time, my driving suspension—my driving was under the administrative suspension and my driving privilege allowed me to drive to 1:00 p.m.
>
> So at that time the accident happened, I wasn't the one driving the vehicle. I was with my friends outside the house. So I have no idea who was driving the car.

(Id. at 7-8).

The BMV then presented the testimony of Ms. Allen, who verified that her vehicle was damaged as a result of the incident. Ms. Allen further admitted that she did not get a good look at the operator of the Jaguar: "So I did not see the front of the driver. In the

dark, I saw a person get out of the car and walk down the street." (Id. at 13). Ms. Allen also testified that no court had made any determination of fault or determined an amount of liability as a result of the accident. (Id. at 12).

The only other witness presented by the BMV was Brittany Mathews, who is employed by the agency as a Customer Service Assistant 3. Ms. Mathews authenticated all of the relevant records included in the BMV's file with regard to this matter. (Id. at 15-35). The records included: the Grange Insurance Financial Responsibility Card in Ms. Nyarko's name; the BMV Crash Report Form submitted on behalf of Erie Insurance; the correspondence from Grange Insurance to Erie Insurance denying Ms. Allen's coverage claim; the police Traffic Crash Report; an estimate of damages to Ms. Allen's vehicle; and Appellant's official driving record. (Id. at 15-35). All of the BMV's Exhibits were admitted without objection. (Id. at 38).

Ms. Mathews further testified that, as of the date of the hearing, the BMV had not received any information from Grange Insurance proving that the Jaguar was covered by a liability insurance policy at the time of the accident nor had the BMV received any security deposit to cover the damage to Ms. Allen's vehicle. (Id. at 35).

Appellant was then sworn in and relayed the following testimony. Appellant explained that on the morning of November 8, 2015, his sister had a hair appointment while he needed to run some errands. Because his sister had to take her kids, she borrowed his Jeep while he used her Jaguar. (Id. at 38-39). Appellant testified that he only "drove the car around 8:00, 9:00, 10:00," as he had limited driving privileges and was not allowed to drive after 1:00 p.m. (Id. at 39). Appellant then testified:

> So came back home. When I came back home, I was waiting for—cooking, and my friend came over. So we're eating. After we done, me and my friend, called Jones, we plan to go outside and to have a party.
>
> So at that time, I was already dressed, and I was looking for my cell phone. So I couldn't find my cell phone. So that's when I went to my sister and I ask her the key, because I thought I left it in the car or dropped it in the car, her car.
>
> So I took the key, and then I went to the car, and I couldn't find it. By that time, I was in a hurry, so I didn't know where to put the keys. So I left with my friend, Jones, to the party outside.
>
> And then I came home—and he dropped me off around midnight, and then my sister told me that the police officers have come to the house, that the car had been involved in an accident. At that time I wasn't even close to that vicinity, so I wasn't the one driving it.

(Id. at 39-40).

During cross-examination, Appellant continued to assert that he had only been in the Jaguar that evening to look for his phone and did not operate the vehicle at any time that night:

> Q. So you go back into the house at 5:30?
> A. Yeah, I was in the house.
> Q. and you grabbed the key, and you let your sister know you were grabbing the key?
> A. Yeah.
> Q. And do you tell her that you're going to look for your phone?
> A. Yeah, because I was already asking her about the phone, and then all my friends said probably I should go look at the car.
> Q. Okay. So that seems to make sense on why she said that—
> A. Yes.
> Q. –She thought you took the vehicle at 5:30—

A. Correct.
Q. –because she knew that you were getting the keys.
A. Correct.

(Id. at 51-52).

Appellant explained that he looked for his phone for a few minutes, could not find it, and so he and his friend decided to leave the house and go to a party. (Id. at 52). When questioned as to whether he took the car keys back inside the house, Appellant answered: "That's what I was supposed to do, but I wasn't sure whether I took the key in the house or I left it in the car when I was looking for the key [sic]. Because we got a lot of stuff in the car, like, maybe groceries. They're all packed in the car, so I don't know." (Id. at 53).

The BMV's counsel inquired as to whether Appellant was contending that he "somehow, within those couple of minutes," lost the keys, and Appellant stated: "I supposed to put it in the house, but I don't know whether I put it in the house or I left it in the garden where we were cooking." (Id.). Appellant further testified that he does not know who took the vehicle that night: "No, I don't know who it was. I don't know. Because we live in the apartment, so somebody might be driving it or somebody might find the key in the car or in the garden or something like that. I don't know." (Id. at 55). Appellant also testified that, after he asked his sister for the car key at 5:30 p.m., they did not see each other again until he came home from the party around midnight. (Id. at 54).

During cross-examination, Appellant admitted several times that his sister had informed the officer that he drove the vehicle at 5:30 p.m.:

> Q. But your sister told the police, which is indicated in the police report * * * that you drove the vehicle at 5:30.
> A. Yeah, that's what she told the police, but, I mean, she's in the house and the vehicle's in the parking lot. So I wonder why the police made that comment that I drove it.

(Id. at 50).

> Q. Okay. Did your sister tell you that she told the police that she thought you were the one driving the vehicle?
> A. Yeah.
> Q. Did that concern you?
> A. Yeah, it did concern me * * * .

(Id. at 56).

> Q. Okay but going back to the fact that you found out that your sister told the police that she thought that you were the one driving the vehicle and got in this accident and then fled the scene. That had to be pretty concerning, right?
> A. Yes.

(Id. at 58).

However, Appellant also testified as follows with regard to this issue: "So I'm kind of concerned my sister told the police, she said—my sister, she told the police I was the one who had a key, but not knowing—she don't know where I was. And having call her and (inaudible) accident. But the report says that my sister said I was the one who drove the car." (Id. at 58-59).

At the hearing, the Appellant presented two documents in support of his case. One was the following statement from his friend, Arthur Jones:

> Dear sir/madam
>
> My name is Arthur Jones. I am writing this letter as a witness to Mr. Benjamin Annor concerning the accident he's been allied to. I came his house during the date of 11/08/2015 to hang out with him. In the evening I took him out for a friends birthday party, were there until about 11pm. So I dropped him off at his house right around midnight. I could not come personally because I am currently working at Pennsylvania.

This document was admitted into evidence over the BMV's objection. (Appellant's Ex. B). Because it was unsigned, the Hearing Examiner permitted Appellant to submit a signed and notarized copy of Mr. Jones' statement post-hearing. Next, Appellant submitted an "Entry for Limited Driving Privileges" to establish that, due to an administrative license suspension, he had limited driving privileges and would not have been driving any vehicle after 1:00 p.m. On its face, the Entry shows that the license suspension and limited driving privileges expired on November 27, 2014. (Appellant's Ex. C).

Finally, although Appellant indicated several times at the hearing that the Jaguar was insured through Grange Insurance, he admitted knowing that Grange had denied coverage for the accident: "When I talk to the insurance company, they said they are not going to cover the insurance because of they didn't know the person driving the car, and then I should have reported it like a theft or something like that. But at that time, I don't have any idea how to do that; so, I mean, that's why I didn't do it." (Id. at 46-47).

On July 7, 2016, the Hearing Examiner issued a Report and Recommendation concluding that Appellant was in violation of R.C. 4509.101(A)(1) and R.C. 4509.12. The

Hearing Examiner determined that Appellant's claim that he was not the operator of the Jaguar was not credible:

> [a]lthough the Petitioner claims he did not borrow his sister's car on the night of the accident, he admitted that he drove the car earlier that day despite not having insurance coverage in his name. Furthermore, to support his contention that he was not the driver of the vehicle during the accident, he testified that he was not permitted to drive past 1:00 pm because he had limited driving privileges. However, according to Exhibit C, submitted by the Petitioner, this court ordered suspension expired on November 27, 2014. Likewise, the Petitioner has a history of being convicted of "hit skip" in 2013. Despite the statement submitted by Mr. Jones, the Hearing Examiner does not find the Petitioner credible. To the contrary, Ms. Nyarko's statement made to the police, as the Petitioner's sister with no apparent motive, has more credibility.

(Report and Recommendation, p. 3).

Appellant timely filed Objections to the Hearing Examiner's Report to the Department of Public Safety. Appellant specifically objected to the Hearing Examiner's finding that he had a prior "hit skip," noting that his prior conviction was for reckless driving. He further explained that he had submitted the wrong exhibit at the time of the hearing, and attached the corrected exhibit to verify he did indeed have limited driving privileges on the date of the incident. Appellant also took issue with the Hearing Examiner's reliance on his sister's purported statement to the investigating officer as well as her finding that he was the operator of the Jaguar, arguing:

> [a]ccording to my sister, she did not tell the police officer that I took her car as stated by the officer on the report but rather she told the officer she lived with me and I have went out and she did not know my

> where about. Also don't know if I have being involved in accident.

Appellant further argued: "With due respect, I was not the driver and I should not be held responsible of accident and the consequences of this allied claims. Someone was trying to steal that car and crashed it."

On July 26, 2016, the Registrar of the BMV issued a Final Adjudication Order that was adverse to Appellant. The Registrar allowed the substitution of the corrected "Entry for Limited Driving Privileges," but concluded that "[t]he mere fact that the Petitioner only had privileges until 1:00 P.M. on Saturday and Sunday does not mean that he didn't violate the terms of such privileges and drive anyway." (Final Adjudication Order, p. 2). The Registrar next concluded that, assuming Appellant was convicted of reckless driving instead of "hit skip" in 2013: "I fail to see how such fact warrants the deletion of the Petitioner's noncompliance and security suspensions." (Id.). Next, the Registrar ruled there was "absolutely no reason why [he] should accept the Petitioner's self-serving statements regarding what his sister allegedly said or didn't say to him." (Id.). Finally, the Registrar rejected Appellant's claim that he was not the driver as not being supported by the evidence and ruled that the Hearing Examiner's conclusions were supported by the evidence.

Thus, the Registrar upheld the noncompliance and security suspensions entered against Appellant's driver's license. Appellant then initiated this timely appeal.

III. STANDARD OF REVIEW

In a R.C. 119.12 appeal, the Court must affirm the order of the Commission if it is supported by substantial, reliable, and probative evidence. *Our Place, Inc. v. Ohio*

Liquor Control Comm'n, 63 Ohio St.3d 570 (1992). "The Ohio Supreme Court has defined 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." *Keydon Mgmt. Co. v. Liquor Control Comm'n*, 10th Dist. No. 08AP-965, 2009-Ohio-1809, at ¶5 (quoting *Our Place*, supra, at 571).

"To some extent, this standard of review permits the court of common pleas to substitute its judgment for that of the administrative agency." *Dep't of Youth Servs. v. Mahaffey*, 10th Dist. Nos. 14AP-389 and 14AP-396, 2014-Ohio-4172, ¶13. "The court must, however, 'give due deference to the administrative resolution of evidentiary conflicts.'" Id., quoting *Univ. of Cincinnati v. Conrad*, 63 Ohio St.2d 108, 111, 407 N.E.2d 1265 (1980).

IV. LAW AND ANALYSIS

A. Appellant's Motion to Supplement the Record

Appellant moves the Court for leave to supplement the record with the Affidavit of his sister, dated October 10, 2016, wherein she denies that she told the police officers that her brother was driving the vehicle at 5:30 p.m. on November 8, 2015. Ms. Nyarko avers that her English is "fairly broken," and that the officer may have misunderstood her. Although she does not set forth what she purportedly did say to the officer, Ms. Nyarko avers that she did not give consent to anyone to drive her vehicle on the evening

of November 8, 2015; she is unaware of who was driving the Jaguar at the time of the accident; and she believes it was stolen.

Appellant argues that his sister's testimony is newly discovered evidence that could not with reasonable diligence have been ascertained prior to the hearing. Appellant asserts that he could not have anticipated that the BMV would attempt to use the unsworn and unauthenticated accident report for the truth of the matter asserted. The BMV opposes Appellant's Motion disagreeing with Appellant's characterization of his sister's testimony as being "newly discovered evidence."

"R.C. 119.12 provides, in pertinent part, that, unless otherwise provided by law, the common pleas court is confined to the record as certified by the agency." *Burden v. Ohio Dep't of Job & Family Servs.*, 10th Dist. No. 11AP-832, 2012-Ohio-1552, ¶36. "The court may, however, '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.'" Id., quoting R.C. 119.12. Significantly, "[n]ewly discovered evidence under R.C. 119.12 refers to evidence that existed at the time of the administrative hearing; it does not refer to evidence created after the hearing." Id., quoting *Beach v. Ohio Bd. of Nursing*, 10th Dist. No. 10AP-940, 2011-Ohio-3451, ¶16. Finally, "[t]he decision to admit additional evidence lies within the trial court's discretion, but only after the court determines that the evidence is newly discovered and could not have been ascertained prior to the agency hearing with reasonable diligence." Id.

In *Burden*, the Tenth District Court of Appeals ruled that a party's affidavit, created after the agency hearing in the case, did not fall "within the definition of newly

discovered evidence contemplated by R.C. 119.12." Id. at ¶37. Here too, Appellant seeks the admission of an Affidavit that was made after the administrative hearing. This is not "newly discovered evidence," but rather is newly *created* evidence, which is not authorized by R.C. 119.12.

Even if the Affidavit can be deemed to be "newly discovered evidence," Appellant has not shown that his sister's testimony could not with reasonable diligence have been ascertained prior to the hearing. Importantly, based on Appellant's hearing testimony, he was fully aware *prior* to the hearing date that: 1) his sister had spoken to a police officer regarding the incident; and 2) that an accident report had been filed identifying him as the operator of the vehicle and containing his sister's purported statement to the officer that he had taken the Jaguar at 5:30 p.m. on the date of the incident.

The vehicle involved in the accident is owned, not by Appellant, but his sister. No eyewitness specifically saw Appellant behind the wheel of the Jaguar and cause the accident. Yet, the investigating officer determined that Appellant was the driver based on his sister's alleged statement. Finally, Appellant lives with his sister. Therefore, with reasonable diligence, he should have been able to make inquiry with her regarding her statement to the officer and should have discovered any discrepancies with sufficient time to present her affidavit at the hearing or to call her as a witness. Appellant was specifically notified that he would have an opportunity at the hearing to present evidence and to examine witnesses appearing for or against him.

Appellant contends that his failure to do so should be excused because he had no way of knowing that the BMV or the Hearing Officer would rely on his sister's hearsay and unsworn statement contained in the accident report. This argument is simply

unreasonable. Again, he was fully aware of the contents of the accident report prior to the hearing and cannot claim that the presentation of the report at the hearing came as a surprise. Moreover, he made no objection to the admission of the document. Appellant could have objected at the hearing or can argue in his appeal (as he does) that the statement is not admissible and is not reliable evidence to support the BMV's decision. However, the submission of what is essentially rebuttal evidence which is not "newly discovered" is not an available remedy for the alleged error.

For these reasons, Appellant's Motion to Supplement the Record is DENIED.

B. The BMV's Motion to Strike or Motion for Leave to File Surreply Instanter

The BMV moves the Court to Strike Appellant's Reply for the reason that he relies upon evidence outside of the record and further raises due process arguments that the BMV believes have been waived. Alternatively, the BMV seeks leave to file a Surreply Brief. The Court is fully aware that the scope of review is limited to the evidence contained in the record, which has been thoroughly reviewed. Additionally, as shall be more fully explained below, the Court finds that the BMV did afford Appellant procedural due process, and therefore, the BMV is not prejudiced by consideration of this issue, even if it should be deemed waived. Therefore, the BMV's Motion to Strike and Motion for Leave to File Surreply are DENIED.

C. Appellant's Administrative Appeal

Turning to the appeal, Appellant asserts two assignments of error challenging the BMV's decision on the merits as well as on procedural grounds. For ease of discussion, the Court will address the assignments of error out of order.

1. **<u>Assignment of Error No. 2</u>: The suspension of Appellant's Driver's License violates his procedural due process rights because the suspension was made before providing Appellant a forum for the determination of the question whether there is a reasonable possibility of a judgment being rendered against him—*Bell v. Burson*, 402 U.S. 535.**

"[I]n Ohio, a license to operate a motor vehicle is a privilege, and not an absolute property right." *Doyle v. Ohio Bureau of Motor Vehicles*, 51 Ohio St.3d 46, 51. However, in *Bell v. Burson*, 402 U.S. 535 (1971), the United States Supreme Court set forth "the general proposition that relevant constitutional restraints limit state power to terminate an entitlement whether the entitlement is denominated a 'right' or a 'privilege.'" Id. at 539. Thus, the U.S. Supreme Court ruled that, once a driver's license is issued, the individual has a significant interest in continual possession of his license, and it may not be taken away by the state without procedural due process. Id.

Bell addressed Georgia's Motor Vehicle Safety Responsibility Act requiring the driver's license of an uninsured motorist involved in an accident to be suspended unless he posts security to cover the amount of damages claimed by aggrieved parties as a result of the accident. The accident at issue occurred when a five year old child rode her bicycle into the side of the petitioner's vehicle. Upon receiving notice of the suspension of his driver's license, the petitioner requested an administrative hearing on the grounds that the accident was not his fault.

At the administrative hearing, the agency indicated that liability for the accident was not at issue and that it would only consider whether petitioner was involved in the accident, whether he had posted the security as required by law, or whether any statutory exceptions to compliance existed. The agency rejected the petitioner's proffer

of evidence demonstrating that he was not at fault for the accident. After several layers of review, the matter made its way before the U.S. Supreme Court who determined that the petitioner had not received procedural due process: "Since the statutory scheme makes liability an important factor in the State's determination to deprive an individual of his licenses, the State may not, consistently with due process, eliminate consideration of that factor in its prior hearing." Id. at 541.

The high court held that "it is fundamental that except in emergency situations (and this is not one) due process requires that when a State seeks to terminate an interest such as that here involved, it must afford 'notice and opportunity for hearing appropriate to the nature of the case' *before* the termination becomes effective." Id. at 542. (Emphasis in original). They ruled that "before the State may deprive petitioner of his driver's license and vehicle registration it must provide a forum for the determination of the question whether there is a reasonable possibility of a judgment being rendered against him as a result of the accident." Id.

Here, Appellant claims that he was not afforded procedural due process as established by the U.S. Supreme Court in *Bell*. Appellant's assertion is simply belied by the record. Appellant was notified on May 11, 2016 that his driver's license would be indefinitely suspended, *commencing June 10, 2016*, based on his failure to both establish that he was insured at the time of the accident and to post security for the monetary damages resulting from the accident. Appellant was provided notice that he could request a hearing on both issues and was further given instructions as to how to do so.

Within the security suspension hearing instructions, Appellant was expressly advised: "You can request of the Ohio Bureau of Motor Vehicles *a pre-suspension* administrative hearing for the purpose of demonstrating to the State of Ohio that, notwithstanding the fact that you were uninsured, there is no 'reasonable possibility of judgment being rendered against you in a court of law.'" (Emphasis added). Appellant did indeed request the security suspension hearing asserting that he was not driving the Jaguar at the time of the accident. Immediately upon receiving his hearing request, the BMV held his suspension, which had not yet taken in effect, in abeyance pending the outcome of the proceeding. Thus, as required by *Bell*, the BMV afforded Appellant a forum for the determination of the question whether there is a reasonable possibility of a judgment being rendered against him as a result of the accident. In further compliance with the U.S. Supreme Court's ruling, Appellant was afforded this opportunity prior to the suspension coming into effect.

Appellant criticizes the fact that the issue of his alleged non-liability was heard in conjunction with consideration of whether the Jaguar was insured and whether the proper security had been posted for the damages resulting from the accident. He further notes that the Hearing Examiner never stated that the purpose of the hearing was to determine whether there was a reasonable possibility of a judgment being rendered against him as a result of the accident. However, unlike the driver in *Bell,* Appellant was afforded a full opportunity at the hearing to present evidence purporting to show that he could not be found liable for the accident. In fact, the majority of the evidence presented by Appellant focused on his argument that he was not the operator of the Jaguar. Additionally, the U.S. Supreme Court expressly sanctioned combining

this issue with other related administrative proceedings. See *Bell* at 542-543 ("The * * * methods of compliance are several. Georgia may decide to merely include consideration of the question [of liability] at the administrative hearing now provided.").

Appellant did not suffer deprivation of his driver's license until after he had been afforded an opportunity to present evidence that he was not at fault for the accident. The Court finds that he was provided procedural due process in full compliance with the standard set forth in *Bell*. Therefore, his second assignment of error is not well-taken.

2. <u>Assignment of Error No. 1</u>: The suspension of Appellant's Driver's License is based upon the improper consideration of inadmissible, unsworn and uncorroborated hearsay upon hearsay evidence and is not supported by the record.

Upon being informed of the occurrence of a motor vehicle accident, R.C. 4509.12(A) authorizes the BMV Registrar "to determine the amount of security which is sufficient to satisfy any judgments for damages resulting from the accident as may be recovered against each driver or owner involved in the accident." Pursuant to R.C. 4509.13, the Registrar shall then provide notice to the driver of the amount of security required to be deposited by him. If the driver fails to request a hearing or to deposit the security within thirty days, the Registrar shall impose a suspension of the person's driver's license. R.C. 4509.17.

Additionally, R.C. 4509.101(A)(1) provides that no person "shall operate a motor vehicle in this state unless proof of financial responsibility is maintained continuously throughout the registration period with respect to that vehicle, or, in the case of a driver who is not the owner, with respect to that driver's operation of that vehicle." A violation

of this provision results in the suspension of the individual's driver's license. R.C. 4509.101(A)(2)(a).

The BMV determined that the credible evidence established that Appellant was driving the Jaguar and is responsible for the subject motor vehicle accident. The BMV found that he is therefore required to post security for the amount of damages as calculated pursuant to R.C. 4509.12 and that his driver's license is subject to a mandatory suspension until he complies. The BMV further determined that the evidence demonstrated Appellant operated the Jaguar without having insurance, and thus, that his driver's license is also subject to suspension pursuant to R.C. 4509.101(A)(2)(a).

Appellant argues that the BMV's order should be reversed as it is based almost entirely on the "hearsay upon hearsay" statement contained in the accident report, i.e., his sister's alleged statement to the investigating officer that he had taken the Jaguar at 5:30 p.m. Appellant argues that the statement was not admissible and further should not have been deemed to be more credible than his sworn testimony.

As a general rule, administrative agencies are not bound by the strict rules of evidence applied in court." *1609 Gilsey Invs., Inc. v. Liquor Control Comm'n*, 10th Dist. No. 07AP-1069, 2008-Ohio-2795, ¶12, citing *Felice's Main Street, Inc. v. Liquor Control Comm.,* Tenth Dist. No. 01AP-1405, 2002-Ohio-5962, citing *Haley v. Ohio State Dental Bd.*, 7 Ohio App.3d 1, 6 (1982). "Thus, '[t]he hearsay rule is relaxed in administrative proceedings, but the discretion to consider hearsay evidence cannot be exercised in an arbitrary manner.'" Id., quoting *Haley*.

"Concerning hearsay evidence, one of the issues to consider is whether the statements were inherently unreliable or whether they "bore significant indicia of trustworthiness.'" Id. at ¶13, citing *Felice's Main Street, Inc.,* at ¶18. "Unless shown otherwise, police and administrative investigative reports 'have a very high indicia of reliability.'" Id., quoting *Felice's Main Street, Inc.* "Moreover, the reliability of hearsay statements may be inferred without more where the evidence falls within a firmly rooted hearsay exception." Id. "Firmly rooted hearsay exceptions include the business records exception in Evid.R. 803(6), and the public records exception in Evid. R. 803(8)." Id. Additionally, [h]earsay challenges are waived, absent plain error, if not objected to during the subject proceedings." *Felice's Main Street, Inc.* at ¶14.

Here, Appellant did not object to admission of the accident report and certainly did not raise any hearsay arguments. Therefore, he has waived this argument. In any event, in this "relaxed" proceeding, the Hearing Examiner was authorized to consider hearsay statements having some degree of reliability and trustworthiness. Police investigative reports are considered to have a high degree of reliability. Moreover, Appellant himself testified several times that his sister told him that she informed the officer that he had taken her vehicle:

> Q. But your sister told the police, which is indicated in the police report * * * that you drove the vehicle at 5:30.
> A. Yeah, that's what she told the police, but, I mean, she's in the house and the vehicle's in the parking lot. So I wonder why the police made that comment that I drove it.

(Tr. at 50).

> Q. Okay. Did your sister tell you that she told the police that she thought you were the one driving the vehicle?
> A. Yeah.
> Q. Did that concern you?
> A. Yeah, it did concern me * * * .

(Tr. at 56).

> Q. Okay but going back to the fact that you found out that your sister told the police that she thought that you were the one driving the vehicle and got in this accident and then fled the scene. That had to be pretty concerning, right?
> A. Yes.

(Tr. at 58).

If the only evidence considered and relied upon was the police report, then the Court might agree that this would not be sufficient. However, the Hearing Examiner and the Registrar did not summarily rely on the accident report, but rather, provided Appellant a meaningful hearing and review of his arguments and evidence. Moreover, by its nature, a "hit skip" accident often involves circumstantial evidence. This being an administrative proceeding, the violations did not need to be established beyond a reasonable doubt, and there need only be reliable, probative, and substantial evidence to support the agency's conclusions. The totality of the circumstances, including Appellant's driving history and his own testimony, supports the BMV's findings and conclusions.

This Court may have reached a different outcome and afforded more credence to Appellant's live testimony and the statement of Mr. Jones. However, "[i]n an R.C. 119.12 appeal, the common pleas court should ordinarily defer to an agency's determination as to witness credibility and the weight assigned to the evidence." *Trish's*

Café & Catering, Inc. v. Ohio Dep't of Health, 195 Ohio App.3d 612, 2011-Ohio-3304, ¶25 (10th Dist.). The Hearing Examiner had the opportunity to hear Appellant's testimony and observe his demeanor and did not find him to be a credible witness. This Court has conducted an exhaustive independent review of the record, and notes there are inconsistencies with Appellant's testimony and his arguments.

Based on the Court's thorough review, the Court finds that there is substantial, reliable, and probative evidence to support the BMV's adverse findings against Appellant and the imposition of the noncompliance and security suspensions. Accordingly, the BMV's Order is AFFIRMED.

Pursuant to Civ. R. 58, the Clerk of Courts is to provide all parties notice of and the date of this judgment.

IT IS SO ORDERED.

Electronically Signed By:
JUDGE MARK A. SERROTT

Franklin County Court of Common Pleas

Date:	12-08-2016
Case Title:	BENJAMIN B ANNOR -VS- OHIO STATE DEPT PUBLIC SAFETY BUREAU MOT
Case Number:	16CV007375
Type:	DECISION/ENTRY

It Is So Ordered.

/s/ Judge Mark Serrott

Court Disposition

Case Number: 16CV007375

Case Style: BENJAMIN B ANNOR -VS- OHIO STATE DEPT PUBLIC SAFETY BUREAU MOT

Case Terminated: 18 - Other Terminations

Final Appealable Order: Yes

Motion Tie Off Information:

1. Motion CMS Document Id: 16CV0073752016-11-1499980000
   Document Title: 11-14-2016-MOTION TO STRIKE - DEFENDANT: OHIO STATE DEPT PUBLIC SAFETY BUREAU MOT
   Disposition: MOTION DENIED

2. Motion CMS Document Id: 16CV0073752016-10-1499970000
   Document Title: 10-14-2016-MOTION - PLAINTIFF: BENJAMIN B. ANNOR - PTF TO SPPLMNT THE RECORD
   Disposition: MOTION DENIED